THE THIRD GLOBALIZATION

In this section, I summarize my as yet quite tentative thoughts about how the analysis above might be extended to include a third globalization. Although it is easy to see the first and second globalizations as thesis and antithesis, the third globalization cannot be seen as, does not see itself as, a synthesis. The third globalization resembles the first two in that it is founded on a brutal critique of its predecessor, in this case, the social. But it differs from both CLT and the social in the respect that there is no discernible large integrating concept, parallel to the will theory or the notion of adaptation to interdependence, mediating between normative projects and subsystems of positive law. Rather I would describe the structure of the consciousness globalized after 1945 as the unsynthesized coexistence of transformed elements of CLT with transformed elements of the social. Of course, this failure on my part to "totalize" may mean only that, because dusk has not yet fallen on "modernity," my pet owl Minerva has not been able to take flight.

The key transformed element of CLT is thinking in the mode of deduction within a system of positive law presupposed to be coherent, or "neoformalism." Neoformalism runs wild in, but also is mainly confined to, public law, including international, constitutional, and criminal law (not administrative law), and family law. It can be right or left. By contrast, CLT legal science was that of the law of obligations. The key transformed element of the social is policy analysis, but based on "conflicting considerations" (also called balancing or proportionality). It produces rules that are ad hoc compromises, rather than the social rules dictated by single social purposes in coherently adaptive new legal regimes. This mode can also be right or left, and is present everywhere, sometimes therefore, surprisingly, coexisting with neoformalism.

Between 1850 and 1950 (more or less), the plurality of schools of legal philosophy did not produce a diversity of modes of legal imagination, argument, and law making. Until around 1900, everyone ended up with a version of the will theory, and after 1900 everyone ended up either with a version of the will theory or with a version of the social. Today, all over the world, positive legal regimes in every area of law are those that emerged from the confrontation at the level of legislation or case law between CLT and the social, understood as law reform projects rather than as legal consciousnesses. There is a substratum of positively enacted classical contract law everywhere, and a superstructure of positively enacted social labor law. There are multiple administrative agencies dealing with a host of socially problematic areas, everywhere; and everywhere there is the law of the free market (itself more or less internally "socialized") governing beneath and between and among the regulatory regimes.

What there is not is a new way of conceiving the legal organization of society, a new conception at the same level of abstraction as CLT or the social.

Institutional innovation goes on constantly (e.g., structural adjustment, the European Commission, securitization). But each new piece of positive law presents itself as *parole*, dissolvable into the expanded legal *langue* that now includes as interchangeable elements all the innovative concepts of the social along with, rather than in place of, those of CLT.

On the field of positive law, structured and unstructured in a way that represents not any single logic, but rather the contingent outcomes of hundreds of confrontations of the social with CLT, it is still possible to argue as a classical person. One simply starts from and pursues the premise that the law is or should be the coherent working out of the coherent idea of individual freedom so far as compatible with the like freedom of others. In the law of market (see below for sex and the family), this mode of argument now identifies one as a neoliberal or libertarian or free market conservative. CLT in its pure or reactionary form is now a right-wing project rather than a legal consciousness.

It is also still possible to argue as though there was an obvious logic of social development, denied by CLT, that does or should animate all of positive law. Whereas up to WWII this might identify one as a fascist as probably as a progressive, the left-over social is now, in the law of the market, almost always a progressive stance. Like CLT, the social in market law has lost its political indeterminacy, but ended up on the left rather than on the right. CLT and the social, in these leftover, politicized forms, are not so much discredited as dated, or "old hat," or tired ways of proceeding, sporadically forceful, more often merely ritual.

These valences are reversed in the law of sex and the family. There, CLT is left or liberal feminist or libertarian, with equal rights still a program for transformation of the relations between men and women and for the liberation of "sexual minorities." The social, in sharp contrast, is conservative, traditionalist, or authoritarian in sex and family law, just the opposite of its valence in market law. The pre-War traditionalist or authoritarian element in the social survives here as Asian or Islamic or official Catholic or fundamentalist Christian values, opposed to the "decadence" of Western sexual and familial rule and mores.

