

## RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY RICHARD B. BILDER

### BOOK REVIEWS

*A World of Struggle: How Power, Law and Expertise Shape Global Political Economy.* By David Kennedy. Woodstock, Oxfordshire: Princeton University Press, 2016. Pp. ix, 298. Index. \$29.95, £24.95. doi:10.1017/ajil.2016.14

In his latest book, David Kennedy, a professor at Harvard Law School, continues his iconoclastic project of blowing up global governance.<sup>1</sup> Writing from a position of critical detachment, Kennedy provides a profound and arresting account of how globalization is constructed by experts who obfuscate their own role, with a particular focus on international lawyers. He is coy about his own normative views, except to suggest that the current state of affairs is badly malfunctioning. In this review, I explore what he has produced and unpack his positive and normative claims. The strengths and weaknesses of the book largely mirror those of the critical legal studies project more broadly—there are many important insights, but at the end of the day, the project has no normative implications of its own.

Kennedy begins the volume by introducing his central concern: experts who construct a world in which they deploy their knowledge to solve problems. These experts either do not recognize, or willfully obfuscate, the political and distributive consequences of their expertise. When we focus on the decisions made by political leaders, we pay insufficient attention to “the way expert ideas and professional practices of assertion and argument construct and reproduce a world of inequality and injustice” (p. 14). While we colloquially think of expertise as simply

providing data and advice for those exercising political decision, this “background work” (as he calls it) also rationalizes and naturalizes discretion. In this way, power is constituted by expertise itself.

But, Kennedy suggests, this need not be the case. As he describes in the book’s introduction and conclusion, he often asks his students if the current situation is more like the year 1648, shorthand for a moment in which everything was up for grabs, or more like 1989, when remaking the international order was just in need of a few reforms. Kennedy believes that it is the former—suggesting that if we can just take off the blinders of expertise, we can imagine—and thus create—a new world. Kennedy suggests that we need to stop speaking of global governance as if it were a technocratic project, and instead diagnose its pathologies and expose its utterly political nature. He advises that we must refuse to “take our eyes off the dynamics of struggle through which injustice is mysteriously reproduced by so many who intend just the opposite” (p. 20).

In a series of chapters on various aspects of globalization, Kennedy describes how our world is constructed by experts competing with each other. “Struggle” is his central concept, in which experts seek to establish the taken-for-granted underpinnings through which power is exercised. Kennedy attempts to “reframe the international situation less as order or system than as a continual struggle . . . [because] struggle and conflict are more prevalent and constitutive of our everyday world than we realize.”<sup>2</sup> After two introductory chapters in which he introduces his

<sup>1</sup> See also DAVID KENNEDY, *THE DARK SIDE OF VIRTUE* (2004).

<sup>2</sup> Kayla Whittle, *David Kennedy on Remaking Our Technocratic World*, PRINCETON UNIV. PRESS BLOG (Mar. 23, 2016), at [blog.press.princeton.edu/2016/03/23/david-kennedy-on-remaking-our-technocratic-world](http://blog.press.princeton.edu/2016/03/23/david-kennedy-on-remaking-our-technocratic-world).

vocabulary, a middle section explains how certain problems come to be imagined as properly subjected to global expertise. The consequences of being identified as a proper subject of global governance are, in Kennedy's telling, primarily distributive. Only some people can speak, making certain types of discursive moves, proposing solutions with limited gains that are the target of yet more struggle.

Chapter Three elegantly distinguishes "insider" from "outsider" modes of discourse, the former focusing on global governance as aspiration and ambition, and the latter viewing it as threat and power play. Importantly (and reflexively), he identifies both discourses as available to individual actors, who shift back and forth as the situation may demand (pp. 103–07). Chapter Four is a primer on the sociology of knowledge, though it eschews the rigor and style of that field. Knowledge work constitutes our world through imagination, performance, and technical discourse, and the distinction between foregrounded decisions and the invisible background work is itself a product of expertise. This chapter also includes a manual for going forward: Kennedy's students will learn how to identify an expert community and to map its expert knowledge.

