

Author! Author!:

A Response to David Kennedy

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David Kennedy's article is an excellent teaching resource.¹ It summarizes a range of criticisms of the international human rights system and skewers various confusions and inconsistencies in advocacy and scholarship in the field. Overall, it offers a racy and readable alternative to the often overblown discourse of human rights and, I have discovered as a teacher, prompts many students to clarify the basis of their interest in the area.

Here I offer some brief reflections on Kennedy's critique. I agree with many of the propositions David Kennedy lists, but I wanted him to be clearer about his own views and commitments. He tenders his criticisms as a pulling together of the worries of other well-meaning professionals and retains a certain detachment about them. At the beginning and again at the end of the article, Kennedy tantalizes in his declaration that some of the doubts he has listed about the international human rights movement strike him as more plausible than others, but he does not divulge which ones they are.

The list is in any event a useful and provocative one, although it would be easier to engage with if more specific examples were offered. For example, Kennedy claims that human rights are "a dominant and fashionable vocabulary for thinking about emancipation." Perhaps this is the case in societies such as the United States where debates about freedoms are largely conducted in terms of constitutional guarantees of rights. In many other contexts, however, (such as in my own country, Australia) rights talk is deeply unfashionable and has little impact in legal or political debates about freedoms or social justice. So, too, what events does David Kennedy have in mind when he notes complaints that the international human rights movement undermines valuable local institutions and strategies?

Others no doubt will respond more fully to the central propositions of the article, but to me its most intriguing aspect is the self-portrait of its author.

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1. David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RIGHTS J. 101 (2002).

Some of David Kennedy's earlier writings have emphasized his persona as an unrelenting, unromantic, hard-headed observer of the international law scene. In a controversial account of a human rights conference devoted to the situation of East Timor under Indonesian occupation, Kennedy gave a tough and unsentimental reading of the work of human rights activists.² He described the meeting as a "human-rights junket" without any vestige of the "transcendent idealism" of human rights.³ He observed the elaborate rituals of international lawyers (often out of their depth) performing their detached expertise for a hopeful and sometimes pathetic audience. Kennedy described the fantasy worlds created at international human rights conferences where drafting worthy preambles can give the participants a sense of progress and involvement. He reflected in a blunt way on the complex interaction of personal alliances, social opportunities, and professional cynicism with a human rights agenda.

In this article, however, Kennedy introduces himself to readers as "a well-meaning internationalist and, I hope, compassionate legal professional." I wonder whether there is any significance in Kennedy's firm assertion of his well-meaning internationalism but mere expression of hope that he is a compassionate legal professional? Perhaps the strong critical reaction to his piece on the East Timor conference has caused this hesitation. But who will judge this? And what do these identities mean anyway? Do the categories of "well-meaning internationalist" and "good-hearted" and "compassionate legal professionals" have any substance? Are there any international lawyers out there who would claim to be ill-intentioned internationalists, bad-hearted or uncompassionate legal professionals?

So, what professional performance is going on here? It is possible that the phrases are used simply to indicate that this is an insider's sympathetic critique of the international human rights movement, indeed based on a collection of sotto voce worries from the more thoughtful participants in this field. But Kennedy's self-identification as "well-meaning" and "compassionate" also preempts the charge that this is just another soulless deconstruction of a substantive area of law. In this sense, he seems to be seeking affiliation with a cosmopolitan community of international lawyers about which he has long expressed deep ambivalence. At the same time, David Kennedy implies that many members of the human rights movement become seduced by the sense of their own benevolence—you can make a successful jet-setting career, a glamorous but guilt-free and admired livelihood, from ministering to the unfortunate victims of human rights violations. So he is part of this good-hearted world, but in a savvy and ironic way.

In a wonderful tour of the repetitive reform agenda of international law written in 2000, David Kennedy suggested a range of techniques for practi-

2. David Kennedy, *Autumn Weekends: An Essay on Law and Everyday Life*, in *LAW IN EVERYDAY LIFE* 191, (Austin Sarat & Thomas R. Kearns eds., 1993).