Policy analysis, the first of the great innovations of post-War legal thought, deals with the ongoing management of preexisting legal regimes conceived as compromises between "individualist" (CLT) and social desiderata. Public law neoformalism, the second great innovation, is a disruptive, rather than managerial mode, brought to bear sometimes on the institutions that embodied the social, and sometimes on the institutions that embodied CLT. It appeals, beyond the settlement between CLT and the social represented by the institution in question, to supposedly transcendent, but also positively enacted values in constitutions or treaties, against the status quo.

In place of the unselfconscious confidence in reason and science of CLT, and of the combative self-assertion of the social, policy analysis has been, for fifty years, the vehicle of modest, workmanlike devotion to doing legal work with whatever materials are left over from the grandiose projects of the past. Its practitioners are most proud when their conclusions are warranted non-political because they please and displease left and right without apparent pattern.

Public law neoformalism rebels in the name of "absolutes" outraged in a particular context. Neoformalism is unreflective in a way diametrically opposite to policy analysis. The argument that the closed shop violates the Mexican Constitution's guarantee of freedom of association, or that the failure to criminalize clitoridectomy violates the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), or that affirmative action in U.S. university admissions violates equal protection, or that any judge in any country might authorize the detention of Pinochet for human rights abuses in violation of international law, all presuppose either a mystical union of natural and positive law or the mode of deduction from abstractions effectively trashed by the early social theorists.

In place of the professor of CLT and the legislator/administrator of the social, the hero figure of the third globalization is unmistakably the judge, who brings either policy analysis or neoformalism to bear, as best s/he can, on disputes formulated by governmental and nongovernmental organizations claiming to represent civil society.

Human rights play the same role in contemporary legal consciousness that "private rights" played in CLT and "social rights" played in the Social. Identity plays the role that the individual played in CLT, and that classes and national minorities played in the Social. The contemporary ideal is a legal regime that is pluralist, not in the sense of CLT, which coordinated atomized individuals through universally valid abstract rules, nor in that of the Social, preoccupied with finding and supporting the "valid" "living" law of subcommunities as a path toward an idea of distributive justice. But in the sense of appropriately recognizing and managing "difference."

The individual (and corporate) property and contract rights beloved of CLT were a limited class, cabined by the worship of sovereign power on the one hand and by the sharp distinction between legal and moral obligation on the other. They are an ancestor, but not the model for contemporary human rights, nor, for that matter, are they central to the human rights pantheon. The collective social rights (food, housing, work, health) beloved of The Social, are more or less vindicated in positive law, but they, like CLT property rights, are conceptually at the margin of contemporary legal consciousness in its transnational form.

Contemporary legal consciousness is the endpoint of a long process in which the general concept of a right has risen from its historical low point

in the 1930s (heyday of right and left versions of the social) to become the universal legal linguistic unit. Human rights are the "hypostatization" of this trend, operating as universals, at once natural and positive, in a way oddly analogous to the operation of right, will and fault in CLF private law. Human rights also function sometimes as rules (even absolute rules) and sometimes as mere policies, potentially relevant in virtually every legal dispute even if there is no claim of violation of an enacted constitution or charter or treaty.

Contemporary legal consciousness organizes rights claimants according to their plural, cross-cutting "identities." Identity represents at once an extension of and a total transformation of the categories – social class and national minority – through which the social jurists disintegrated the Savignian "people." Contemporary identities cross cut in the sense that each of us has many. One person can be a straight white male married ruling class New England Protestant Unitedstatesean, not living with a disability, not a person living with AIDS, not a survivor (that he remembers) of childhood sexual abuse, and so on.

My example is awkward because, in contemporary global legal consciousness, the notion of identity is the descendant of the social preoccupation not with dominant but with subordinated or discriminated or persecuted identities. Identity is typically the basis of a claim against the "majority" or "dominant culture." Identity thinking alternates between essentializing what it is to have some particular trait that sets its possessors apart, in order to develop and legitimate legal claims, and trying to reconcile those claims when they conflict. Of course, straightforward nationalist claims, and claims based on class or national minority oppression are no less common today than they were in the interwar period. It is just that they are no longer paradigmatic.

Identity/rights discourse seems at first glance to be a public law and family law phenomenon. But it is in fact a true lingua franca, just as applicable to the law of the market. On the side of the typical beneficiaries of identity discourse, namely what the social jurists call "weak parties" (women, discriminated minorities, now even "the poor" understood as an identity rather than a class) formal market law no longer ignores identity. Some public and private market actors, but not others, are forbidden to discriminate against some identities, but not others, which means that they may be compelled to deal, against their will, at some economic cost, or forced to deal on more favorable terms than the identity incumbents could obtain in a "free" market. Histories of discriminatory treatment of an identity give rise to complex economic claims against private market actors or private property owners in the present.