Chapter Five describes how expertise works in practice, helpfully laying out the argument in a series of schematic diagrams. What Kennedy calls "disenchantment" is a theme of this section of the book. He uses the term in two senses: disappointment in the inevitable gap between our expert aspirations and what can actually be accomplished; and disenchantment in the sense of a willing unseeing, in which we bracket the politics and instead pretend that expertise is apolitical. "The most accomplished experts," he argues, "are not surprised—or troubled—by the uncertainty of their expertise. Often they seem emboldened" (p. 9). Expertise becomes ever more sophisticated when it recognizes its own limits, creating full disenchantment.

The last three chapters focus on legal expertise in particular—mapping debates about globalization and international economic law (Chapter Six), international lawyers (Chapter Seven), and

the law of war (Chapter Eight). In each case, he elaborates how international law, "a sophisticated vocabulary for contemporary global management," (p. 12) structures the concepts in debate, obfuscating or normalizing distributive consequences. Law is the central language of our era, legitimating authority and normalizing entitlements. This means that law is both a target of struggle, and also a tool to be wielded in the distribution of gains across many other different fields. He notes how the internal contests within international law—for example, between those pushing for amnesty as opposed to accountability for international crimes, or between those pushing for trade or economic nationalism—serve to advance both sides of the legal project together.

Of particular interest to readers of this *Journal* will be Chapter Eight, which argues that war is pervaded by law.<sup>3</sup> Kennedy points out that the very notion of a law of war, in which some uses of force are legal and others illegal, legitimates killing and violence. Experts on both sides of any particular decision will rationalize their claims in struggle. International law, he notes "can echo with virtue and stand firmly on the side of peace while pursuing a proliferating institutional and professional engagement with the practice of war."<sup>4</sup> In this area, the logic of expertise hits its extreme. *Decisions* about who to kill become professional *judgments* (pp. 275–76), with the greatest casualty, in his account, being responsibility. It is a powerful and distinctive indictment of law as a technocratic practice.

At a gross level, the idea that law is a distributive form of expertise will be familiar to anyone with basic exposure to the sociology of knowledge, which emphasizes the importance of tracing and revealing the internal logic of expert claims.<sup>5</sup> That field has long been concerned with epistemic battles among and within

<sup>3</sup> See also DAVID KENNEDY, *OF WAR AND LAW* (2006).

<sup>4</sup> David Kennedy, *Lawfare and Warfare*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 171 (James Crawford & Martti Koskeniemi eds., 2012).

<sup>5</sup> Robert Owens, *Judicial Decision-Making as Knowledge Work*, 41 L. SOC. INQUIRY 502 (2016).

professions and knowledge practices, including law.<sup>6</sup> There is also a massive body of law and society literature which recognizes law's often hidden distributive and political consequences.<sup>7</sup> Sociologists have exposed how legal knowledge practices are wielded for material and family advantage.<sup>8</sup> Studies in the anthropology of law have unpacked technologies of governance that purport to be neutral.<sup>9</sup> That the market is not a neutral construct, and that public power underpins private gain, is a commonplace of political economy.<sup>10</sup> These literatures draw on empirical grounding to support their claims.

Kennedy's novelty is in his focus on the legal construction of global governance, and in his particular level of abstraction. This is not an empirical study of particular professional knowledges within the global legal field. It would be interesting, for example, to trace how new fields such as "rule of law," transitional justice, and post-conflict reconstruction have emerged as discrete fields, complete with their own graduate programs and United Nations job descriptions. Or how the Venice Commission of the Council of Europe, an organization with no formal power, has maneuvered itself into becoming the keeper of the common European legal heritage.<sup>11</sup> But

<sup>6</sup> ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS* (1998); Pierre Bourdieu, *The Force of Law: Toward A Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987); Sida Liu, *The Legal Profession as a Social Process: A Theory on Lawyers and Globalization*, 38 L. & SOC. INQUIRY 670 (2013); YVES DEZALAY & BRYANT GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002); cf. KENNEDY, *A WORLD OF STRUGGLE*, at 10 ("Accounts of law's distributive role in struggle are few.").

<sup>7</sup> See, e.g., STUART SCHEINGOLD, *THE POLITICS OF RIGHTS* (1974); E.P. THOMPSON, *WHIGS AND HUNTERS* (1975).

