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LECTURE ARTICLE

# Law, Expertise and Global Political Economy

David Kennedy<sup>\*,†</sup>

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Professor David Kennedy's 2018 Montesquieu Lecture considers the role of expert legal knowledge in our political and economic life. As politicians, citizens, and experts engage one another on a technocratic terrain of irresolvable argument and uncertain knowledge, a world of astonishing inequality and injustice is born. Kennedy draws on his experience working with international lawyers, human rights advocates, policy professionals, economic development specialists, military lawyers, and humanitarian strategists to describe the conflicts, unexamined assumptions, and assertions of power and entitlement that lie at the center of expert rule. He explores how we can harness expert knowledge to remake an unjust world.

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It is a tremendous pleasure to be here in Tilburg and an honor to have been asked to give this year's Montesquieu Lecture. I would like to use the opportunity to explore law's role in some puzzling aspects of contemporary global political and economic life: the widespread sense that a postwar global order or system is giving way to something more chaotic and uncertain; concern about the rise of expert governance or technocracy in world affairs; and the astonishing persistence of injustice and inequality. My hope is that doing so may provide an antidote to the frustrating feeling that, for all their defects, there are no alternatives to our customary political programs and institutional reforms. In fact, there are alternatives all around us – attending to law may help us identify and pursue them.

## 1 Waking From a Dream

It is hard not to be nostalgic for the idea of a global order, centered in the North Atlantic, vouchsafed by a network of legal and institutional arrangements. In hindsight, it looks pretty good. Yet today, what many see is more chaotic struggle than stable order, both hard to grasp and rickety to rely upon.

If there is an order, it is very hard to locate in a world where power and governance capability are ever more widely dispersed. The number and range of participants in global political and economic life has increased dramatically. Film stars and tycoons are as visible as statesmen. Leading sectors are powered by tremendous global monopolies while competition everywhere else – among firms, regions, nations – intensifies. National governments find themselves gridlocked and disempowered, vulnerable to far away decisions that take them by surprise. Left prostrate by financial constraint, they find themselves dwarfed by commercial interests, beholden to kleptocrats. Institutions we thought central to the management of all this seem disempowered. The WTO, the IMF, the World Bank, the UN, the European Union are all buffeted by economic forces, newly rising powers and social media empowered political turbulence. Who has an overview? Perhaps only a diffuse cadre of elites: the men and women of Davos. At their best, they may be open to their 'social responsibility,' but they also find themselves limited by their role and buffeted by the ruthlessness of their competition.

In so dispersed a system, there is no addressee for complaint. I remember the years I worked in Brussels – wherever you went, no one had decided. The Commission thought it all happened in the Council, the Member States blamed the Commission, the Parliament found things precooked by the technical Working Groups, and so on. Public actors today seem captured by private interest: but corporate managers or investors feel they are constrained by regulation, by their mandate, by the competition. Although national

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\* Manley O. Hudson Professor of Law Director, Institute for Global Law and Politics, Harvard Law School, US, [dkennedy@law.harvard.edu](mailto:dkennedy@law.harvard.edu)

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governments seem displaced by global institutions and commitments, when you go there, you hear about the pressures of Member States and national politics.

Yet there is no shortage of problems which seem to demand action: global warming, terrorism, pandemics, we would each have our list. Although we might call them “global,” we know such problems fall unevenly on the rich and the poor, on people here and people there. For many people – for most – immediate problems are more, well, immediate. People call some problems “global” for a reason: to stress their importance, to shift responsibility for their solution, to diffuse the possibility that they might be addressed. All the sites where global problems might be addressed are manned by people with more parochial mandates, interests and projects. There simply is no global location where global problem can be addressed, no global authority – not even a hegemon – pretending to take responsibility for the global public interest.

Meanwhile, whole regions of the world are coming unglued. Authoritarian rulers are newly empowered, flaunting their disregard for the values of economic liberalism, democracy and human rights. Across the world, confidence in the Rule of Law ebbs as its institutions and normative commitments are weakened in the North and instrumentalized for internecine political struggles across the world. The establishment liberalism we associate with postwar order is now as much bogeyman as status quo. If twenty years ago it could seem that rising powers were entering a global consensus, we can now see that they rise with their own ideas, institutions and infrastructures. Even within the North Atlantic, the establishment consensus seems newly fragile. Nationalism, populism, Brexit, Trump – it is no wonder the global commentariat is asking whether the center will hold.

It’s not clear what happened – whether the center began to wobble, other powers began to rise, the peripheries became more unstable – or people simply stopped believing. Perhaps all these, but no question, we’ve lost confidence and have started to describe the “postwar order” in the past tense. Looking back, it’s easy to see what made that order so reassuring – although, with hindsight, it also looks too good to have been true. Indeed, it was always largely a dream – a dream which froze our imagination and stunted our powers of reinvention. To recapture those powers as we wake up, we need to remember what we can of the dream – and how it nurtured our sleep.