3. *Id.* at 196–97.

tioners of the discipline interested in both social power and institutional politics.⁴ He offered the important intuition that “in some way the international legal profession has often made the very things it claims to care most about less likely, [and] that the professional discipline is part of the problem.”⁵ So, part of Kennedy’s project has been to work out how international lawyers participate in sustaining an unjust legal order while they also seek the role of effective humanitarian reformer.⁶ He is concerned with the way that reform agendas work to reinforce deep biases in international law.⁷ One of Kennedy’s proposed methods is to destabilize the idea that international lawyers have a common set of values from which the best answers to the issues of international law can be derived. Thus he is interested in retarding the emergence of an all-enveloping disciplinary middle ground.⁸ His destabilizing techniques, or “extra-vernacular projects” aim to articulate the dark side of international law and to expose the issues that never make it onto the discipline’s reform agenda. They include foregrounding what various areas of international law have to offer ill-intentioned internationalists—for example, “the statesman who wants to degrade the environment or prepare for war.”⁹ Kennedy’s article in this journal, however, seems to present its author as squarely occupying a middle ground: the *enfant terrible* who is prepared to voice skepticism about the sacred vocabulary of human rights is at the same time the experienced, urbane international lawyer who can graciously acknowledge the “enormous achievement” and the “great deal of good” performed by the international human rights movement.

It may be that David Kennedy cuts off the possibility of some types of extra-vernacular projects by taking as his subject “the international human rights movement.” This entity is not unpacked in the article, but it appears to be extremely broad, encompassing institutional actors such as the United Nations, national legal systems, non-governmental organizations, academics, lawyers and professionals of good-heart everywhere. In many cases, although they may share a commitment to the abstract ideal of “human rights,” the interests of particular groups and individuals will differ dramatically in particular contexts. Exploring the details of tensions and disagreements within the communities involved in international human rights work in specific cases and challenging the idea of a monolithic entity (regularly employed by supporters and detractors alike) may be a more effective way of critically analyzing the field of human rights.

Another central aspect of the author’s identity emphasized in the article is that of pragmatic professional. Kennedy’s mission is “to encourage other

4. David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT’L L. & POL. 335 (2000).

5. *Id.* at 456.

6. *Id.*

7. *Id.* at 459.

8. *Id.* at 475.

9. *Id.* at 346.

well meaning legal professionals to adopt a more pragmatic attitude towards human rights." I am interested in the barrier that the word "professional" erects here. Who are the professionals and who are the non-professionals? Who is Kennedy *not* addressing and why? His version of pragmatism involves the calculation of the costs and benefits of articulating, institutionalizing and enforcing human rights. David Kennedy avoids issues of lack of commitment or scarcity of resources (although these could be seen as the most pragmatic of all considerations). He presents pragmatism in contrast to a naïve, devotional approach to human rights.

Pragmatism in this sense, however, is far from being an extra-vernacular project or even one that would ruffle the feathers of most human rights activists. The international human rights movement indeed already largely operates in this pragmatic mode. The international human rights treaties themselves have strong elements of pragmatism. For example, the treaties allow considerable leeway in national translation of their standards and they contemplate derogation from rights in particular contexts. They read more as bureaucratic than devotional texts. And to have any utility or force, the invocation of human rights in particular contexts must always grapple with the negative consequences of such claims and make a rough estimate of the net costs and benefits. We can see this for example in recourse to the language of human rights in the current political battle over the treatment of prisoners taken by the United States in its campaign in Afghanistan. Advocates of respecting the human rights of a group that is deeply unappealing to most Americans have avoided any devotional vocabulary. They have employed the essentially pragmatic argument that non-enforcement of human rights in this context will justify violations of the human rights of American forces captured by uncivilized enemies.

David Kennedy interprets his pragmatic approach as excluding consideration of a range of theoretical challenges to human rights. He suggests that, for this article at least, we should just pretend that rights exist and set to one side questions about the basis or coherence of rights talk. Kennedy seems to assume that these issues have no impact on the daily life of the international human rights movement. Separating out such issues, however, reduces the force of the article: for example, the coherence or otherwise of rights claims is a critical aspect of their pragmatic value. Indeed, some of the doubts on David Kennedy's list of "pragmatic worries and polemical charges" cannot avoid these larger issues, such as Kennedy's discussion of the way that rights talk often insulates the economy from change.

The idea of the pragmatic author here is also somewhat in tension with the article's methodology. David Kennedy presents himself as a scribe, a conduit for concerns expressed by a bunch of compassionate legal professionals to which he also subscribes in greater or lesser (but unarticulated) degree. But the list of concerns does not appear to have a pragmatic point: the ten theses are curiously paralyzing and do not indicate how these issues may be taken on board by those interested in achieving just outcomes in particular

cases. I could agree with most of the concerns and admire their pithy expression here, but there was no signal of how we compassionate types could operate in a pragmatic and calculating way.

So, I find the pragmatic, cosmopolitan voice of the author of this article strangely at odds with the playful, troublesome perceptiveness of the other David Kennedy. I hope that he will move to devise some extra-vernacular projects with respect to the field of human rights and shake it up in a really profound way.