<sup>8</sup> See, e.g., DEZALAY & GARTH, *supra* note 6.

<sup>9</sup> See, e.g., SALLY ENGLE MERRY, *THE SEDUCTIONS OF QUANTIFICATION* (2016).

<sup>10</sup> KARL POLANYI, *THE GREAT TRANSFORMATION* (1944); BARRINGTON MOORE, *THE SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY* (1966); CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE* (1982).

<sup>11</sup> On the Venice Commission, see Maartje De Visser, *A Critical Assessment of the Role of the Venice*

those would be routine studies in the sociology of knowledge. Instead, Kennedy operates at one level higher. This vantage point allows him to construct an extended diagnosis and conceptual mapping, rather than an account of how this state of affairs came to be in particular fields or what stabilizes it.

This choice of abstraction renders the critique powerful and sweeping. It is impossible to read without changing one's view of the project in which we, experts all, are engaged. But it also invites questions that cannot be directly answered by the method. Is international law's heightened relevance simply the result of its success in an epistemic struggle? What is the role of the end of the Cold War, U.S. hegemony, and legalism in getting us to this point? What alternative knowledges did law replace? These questions are (merely) historical and empirical, but also essential to a full diagnostic account. For without knowing fully how we got here, how can we know if it is truly possible to escape our iron cage? The positive claim that legal expertise structures our world is straightforward, but is also articulated at a high enough level of abstraction so as not to be really verifiable. Kennedy's critical method is really a mood, a stance of a disinterested seer who purports to stand outside the game.

Kennedy's choice to eschew the conventions of social science means that he can avoid rigorous definitions of his key concepts. Most centrally, there is expertise, which is amalgamated into a single and binary category. Expertise is either wielded, or it is not (but mostly it is). Wielded is the critical term here. For expertise is never as confident as it portrays itself, and the zone in which expert knowledge runs out is far larger than we conventionally imagine.

This binary conception of expertise is overly simplistic. Within the technological-scientific paradigm as it actually operates in our daily lives, we have the notion of a confidence interval—a quantification of the limits and contingency of claims. Kennedy acknowledges this

*Commission in Processes of Domestic Constitutional Reform*, 63 AM. J. COMP. L. 963 (2015).

variation, but assumes that knowledge claims are generically weak: “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” (p. 3). Where others see a good deal of consensus, he sees disagreement; hence, the idea of disenchantment.

Struggle too is a polemic idea. Although he provides a caveat at the outset (p. 7), Kennedy’s analysis does not have room for any purely cooperative games; there are no gains that are not subject to distributive conflict, no pure coordination problems akin to driving on the left or right.<sup>12</sup> Every expert is self-interested, every act self-serving (p. 69). It is not clear what the currency is in this world of struggle. Are experts fighting over material gains, epistemic gains, status, or ideology? Obviously not all acts of expertise are altruistic, but is it really the case that none of them are? Leaving this unanswered renders the claims unfalsifiable, a standard feature of the critical method.

Power is another central concept in the book. Starting with the commonplace idea that expertise is political, Kennedy goes so far as to suggest that we can profitably elide the distinction between expertise and power. This part of the claim gets confusing: while politicians and citizens are not conventionally thought of as experts, Kennedy says that they are (pp. 165–66). This means that they share ultimate responsibility for expert decisions, even as the unit of analysis shifts from agents to expertise itself.

In imagining a world in which power is not distinct from expertise, Kennedy lets political decision-makers off the hook and transfers responsibility to epistemic communities. Consider what was (until the U.S. election on November 8, 2016) the single most momentous international event of our young century: the American-led invasion of Iraq in 2003. In Kennedy’s telling, this was not so much a political choice of the Bush administration, so much as something foreordained, normalized, and set in motion by a thousand background arguments

and decisions (p. 118). This renders it, in Kennedy’s view, analytically indistinguishable from Obama’s decision *not* to respond with American force to Syria’s use of chemical weapons in August 2013: both were the subject of argument and became “facts to interpret.” Really? Stated so broadly, the claim is undeniable, but I suspect most readers would find the two scenarios can be profitably distinguished on a number of dimensions, driven by the political agent who was at the helm making the decision. Each agent may have justified their momentous decision on the basis of expertise (notoriously weak in the case of Iraq),<sup>13</sup> but to suggest that there was no decision being made at all is implausible. And if decisions were made, there *is* more to decision-making than simply the background work. The grand historical events that shape us are hardly the realm of “habitus,” as defined by Pierre Bourdieu, or expert governance, but genuine junctures in which politics—bald and clear—are apparent to all.