On the side of "strong parties," employers, creditors, sellers of tangible and intangible commodities, there has been a sustained effort, emblematic of contemporary legal consciousness, to reconfigure property and contract rights as parallel to minoritarian identity/rights. Eastern European dissident rights theorists, for whom The Social was implicated if not in communism

itself at least in its toleration through the years up to 1989, included private property in their catalog of what was denied under communism. The ultimate realization of this trend is Amartya Sen's inclusion of the "right to engage in entrepreneurial activity" in his catalog of human potentiality protection, probably best understood as part of the third world reaction against the social as manifested in the failed ISI regimes of the sixties and seventies.

The international business community gradually adapted to the rise of identity rights rhetoric by transforming property ownership into a minoritarian identity and government regulation into the analog of discrimination by legislative majorities. Through the WTO, for example, multinationals demand protection for intellectual property rights against the practices of third world countries that refuse to recognize patents and trademarks or to prevent "piracy" (nicely paralleling the demand of international capital that imperialist states suppress tangible piracy in the early nineteenth-century Mediterranean by colonizing North Africa).

The hope of The Social, that an institutional mechanism based on the recognition of organized groups (as in corporatism) can correctly achieve accommodation, has disappeared. Just as the people/nation complex of CLT was riven by the focus on social classes and national minorities, so the order based on classes and national minorities fragmented when the identity concept became cross cutting. The end result is that the concept of an identity, and the set of legal concepts and techniques based on the idea of a right, through which identities enter law (e.g., discrimination, accommodation, etc.), are general. But they provide only a *langue*, used to produce an infinite variety of particular arguments and particular regimes of positive law, as *parole*.[142]

Each national legal system makes its own choices about which identities to recognize and which to stigmatize. But the arguments for and against recognition are close to identical across time and space. When an identity is recognized, it will be through a typically contemporary mix of highly formal norms, of equality and nondiscrimination, with a highly negotiated, ad hoc set of norms, about tolerance or accommodation for identity defining practices like "sodomy" and the veil, and about affirmative action or reparations. In other words, public law neoformalism combined with conflicting considerations (balancing, proportionality). There will be as many "solutions" as there are law-making authorities.

Each of the traits of the third globalization has a recognizable Unitedstatesean genealogy, in the sense that, starting from our present and moving back in time, we soon come upon Unitedstatesean developments that seem at least to presage those in the global context. Public law neoformalism strongly resembles the practices of late nineteenth-century U.S. courts, which took

[142] Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987).

the CLT construction of private law and applied it to the U.S. Constitution. After WWII, liberal civil libertarians who had strongly criticized the conservative public law neoformalism of the earlier period took up the same practice through the Warren Court. Policy analysis and balancing were post-Realist U.S. developments, and the advocates of balancing were already debating public law neoformalists in the early 1950s.

The identity/rights complex, as a template for thinking about a vast range of legal issues, seems foreshadowed in the United States by the post-WWII alliance of elite WASPs, Jews, and blacks in the construction of the category of ethnicity, linking the evils of the Holocaust to those of racism in the United States as illegal discrimination. U.S. second-wave feminism is responsible for the abstraction and generalization of the category by transforming it into "identity." And it is familiar since de Toqueville that Unitedstateseans tend toward juristocracy .

Along with this conceptual genealogy, each of the main sites for the development of contemporary legal consciousness has a strong U.S. connection. I would include among these sites, first the constitutional courts, with judicial review often of issues of the distribution of powers in federal systems as well as over rights against the state, that have come into existence all over the world since 1945. Second, the rise of transnational jurisdictions, in a host of different contexts, from the European Union (EU) to the WTO to the International War Crimes Tribunal. Third, in the world of law practice there is the development of the U.S.-style large international law firm dealing with the issues of the globalized economy, and of a nonprofit NGO sector, equally globalized, understanding itself as constituting "the international community," or "international civil society."