- Like any order one gets used to, the postwar order seemed *natural, stable*. When we looked out the window, we thought we could see a political equilibrium of roughly equivalent sovereigns reflected in diplomatic routines and institutions, all co-existing with a global market moving resources to their most productive use as if by an invisible hand.
- At the same time, our dreamscape felt *hard won* – the global market rescued from national protectionism, a legal order wrung from inter-sovereign competition. For political stability to replace war and great power conflict, particularly here in Europe, required enormous commitment and effort.
- After all this effort, there seemed *no going back*. Going back could only mean returning to an unattractive state of nature: to WWII, to the economic catastrophes of the great depression, to colonialism or a world of religious wars. Although the postwar order had been many things in its short life – a regime of capital controls, then of free movement; of national economic development, then of open economies; of cold war division, then of triumphant universalism – there was no exit or alternative. Like the Hotel California, the order could always be reformed, but you can never leave.
- And the order seemed remarkably *resilient* – it had gotten through the Soviet era, absorbed decolonization, the 1960s, the oil shock. It had survived repeated global economic crises and wars all around the periphery as well as dramatic changes in technology, communication, the structure of manufacturing and finance. Why wouldn’t it also survive today’s challenges?
- After all it had been through, it promised stability – even *stability in the interest of all*. A Europe for all Europeans, a global order for all the world. And if American or Western hegemony underwrote the whole thing, this was less a worry than a relief. At least somebody was paying attention to what all require: a benign hegemony for which one should be grateful, given the historical alternatives.

Taken together, this was a fantastic picture – a benevolent global order, pragmatic, problem-solving. It’s hard to give up.

While we were dreaming, there were things we didn’t see, perhaps preferred not to see, or saw only dimly, in a distorted light. Our dream did speak to the challenges of injustice, but in ways which limited our responsibility and restricted our program of action. More than comfortable stability, the order seemed *progressive* – the arc of history bending towards liberal values, toward peace, toward human rights and

toward prosperity. The way things were – at least here, at least most of the time – prefigured how they might one day be for the world. That’s why we thought working *for the order* – and preserving what we had built for ourselves – was also to work toward a more just future for all the world.

Or take inequality. To frame the world’s great disparities in wealth, opportunity, honor or authority as “inequality” suggests a background norm of equality which no one expects and few actually desire. The relationship of haves and have nots seems passive: they *are* unequal. If inequality is “structural,” it must be the structure that’s to blame. Someone else, some third party, the politically responsible, ought to adjust the structure. But great disparities are better understood actively: the haves have gone too far, pressed their dominance too successfully and become entangled in injustice. When we speak of inequality, we mean that these disparities are greater than we might wish. Or that they are differently distributed than we might wish – by race, for example, rather than nationality, which seems more acceptable.

In our dream, domination and unequal power were somewhere at the margins, *outside* the order, before it, beneath it – conditions to which it responded. We knew there were stronger and weaker powers, developed and underdeveloped societies, leading and lagging sectors. But these were not produced or reinforced by the postwar order. On the contrary – the order promised equality, anyone could join, catch up, participate. The “more than equals” were less winners than fortunate first movers: blessed, thrifty and productive, they did what was needed and got there first.

Development – or “modernization” – was available to any country with the right policy, just as liberal democracy might come to any nation with the right constitution. The global consensus and the institutional arrangements it underwrote were open to anyone with right values. The trade regime as well if you joined the WTO, made the necessary concessions. The global financial architecture also, if you managed your national accounts, protected investor rights and joined the regime of bilateral investment treaties. The European Union and the Euro have paths to membership. Even the Rule of Law could be injected by the development agencies of the North. If outsiders cannot be assimilated – and normally *wir schaffen das* – it is only because they present existential threats.

This picture suggests a way to understand lagging regions or nations. Some *are* existential threats: terrorists, failed states, “deplorables.” But most are not. They are people in the global South who are not yet – or in the cities and rural byways of the global North who are no longer – suited for the rigors of modern life. Some are the losers in capitalism’s creative destruction and some have simply been overlooked. All *could* be brought along with sensible policies nudging folks forward, making sure the path to participation remains open, the social floor not too far below the last rung on opportunity’s ladder. The tools are known and available. All we need is the “political will” to use them – to keep doing what we’re doing, but perhaps more so. They will need to try, of course, but the most important thing is patience. Rome was not built in a day.

But if the problem is not timing, not patience – if things are moving backward rather than forward, if inequality is growing, there is a real scandal. The emergence of “sustainability” as a vocabulary of worry gives a hint of this scandal: there may not be time enough to wait. When people ask whether so much inequality is *sustainable*, they frame the problem as a temporal threat: can the order handle so great a challenge to its promises long enough for the problem to resolve itself? The vocabulary of “political risk” gets closer to the worry: has the establishment bitten off more inequality – generated greater disparities – than it has the political machinery to consolidate? Or will it be overthrown, undermined, replaced.

In our dream it was hard to see inequality as an active project, to imagine the established arrangements making things worse, winners feathering their own nests while making promises they cannot keep. It was hard to see the “structure” as a collection of levers winners use to defeat losers, consolidate and legitimize their gains. We could see how many global problems result from the North Atlantic externalizing its pollution, its security needs, its military campaigns, its economic costs. But here too, the order offered remedies – another conference, a treaty, technological innovations, corporate social responsibility, social justice activism. Although none of these remedies were quite up to the task, we could be reassured by a shared recognition, in lagging towns of the American Midwest as much as in emerging markets, that were the North Atlantic center *not* to hold, there would be no reason to expect these problems to get any easier. As a result, when the order was threatened – by backsliding, by outsiders – the solution was vigilance, security cooperation and doubling down on the density of the institutional order. We could see that strikingly here in Europe – the only response to an unsatisfactory Europe is more Europe. Reinforce the boundaries, deepen the institutions. When you’re dreaming, there really is no alternative.