Kennedy’s assimilation of power and expertise is problematic for another reason too. If everything is expertise but nothing knowable, how can any critiques have normative content? What, as they say, is to be done? Here the book leaves us to our imagination, though it suggests some possibilities from time to time, mostly around politics. Kennedy notes the possibility of

reintroducing institutional forms of economic life linked to territory and to the constituencies whose economic and political possibilities rise and fall with their location: public unions, publicly owned enterprises, corporate forms responsive to public policy as well as shareholder profit (p. 52).

Without the union part, this sounds very much like East Asian capitalism, in which China is the most prominent exponent.<sup>14</sup> But East Asian capitalism is just another form of expert-guided policy; indeed, according to some

<sup>13</sup> See, e.g., JOHN HAGAN, JOSHUA KAISER & ANNA HANSON, *IRAQ AND THE CRIMES OF AGGRESSIVE WAR: THE LEGAL CYNICISM OF CRIMINAL MILITARISM* (2015).

<sup>14</sup> RANDALL PEERENBOOM, *CHINA MODERNIZES* (2007); ALICE AMSDEN, *ASIA’S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION* (1989).

<sup>12</sup> Cf. RICHARD MCADAMS, *THE EXPRESSIVE FUNCTION OF LAW* (2015).

accounts, it is especially expert-guided.<sup>15</sup> How could one possibly “identify levers of change” (p. 5) without expertise? If expertise turns politics into an epithet, Kennedy turns the political into a saving grace, but without content.

Kennedy hints at being a liberation theorist. He wants us to take off our blinders, to question expertise, to unpack the political and distributive. This stance assumes that it is actually possible to step outside of expert knowledge claims, that if only we can exercise our imaginations to see our moment as akin to 1648, we can define new ideals and frames that better serve humanity. He notes in an optimistic tone (pp. 166–67) that when expertises confront each other, there are moments in which the mask falls, and one can see the underlying politics for what they are. Kennedy describes this moment of vertigo or transcendence for the expert as suggesting broader possibilities. Experts, he notes, often flee from the experience of decision and responsibility, but when the expertise runs out, there is nowhere to go.

A crucial question then becomes, how big is this zone of transcendence in which claims of expertise run out or fall away? Just as economists fight passionately about the scope and significance of market failures, so can we imagine debating the space for genuine decision. For Kennedy, the zone of decision is small, but imbued with a quasi-mystical quality. For most readers of this *Journal*—experts all, with an intuitive sense of confidence intervals—I suspect the zone is somewhat larger. However large, once we come to the space of decision, we can choose to just “experience the place we stand as a fulcrum of possibility” (p. 5). But again, to what end? Kennedy’s book is not a work of normative political theory, though in his complaints we get hints from time to time regarding what it is he does not like. But we do so without development or justification. The critical stance always promises that awareness is liberating. Yet it will take more than contemplation of the *kōan* of de-expertise to really deliver meaningful change on any

dimension that matters. It will take policy proposals, a political program, and a social movement.

Without a vantage point, there is no metric from which we can debate any political program, or even whether the blinders are worth taking off. And here one comes squarely up to the limits of the critical legal studies project. Though experts are “disenchanted” in Kennedy’s view, the truly ambivalent one is the critical seer, at once outside yet inside the domain of expertise. To the crit, it is the rest of us who are unseeing, but there is no escaping the iron cage: to propose, or even to imagine, is an act of expertise—the very thing being criticized—and hence leads only to an endless regress of self-criticism and reflexive “praxis.” Yet without a program of action—not just imagining—all we have are vague moralistic sentiments. We can travel along with the critical scholar on her reflexive journey, but at the end of the day, we are left empty.