## 2 The Law of Our Dreams

By the end of the last century, law was everywhere we looked. In 1918, people had asked whether law was even possible among sovereigns. A century later, legal arrangements had been dispersed across the world providing a common language for problem solving, dispute resolution, regulation and administration. It had taken

a hundred years of intellectual and practical work to make law so ubiquitous, the legality of transnational law so plausible. Along the way, law was reimagined again and again. The early twentieth century notion of international law as a catalog of valid rules agreed by sovereigns and interpreted by international jurists was modified and augmented by a series of new ideas, forged by people seeking to use law more effectively or find a law fit for their purposes.

- First, *a move to principles and purposes* – where codified rules could not be settled, jurists could find solutions elsewhere, in private law analogies, social observations about the nature of international society, deductions from the idea of sovereignty itself.
- And then *a more sociological turn* – less norms than modes of interaction, processes and procedures for handling claims, defining actors and understanding the normative implications of horizontal sovereign-to-sovereign activity. By mid-century, norms could be found in social life – in what were *enforced* as norms, *interpreted* as norms, seemed *persuasive* as norms, in a rough and tumble policy process, underwritten by shared values. International rules, national laws and corporate norms, hard law and soft, policies and principles, formal rules and informal practices, even explicitly non-binding arrangements could have legal consequences.
- With the sociological turn came a more *functional, problem solving* family of legal ideas. Law as what works, in a new focus on substantive results. The regulatory, administrative and dispute settlement functions of government were redefined as activities which might be done anywhere. Cities do it, states do it, corporations do it, NGO's do it – even rock stars do it. Indeed, to solve global problems, one must become a norm entrepreneur, repurpose your institution as a site for “governance.” In our exuberant moments we thought wherever two are gathered in its name, there is law, there is community, there is consensus.
- And maybe *law is more symbol than substance*, more thought than institution: a shared consciousness which could be shocked, a measuring rod for legitimacy, the expression of a universal civilization.

That is a great deal of intellectual innovation. By century's end, we dreamed of law in many ways, a grab bag of diverse and inconsistent ideas about what law is and how it functions, any of which could be drawn on strategically. Looking back, I think people credited law with so many magical powers because they felt they had to. It was Kelsen who most eloquently asked us to recognize – to choose to recognize – that only the “efficacy of the legal order” underwrote the legal order. We should *choose*, as a matter of professional faith, to see all that disaggregated political and economic activity as *legal* – law abiding, law creating. We had had politics in the 20<sup>th</sup> century and we knew where that led – what was needed was law. To see it, to affirm it, was also to make it true.

As confidence in the order ebbs, we can begin to see the weaknesses of this legal imagination. First, a *forgetfulness* of the kind that often accompanies dreams, here of pluralism and diversity. With law spread so broadly while continuing somehow to seem universal, dissonance was easy to overlook. In dreams, one can imagine that conflicts and contradictions have been domesticated, turned into contending principles and interests to be balanced by inspired statesmen, or into “disputes” which might be settled by the appropriate institutional machinery. Law contained all things and settled all things, expressing the commitments of an international community, beyond which only outlaws, failed states and historical throwbacks.

It was through law – as law – that an “international order” had been or might soon be wrought from a disparate world. There were different pictures of that order: a community with a consciousness? A set of networks with processes and interactions? A constituted whole? In each, the law that made and enforced the order was itself thought sufficiently coherent to hold it all together. Despite all those diverse ideas about what law is and where to find it, we had the professional techniques, so affirmed the International Law Commission, for managing dissonance and fragmentation. But unfortunately, dissonance did not disappear. Interests and perspectives diverge – increasingly so – not only against, but within the order. Like disparities which rise rather than fall, pluralism which persists is the kind of scandal that can wake one up.

A second weakness in our legal imagination was a misplaced confidence that law, however embedded in all those networks and institutions, also somehow stood above, outside or beyond international politics and economics, providing rules of the road, guardrails for political conflict and a platform for a global market. We dreamed of law as a kind of ersatz global sovereign or reassuring father, at once problem solver and ethical lodestar. Law was not only fact, but *norm*: it was a good thing, on the right side of things, solving problems, affirming values. Law protects the environment, resolves disputes, affirms human dignity, reduces the violence of war.

Unfortunately, a law become many things will be used in many ways. In a world of dispersed authority, lacking an interest aggregator up there attending to world public interest, law will also comfort the environmental despoiler, protect private right from public power and heighten the intensity of disputes as all sides come to believe their cause is just. Here also, there is the whiff of scandal. Law has dark sides, may itself be part of the problem.

People who have always wanted things to be unequal have long since located the levers to garner and protect their gains, have hired lawyers to find them, use them, hide behind them. If you're a powerful player, a world with no center – no logic beyond the continual press of interests across thousands of dispersed settings – looks like opportunity. The opportunity to strategize across the widest terrain to consolidate your market share, promote your values as shared values, ensure the security of friends and allies. But if you are not a powerful player, all these opportunities are your vulnerabilities. From the periphery, whether that's Bangladesh or a forgotten region of England or Arkansas, the global game is much more difficult to play.

As this all comes to light, we find ourselves beset by some very 21<sup>st</sup> century worries. First, a worry about the possibility of politics in a technocratic world. If in 1918 one yearned for law, in 2018 the problem seems the reverse. Where is the opportunity to contest things, to participate in the making of winners and losers? What happened to sovereignty – to decentralization, local control, ownership of decisions which matter? Somehow an unbridgeable gap has arisen between a territorial politics and a global economy, a gap underwritten by law and all the practices of elite managerialism.

Second, worries about law. Worries about its coherence and the persistence of pluralism. For all the talk about systems and constitutions and professional techniques of interpretation, the *experience* of pluralism – of confrontation with an alternative one cannot balance away – has become ever more prevalent. Does it all really add up? And a worry about law's effectiveness at problem-solving: can the international order respond to the problems we've come to call "global?" The solutions and reforms seem meager – apologetic promises, the international community a village of Potemkin remedies.

We wake up to worries about law's role in things we deplore. We can see that the great disparities rest on legal arrangements which reinforce power dynamics, differences in bargaining power, patterns of honor and shame, of the deserving and undeserving. These are the very legal, economic and political arrangements once dreamed about as a virtuous order. It is not surprising that the study of colonialism would seem ever more useful. All of which fuels worry about law's virtue. Human rights, development, humanitarianism: pursuing them keeps getting us in trouble in a world of unintended consequences and sharply divergent ethical visions. And then there is law as a strategic asset in war – "lawfare."

Montesquieu knew all this. His most famous quote may be this: "There is no tyranny more cruel than that perpetrated under the shield of the law and in the name of justice." But somehow, dreaming, we forgot. If you find yourself waking from postwar dreams to worries like these, let me suggest three habits of mind which might help identify alternatives worth pursuing.

### 3 Less World System than World of Struggle

A first habit worth encouraging is taking a break from dreams of order to focus on the dynamics of conflict. Although the social sciences often start with conflict – a Hobbesian state of nature or the competitive market of Adam Smith – they work hard to explain how things nevertheless turn out well ordered: perhaps through a "balance of power" or "invisible hand." But much can be learned if we step back from this urge to systematize and think of international affairs as what happens when people everywhere engage one another with little backpacks of powers, entitlements and vulnerabilities and have at it. It is not that everyone is always fighting. Most struggles have already been won or lost and there is no need to re-engage them. Winners can simply press the outcomes on losers as facts about the status of forces. To stand on prerogative or principle, after all, is also to stand on a well consolidated victory. Even the terms and opportunities for collaboration will have been wrought in prior conflict.

It is conventional, when stepping back from images of order, to focus on *power*. To do so seems realistic, hard-boiled. People ask *who* has power and *where* it resides, as if it were a physical substance. But power, like energy, is easy to theorize and hard to put your hands on. We look for the actors who "matter" in the structures than support their authority. This takes us back to states and governments and corporate boardrooms and all their acknowledged "leaders." Yet when people press one another – making arguments, demanding concessions, requiring compliance – they are often trying to change who counts as an actor, what counts as action, how the structure operates and who is imagined to have that magic thing, power. It would be better to search for power's *effect*, the moments where someone asserts and someone yields, where wealth and honor and opportunity are taken, held and withheld.



None of this will be new to those for whom the world order was *always* more struggle than system. To people who never shared the dream, whose problems were not addressed, whose conflicts were not being managed, who always saw the “global order” reinforcing inequality and consolidating their vulnerability. Nor will it be new to strategic actors right at the center of things. In my experience, if you ask leading businessmen or politicians to describe the world, they do talk about order, spinning an elaborate picture of how things work. But if you ask them what they’re doing, about their projects, about threats and opportunities, system thinking fades away. They start speaking *strategically*, attentive to multiple overlapping institutions and modes of engagement. Savvy actors are always moving the goalposts – transforming private into public interest, economics into politics, local into global – shifting, affirming, undermining or ignoring what have seemed systemic limits.

It is not that changing the game is easy. It is difficult to be savvy and strategic. When you are, people resist. That’s why things are so much more “sustainable” than many fear. Just as an economist targeting an efficient equilibrium might forget there might be more than one – a whole series of equally efficient equilibria with sharply different distributional arrangements – it is surprisingly easy to underestimate opportunities to shake up the system and to be surprised when it occurs. Or to focus only on moments of dramatic change – revolutionary breaks, in science or in political life – rather than quotidian distributional struggles. If we can learn to see systemic regularities the way they once appeared to the strategic actors who established them – as opportunities for gain or moments of vulnerability, as victories or defeats – we will avoid the tendency to canonize the institutions we have as order itself.

After all, people struggle over political and economic arrangements because they can be assembled in alternative ways. A couple of examples it is easy to forget: the international financial institutions started off supporting capital controls and import substitution industrialization before they became the voice of free movement and austerity. The human rights movement, led by Amnesty International, started off, as their name implied, favoring *amnesty*, before it embraced criminal justice as the first response to deviation from its purportedly global standards. Although the EU has always been an *ordo-liberal* affair of free movement, the *how*, the space for local arrangements, the meaning and strategy for social policy has shifted wildly with broader changes in membership and elite ideology. We might get better at identifying and pursuing alternatives were we to understand *how* people struggle – how they understand the terrain, their modes of engagement, the forces which shape their authority and the practices through which knowledge becomes effective authority in struggle.