It is unfair to expect a book published in 2015 to have anticipated 2016, the year of Brexit, Trump, and ISIS, in which “Politics” is back with a capital “P.”<sup>16</sup> But there seems to now be broad recognition of Kennedy’s point that globalization has been pushed by elite interests, unwilling to consider the distributional consequences of technocratic choices. Populist anger now appears to be squarely directed at “the way expert ideas and professional practices of assertion and argument construct and reproduce a world of inequality and injustice” (p. 14). Davos man wrings his hands; does the critical scholar celebrate the deconstruction?

It remains to be seen, at this writing, whether President Trump will actually govern in the populist style that his first few days in office suggest. But the broader spread of illiberalism and populism throughout the world suggests that all is not well in the realm of the political. It is no longer unimaginable that the dismantling of expertise might bring new totalist ideologies to the fore. Legal expertise is in the gunshots already. As

<sup>15</sup> *Id.*; cf. KENNEDY, A WORLD OF STRUGGLE, at 147 (characterizing it as neoliberal).

<sup>16</sup> Sebastian Mallaby, *The Cult of the Expert – and How It Collapsed*, GUARDIAN (Oct. 20, 2016), at <https://www.theguardian.com/business/2016/oct/20/alan-greenspan-cult-of-expert-and-how-it-collapsed>.

the honorary speaker of Hungary's parliament said: "It is the will of the people, not the law that matters, and the will of the people always tramples the law."<sup>17</sup> If this is what 1649 looks like, I, for one, would rather not have crossed the Rubicon.

Still, one suspects that expertise will be back, inevitably. The paradox of populism is that governing in the name of the people still requires governing.<sup>18</sup> This in turn requires relying on the very experts whose knowledge has been denigrated. Building fences requires fence-builders; economic nationalism still requires economic policy; and restructuring the courts requires a cadre of conservative jurists. We can bend the bars a little in the iron cage, but we cannot escape it.

Abbie Hoffman is alleged to have said that "an expert is a fast-talking guy from out of town." Kennedy is a fast-thinking guy, who has written an energizing and important book, if one that is occasionally frustrating in its abstraction. But it is surely worth reading to understand yesterday's world—and very likely tomorrow's as well.

TOM GINSBURG

*Board of Editors; University of Chicago*

*Failings of the International Court of Justice.* By A.

Mark Weisburd. Oxford, New York: Oxford University Press, 2016. Pp. xi, 416. Index. \$85.

doi:10.1017/ajil.2016.15

There is no room for doubt about the subject of this book. As the title makes clear, Professor

<sup>17</sup> TAMAS GYORFI, AGAINST THE NEW CONSTITUTIONALISM 62–63 (2016) (quoting Tomasz Tadeusz Koncewicz, *Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense*, INT'L J. CONST. L. BLOG (Dec. 6, 2015), at <http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense>).

<sup>18</sup> JAN-WERNER MÜLLER, WHAT IS POPULISM? (2016); Eric A. Posner, *Can It Happen Here? Donald Trump and the Paradox of Populist Government* (Chicago Public Law Working Papers #605), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2893251](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2893251).

A. Mark Weisburd presents a wide-ranging and carefully documented analysis of what he sees as the failings of the International Court of Justice (ICJ), "the principal judicial organ of the United Nations."<sup>1</sup> Weisburd, who teaches at the University of North Carolina School of Law at Chapel Hill, is an emphatic and unapologetic positivist. He maintains that the definition and limit of the law that the Court must apply can only be found within the familiar elements of Article 38(1) of the Court's Statute—no less and certainly no more.<sup>2</sup> Measured against Article 38, he finds that in several important instances, the Court has exceeded its mandate by applying rules apparently drawn from sources other than those sanctioned by Article 38(1).

Weisburd has limited patience for the Court's supporters in the "invisible college" whose favorable visions of the Court do not match the reality that he perceives. He notes that in its seventy years, "the Court has disposed of ninety-four interstate disputes in one way or another" (p. 350). Of these, the author finds "thirty-four contested cases and three advisory opinions in which either the Court's legal analysis or its fact-finding were problematic" (p. 350). He acknowledges the Court's role in developing or maintaining the law of maritime delimitation, international organizations, and a few other fields. Overall, however, both quantitatively

<sup>1</sup> Statute of the International Court of Justice, Art. 1.

<sup>2</sup> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." *Id.* Art. 38(1).