#### 4 Struggle by Articulation: Performance and Assertion

Our managerial world has not replaced violence with argument. Nevertheless, it is surprising how much political and economic struggle is undertaken by *articulation*: by asserting and performing powers and rights, by attributing and enacting identities and responsibilities, by articulating and embodying reasons and necessities. People in struggle neither talk one another into things nor simply bash one another on the head. They bring “leverage” to bear: a complex amalgam of assertions backed up by more or less tacit threats. Persuasion and coercion are impossible to untangle when people drop bombs to “send messages” and transform economic power into market dominance through negotiation. As George Kennan is said to have told students at the American National War College in 1946, “You have no idea how much it contributes to the general politeness and pleasantness of diplomacy when you have a little quiet armed force in the background.”

We might imagine the exercise of articulative power as a practice or a kind of work: explaining to somebody what facts or norms require them to do or to decide, or interpreting what someone did, pressing it back into the fabric of fact and norm. People do this with words, but also with deeds, claiming authority by its effective exercise, demonstrating their power, the validity and significance of their knowledge. As such, the operation of power as knowledge and knowledge as power is an everyday experience: someone comes to you, explains how things are and what should happen, they assert their authority or exercise their entitlements and you yield – or you respond and they yield. When the dust settles, someone has been put out of business, closed out of a market, prevented from crossing a border by someone else’s claims and assertions.

Although there is much we don’t yet understand about the way knowledge becomes power in our world, let me offer some preliminary observations – hypotheses for further study. A first observation would be that the material people bring to bear in this work is more loose argot than tight analytic. Struggling for gain, people draw on a mix of big ideas, historical precedents, principles, rules, cultural expectations and allegorical morality tales. They deploy a mash-up of argument fragments, rules of thumb, loosely tethered to various knowledge disciplines – including law, but also economics, political science, history or natural science. From whatever discipline, the norms and facts people invoke require interpretation, are malleable

and open to disagreement. They have been midwived by earlier struggles which can be re-fought. That's why technical experts are so often identifiable by national and ideological propensity and why we so easily see the interests behind claims to represent ethical universals or simply to be stating the "facts."

There are lots of places you can go to get professional training in these combative arts – law schools, business schools, schools of public policy. But you can also learn a lot by watching television and browsing around in your social media feeds. Professional and lay people share more than either may realize, in part because everybody is learning to engage iteratively, attentive to one another. There are different styles which can be practiced and mastered. Insiders and outsiders, hegemon and colonial elites, each find ways to participate in or to disrupt the conversation. Human rights workers learn to oscillate between strategic pragmatism and ethical denunciation, while economic development experts blend ideas about economics, society, law and institutions into a strange mix of global recipe and deference to local context and political choice. In all these settings, the knowledge which becomes power is human knowledge: a blend of conscious, semiconscious and wholly unconscious ideas, full of tensions and contradictions.

The comforting idea that the people in power are bringing agreed norms or settled facts to bear on common problems screens out the human *discretion* in the way we are governed and the chaos in the ideas being brought to bear. When people decry the advent of post-truth politics or the erosion of a universal ethical vocabulary, they are also congratulating themselves for *normally* being rational, objective and reasonable in identifying and implementing pragmatic action in the public interest. As if norms and facts – rather than real people – were responsible for the results. And as if what is going on is indeed "governance." Not rent-seeking or nest feathering; not reinforcing some private interests against others; not reinforcing inequality or consolidating social power while managing dissent; not managing an entertainment spectacle. Governance, in short, not struggle.

The interesting point is how a hodgepodge of human knowledge hangs together as a practice of power, how contradictory and inconclusive knowledge has effects, how it shapes or limits our governance culture. Here, there remains much we do not understand. Are there patterns – a kind of grammar – holding so many diverse fragments into effective exercises of articulative power? How does a governance vocabulary which seems so loose, able to take anything and everything into account, both miss so much and seem so decisive?

It is easy to imagine that something or someone else must be calling the shots – the power must lie elsewhere. Behind the assertions we can see must be interests which dare not speak their name. Perhaps, but I am wary of explanations which imagine power behind its effects, driven by forces more decisive and clear-minded than can be articulated in the contemporary languages of effective power. After all, the interests of labor or capital, of Russia or Europe, of the CIA or the United Nations would themselves have to be worked out, developed, authorized, asserted. Doing so takes us right back to those diffuse languages.

I can imagine at least two other places we might begin looking for the missing pieces. First, in what is *taken for granted*, in ideas which lie beneath technical or ideological argument somewhere in common-sense. Ideas like "the world is flat," making it unlikely someone might try to sail around it – at least until the idea is brought forward and contested. And in what is actively *unknown* by those who rule, framed out as insignificant or uninteresting in ways which make some lives matter and the sacrifice of many others an unfortunate matter of fact rather than choice. Although we know these framing notions are important, we rarely study them head on. Yet people are always trying to put new stuff in our unconscious – stuff like "it's a flat world" or "globalization." Or the necessities of a "balance of power" or "global market." Or "global warming" and "the Anthropocene." We might understand the human rights movement – or neo-liberalism – as efforts to adjust our taken-for-granted notions of what government is and can do.

If you are interested in the relationship between polity and economy, law school will train you to contest the thousands of *technical issues of degree* which go into making the state a bit more powerful over this, a bit less over that, and the *large ideological positions* which can be dragged in to justify these differences – politics and economics should be separate, should be linked and so forth. But all this ideological and technical work goes forward in the shadow of settled, once told – now barely conscious – stories about what an economy is and what politics can accomplish. Alongside stories about the purpose and potential of law. These stories make some problems visible, some actors central – and others invisible – before we even get to the choices embedded in technical or ideological disagreement. We might learn to read all this unsaid material as the fine print beneath what must be articulated to be effective.

A second place to look: the things you learn cannot be said in polite company. Even the most malleable technical and ideological material has limits, follows pathways, sets boundaries on public reason. These days, for example, you cannot say God has authorized your victory any more than you can simply take things by brute force. You have to have a *reason* – a reason of principle, a reason of entitlement, an appeal to the universal. Some professionally forged justifications for your coercion. You can push against these boundaries – and

they are constantly being remade – but to struggle, you need to know where the boundaries have been. They establish a bandwidth around what politics can accomplish, what economics can become, often with stark results. My hunch is that a combination of semi-conscious commonsense and the structured limits of even the most malleable material in the professional “consciousness” of those who rule accounts for the unfortunate sense that while everything is being taken into account, everywhere we see issues left out and problems which escape our grasp.

One further observation about global articulative power. In studying legal expertise, I stumbled on a kind of axiom: as law became ever more diverse or plural, it also became more prevalent, more widespread. This seems true for many forms of global expertise: the less decisive, determinative or univocal an expert vocabulary, the more prevalent it becomes. Perhaps because porous vocabularies can be harnessed in principled disagreement as readily as pragmatic settlement. Or because in a plural world, people are constantly probing, testing for facts which might be reframed as decisions, maneuvering for the authority to act on the basis of other realities. As they do, the vocabularies they share become ever more internally diverse.

This porosity helps explain the sense of *pragmatic disenchantment* so common among global elites: a kind of disbelief in all the details anchored by faith in the virtue and objectivity of the vocabulary as a whole. It may simply be that over time, people who use the available vocabularies come to grasp their plasticity, their potential for strategic use and the vulnerability of even the firmest framing conventions. But they continue to find them useful – perhaps *more* useful. The result: a doubled sensibility, at once believing and strategizing, which makes it easier to speak truth to power in the morning and make a deal with them in the afternoon, or to imagine *other people* being persuaded by claims that you know – and presumably they should also know – are just arguments.

Much about this sensibility remains a puzzle. We know the incidence of anti-foundational pragmatics varies over time and among professions and its rise is not a one-way ratchet, as the recent re-appearance of formalist commitment in legal science attests. “Thinking like a lawyer” once meant being able to “solve” complex cases by formal categorization and logical deduction. A half century later, it was difficult to get an A in law school if you tried that. Thinking like a lawyer had come to mean skill in establishing and unravelling the categories, constructing and demolishing chains of deductive logic. And a generation later, clear reliable rules were again in vogue. Economists, psychologists and scientists have their own histories with analytic certainty and doubt, consensus and method war. For some elites, in some professions and some institutional settings, overt embrace of a sophisticated pragmatic skepticism is a badge of honor. For others, only the sort of thing you can share with a friend over a beer. And of course there are still others who cling to their analytics doggedly, any doubts inaccessible beneath a persistent conscious certainty.

As a result, the *distribution of certainty and doubt*, of strategic flexibility and persistence, bears further study. If jaded sophistication varied with distance from the commanding heights, for example, that would be interesting to know. One often hears that people far from power are more gullible to its claims than those at the center of things. I’m not certain, though. One finds dogmatists in the corridors of power and people on the receiving end who appreciate the plasticity of forces to which they yield. It may be that the hoi polloi are simply jaded and sophisticated in a different key. For one thing, they have been trained in savvy listening by media talking heads “explaining what’s really going on” when leaders make this or that claim. Heard in this spirit, elites can sound cavalier about the gravest moral issues even when – or particularly when – they sound self-righteous, hectoring, lecturing about values and the moral bankruptcy of any alternative.

For all the sound and fury – on television, in social media, over lunch – people also realize it is somehow not earnest, that people are mobilizing facts and ideas strategically and that it is anyway part spectacle or entertainment aimed at those more gullible than oneself. Listening, it is easy to conclude the vocabularies for exercising power are a lot of nonsense – you can learn to use it, have to listen to it, but also doubt it is anything but hooey. That Trump doesn’t really mean what he emphatically seems to be saying. And neither does anyone else. And once you start thinking this way, it is easy to imagine that only the things which *cannot be said* – which are “politically incorrect” – are authentic, important, what you really believe. This is also a kind of jaded sophistication. If you have the authority to determine the facts which are true, you might well double down on them earnestly. But if you don’t, the plasticity of the facts brought to bear on your interests might so often be visible that you become psychologically invested in what could not be said, what is everywhere refuted. And you too may come to think something else must be going on – fuel for politics in a very paranoid style.



## 5 Struggle by Law

Law is a great place to explore the global exercise of articulative power. Law infiltrates our commonsense—about the powers that be, the distributions that are just—while the practices of legal professionals frame the arguments which can be made, the interests which can be heard, the factors which can be taken into account. The world is awash in legal norms and claims and procedures and institutions which are tools for distributive struggle, records of past victories and defeats, a vocabulary of assertion and dispute with its own blindspots and biases. Legal rules, arguments and institutions make it possible for people to exclude others, capture and retain the gains from economic, political or cultural activity, legitimating the outcome as order rather than victory. That is why people struggle over these things so insistently. As a result, legal arrangements offer a red thread to unravel the mystery of the world's great disparities.

Patterns of dynamic inequality have legal roots when law allows “centers” to compound their advantage over lagging “peripheries” and encourages the forces which leave some communities behind while others speed ahead. From colonial governance to bilateral investment treaties, the arrangements allowing winners to consolidate gains and establish dynamics of inequality between centers and peripheries are legal. Then as now, legal institutions solidify the distribution of rents from global economic activity and consolidate the political authority of those committed to the stability of the outcome.

All this comes clearly in view when we focus on what people do to one another by asserting rules, invoking powers, developing legal justifications. Mapping these effects makes visible law's darker contributions to injustice and disempowerment and strengthens our ability to identify legal changes which could alter the way wealth and status are allocated. Multinationals readily assess such things to lobby for rules which will consolidate their market power and close out rivals, or increase their share of the value to be distributed across a complex global value chain. Teams of lawyers work to identify levers to place income here and losses there. Although we are prone to imagine that “gains from trade” are distributed by social, political or economic *facts*—like “bargaining power,” the relative “productivity” of factors or the “competitiveness” of actors—what we call “bargaining power” or “competitiveness” depends on the legal and institutional arrangements that affect things like costs of production and barriers to entry, the structure of traded industries, the relative power of labor and capital invested in them, the monopoly power of producers and so on. A history of law's role in domination and distribution would illuminate the ways regimes which seem impartial, even benevolent, participate in making an unequal and unjust world. The legal institutions of the European Union and the financial hegemony of London and Frankfurt, for example, allow monetary union to become a recipe for debt bondage, just as the European Court of Justice interprets free movement for the periphery and social protection at the center in ways which become an engine for relative wealth and stagnation.

Although our sociological tools to identify law's world making effects are rudimentary, this can sometimes be relatively straightforward—when legal regimes transform past might into present right which can then be articulated as fact. For example, the UN Charter cemented the status of the 1945 victorious powers as *the* Great Powers for all kinds of purposes. Although legal work arranges time as much as space—configuring the up-to-date and the far-behind—law's world-making impact may be easiest to grasp geographically. People use international legal materials and arguments to mark national boundaries and to make special spaces subject to special rules—the free trade zone, the detention center “at the border.” Once spaces have been identified, things proper to each can be ordered, arranged and placed there. Just as people become their legal status—he is a refugee, she is an economic migrant—so places also *become* their legal regimes: the high seas, the national territory, the special security zone. The legal arrangements constituting these zones fade from view as the spaces come to be taken for granted. As having this or that character, demanding this or that kind of behavior, subject to this or that authority.

Law's role in this can sometimes be obscured by the fact that law is so often the tool for rendering boundaries porous or linking otherwise distinct spaces. When this happens, it is easy to imagine the *difference* arises elsewhere—from geography or culture. Yet legal disputes about boundaries can also reinforce the notion that the spaces they separate are distinct, the line between them, wherever it settles and however porous, a natural one. Take the boundaries of Europe. European elites have established a complex mash-up of legal regimes to broaden and narrow what counts as inside and out for various purposes. The EU is now a pastiche of spaces: the variable geometry of the Eurozone, the Schengen Area, NATO, the European Stability Mechanism, the Troika and its clients in Greece and Cyprus, association agreements, bilateral and multilateral trade arrangements with third countries, the European Free Trade Association and dozens more. Lots of boundary issues remain thorny—relations with Turkey perhaps most visibly.

Nevertheless – or maybe precisely as a result – people across the world have come to take it for granted that there is a space called “Europe,” rooted in facts of history and geography, which sets limits on elite political imagination in concentric circles from Brussels outward: the Benelux, the Rhine, the original Members, the older Members, the associated nations and those on a pathway to membership. If Turkish relations with the EU are awkward, it seems obvious that geographic facts and cultural differences make membership for Israel or Palestine or Tunisia or Libya impossible, however beneficial it might be for all concerned. They are not “Europe.” They *could be*, of course, just as Malta and small islands scattered about the world’s oceans already are or just as Gibraltar is part of Britain. Not that long ago, of course, they all *were* part of Europe. For now, however, the facts are clear: they are not and therefore cannot be.

Or take the distinction between the global “political” order and the global “economy.” We imagine the first territorially, the second as a vast space floating above the marked territories of sovereign authority. And yet the global economy is everywhere entangled in politics, supported and impeded by all kinds of national institutions and legal rules. The boundary between the political public and the economic private is constantly being remade and nowhere do we find one without the other. Most legal work about them concerns their links and reciprocal influences: structuring transnational public private partnerships, harnessing sovereign debtors to private creditors, establishing public regulation of private activity or bringing public power to bear in defense of private rights.

Although it would be difficult to isolate empirically, law’s intense boundary work does seem to strengthen elite commonsense that international political and economic life are *naturally* different, taking place in alternative imaginary spaces according to distinct logics. The difference is reinforced by limits which seem implicit in legal reasoning about their connections, arguments which can’t be made, linkages which can’t be imagined. In a world where private rights travel and public policies don’t, for example, although you *can* organize labor globally, it is hard; just as you *can* get investors to take a haircut, but that is also hard.

Whenever spaces allocate power and privilege, people have reason to contest them: the West and the Rest, the North and the South, the civilized, the Christian, the developed, the liberal democratic and everyone else. Usually, struggle is over the boundary: there are civilized and uncivilized spaces, but my culture belongs on the civilized side of the line. Sometimes, however, people struggle to overturn the distinction: the world is not organized around levels of civilization, all states are or should be equal. It can be difficult to shift from one mode of opposition to the other.

We can see this in the history of center-periphery struggle within the EU. After 1989, Brussels elites created an imaginary Europe stretching from Scotland to Slovakia by placing East and West in different historical times: countries which had arrived in modern market capitalism and those which still had a ways to go to “catch up.” It seemed clear that complex social protections natural in the West would be premature in Eastern economies requiring the shock of free trade at market prices to jump start their modernization. There was struggle about who was where on the pathway to full membership and the social welfare state. But there seemed to be little room to dispute the apparent inevitability of such a spatial and temporary hierarchy.

The long struggle over austerity, debt and the Euro which followed the financial crisis shifted the frame. It began to seem that the difference between Europe’s North and South, at least, lay not in a hierarchy of development but in a political struggle between unmatched forces with different priorities. As the crisis ground on, national political elites in Spain, Italy and elsewhere needed a strategy about the baseline: should they do all they could to be on the right side of the line or join with Greece to overturn the framework of distinction. Ultimately, they chose the former – but not because the latter was invisible. It was just a greater stretch – seemed liable to unsettle things unpredictably. A better grasp of law’s distributive significance – as a network of rules and institutions, a vocabulary of dispute and a legitimating force – might open the range of alternatives and reduce the sense of stretch.

## 6 What Can this Tell Us About the Potential to Change the World?

It is frustrating when the center claims to have already taken everything into account. It leaves very little room for those with other interests and concerns. And for people who want to change things. Even the emancipatory promises of social movements – such as feminism and human rights – are routinely transformed into governance projects of their own. You can try to go back, back to sovereignty and local control and the politics you remember – Brexit perhaps. But there is no Brexit, there’s only an endless negotiation of a thousand technical questions. It can seem we have only the current arrangements or the power of no: of religion in a secular world, of nationalism, tribalism and racism against a cosmopolitan order.

It is certainly true that the room for national initiative and experimentation has been eroded by a series of small and large institutional changes made in the name of “globalization.” Laws enabling free movement of goods and services have made territorial regulation more difficult. The erosion of the tax base everywhere

has bound sovereigns in the service of global investors. These things were not inevitable. They were made – victories over alternatives. Wherever there was struggle, there were alternatives. Not just between the modest reformism of elite management and outsider agitation, but alternative voices and perspectives and possible arrangements *within* what came to feel like an unchangeable order. One of the tragedies of our contemporary situation is a collective amnesia about the very real alternatives lying all around us – an entire history of heterodox analyses, proposals and real-life experiences. Where money, credit, labor and capital, political power and right have been legally constructed, there was a moment when they could have been put together differently. Had they been, the legal boundaries between economics and politics or between those private and public actors might be otherwise. And then *that* might seem normal, commonsensical – factual.

Today, the gulf between a global economy and a national politics seems an unbridgeable chasm: a difference in scale disempowering politics and leaving global economic affairs unmoored from prudential safeguards. It doesn't have to be that way – we *know* how to link economic life to territory and community – just as we know how to distribute opportunities for political choice across institutions beyond the national capital and the professionals we call “politicians.” It has been done before. To get there, we would need to reorient expert work from managing the separation to arranging their connection.

It is not that we lack the ability to rearrange distribution when we want to. Consider the fashionable notion that every country should become Silicon Valley. I've heard this all over the place – in Russia, Kazakhstan, in Doha, Mexico and China. In each case, the tools people intend to use are legal and administrative changes reallocating opportunities to garner rent in the name of social transformation: adjusting rules on credit, education policy, immigration, intellectual property, local autonomy, export and import licensing; turning the levers of state power to allocate gains to those who would innovate as they had once been turned to those who would industrialize. By changing the rules, the good guys – investors, innovators, entrepreneurs, national champions – would be strengthened and the society transformed.

We might learn to approach the global order with a similar sense for its plasticity. The machinery to link the dispossessed productively to companies and nations which benefit from global markets, mobilities and technologies is not mysterious. Those who have ensured their disconnection know how it could have been done. Just as we could disperse sites for political engagement and link economic actors to communities, we could reshuffle legal arrangements to mitigate dualist dynamics. Think of local content, employment, technology transfer, or investment requirements that link firms benefiting from privileged market access or free trade zones to their periphery. Or corporate mandates that prioritize links with communities or unions alongside shareholders, lending requirements targeting credit to peripheral actors, zoning practices linking an office tower downtown with the establishment of a shipping facility in the ghetto and so on. Corporations could be discouraged from offloading workers on national states for tax and transfer welfare and encouraged or required to find something these workers might productively do. Capital flight could be restrained, capital investment in developing regions required. Go-slow provisions could prevent the rapid in- and outflows of speculative capital in thin peripheral markets. By tracing the impact of legal arrangements on political and economic trajectories, we might illuminate alternative directions for the routine work of managing the “system,” adjusting the entitlements and expectations that link people in relationships of relative privilege and vulnerability.

Rearranging things will not be easy. We will need to be savvy and strategic. People will resist. Rearranging the world will require *struggle*: struggle on the terrain where inequality is established and maintained. This is not a matter of outsider populism or detached academic reflection. It is a matter, in Max Weber's words, of strong slow drilling through hard boards in the institutional arrangements and vocabularies of modern expert rule. I propose we get started.

## Competing Interests

The author has no competing interests to declare.

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