In each of these contexts, the influence of the United States is manifest. As in the analysis of the diffusion of CLT, we can distinguish more or less violent imposition from imposition through superior bargaining power, and both from prestige. For constitutional courts, for example, the development begins with U.S. victory over Germany, Italy, and Japan in WWII, and continues through victory in the Cold War. Then there is the process by which USAID and the international financial institutions bargain with third world regimes desperate for financial bail outs, imposing rule of law reform as part of structural adjustment. U.S. courts have steadily expanded their "long arm" jurisdiction, and the way of thinking about law that goes with it, through the implicit threat that if defendant multinationals refuse to accept U.S. jurisdiction, default judgments will make it hard or impossible for them to access the U.S. market.

The analogy is to nineteenth-century imperial bargaining with the Ottoman Empire or China or Egypt for legal "capitulations" under the two threats of military intervention and refusal of trade. The rise of U.S. style transnational law firms is obviously tied to the relative dominance of U.S.

transnational corporations in the globalized world economy. Prestige seems the more relevant category for understanding the dominance of U.S.-style policy analysis in the work of the EU Brussels Commission on competition law, or for understanding quotation of U.S. Supreme Court cases by the Egyptian Constitutional Court.

On the other hand, it is easy to exaggerate the extent to which the third globalization is "really" Americanization. First, public law neoformalism and conflicting considerations have a European as well as a Unitestatesean genealogy, including, for policy analysis, Rene Demogue and Phillip Heck before WWII, and the early proportionality cases of the German Constitutional Court. Kelsenian judicial review and German ordo-liberalism undergird public law neoformalism. And as in the earlier cases of CLT and the social, there is a process of selection, in which legal elites around the world choose to be dominated in one way rather than another. The European Court of Justice is neoformalist in its interpretation of the canonical "freedoms" of movement of goods and persons in a "single market" in part, as is widely recognized, in order to drape its legislative power in the cloak of legal necessity.

Why is it that, in a goodly number of peripheral and semiperipheral national legal systems, constitutional courts established over the whole period, from the late forties (India) into the 1970s (Portugal, Spain, Greece) and the 1990s (Central Europe, Colombia, South Africa), have come to exercise significant power, successfully invalidating legislative and executive actions? The background of U.S. military hegemony, the pressures of the international financial institutions and of world capital markets, and the prestige of U.S. institutions are all part of the story. But here, too, it seems likely that selection is important.

We might interpret developments of this kind of judicial power as a strategy of a part of the local elite, the part with access to judicial power and legal discourse, to deal by mediation with a characteristic set of conflicting pressures. In the economy, these regimes were the sites of the elaboration of the institutions of the social, from land reform to import substitution industrialization, by the left and right nationalist regimes that came to power after WWII, in the context of decolonization and third worldism more generally. Beginning some time in the late 60s, rising neoliberalism, with strong links to CLT, backed by the resurgence of right-wing power in the United States and Western Europe, has been pushing for the dismantling of social regimes, and especially of ISI regimes.

Third world constitutional courts mediate between these pressures and the resistance of the intended beneficiaries of the social, peasants, the urban poor, government employees, and business interests with access to the rents generated by regulation. Sometimes the courts strike down the social measures, as for example when the Ghanaian Constitutional Court abolishes the Nkrumah era compulsory sales cooperatives of producers of domestic gin. Sometimes they soften the impact of the neoliberal roll back, as when the

Indian court, with the hearty approval of David Beatty, delayed the eviction of squatters on public streets in Mumbai until the monsoon season was over.[143]

A similar but inverse process seems to be at work for the domains of civil liberties, sex, and the family. Here the international pressure comes from the international NGOs, pressing for protection of political dissidents and for the liberalization of sexual and family legal codes. On the other side are, often, the military and traditionalist religious and nationalist organizations. Once again, the constitutional discourses of public law neoformalism and proportionality allow the legally empowered part of the elite to mediate. Clitoridectomy is not Shari'a, so the government can ban it, according to the Egyptian court.

Mediation means that neither side gets everything it wants on social issues, any more than the courts enact either the Washington consensus or the social agenda. Public law neoformalism and the method of proportionality empower judicial institutions to stand above the conflict of CLT-style neoliberalism and the surviving elements of the left-wing social, and equally above the conflict between liberalizers and social authoritarians and traditionalists. They take the conflicts out of the domain of pure politics, with all its explosive possibilities, and relocate it in the domain of legal expertise, ostensibly under suprapolitical local control.

My view is that it will be a while before it is possible to work out, retrospectively, just what the class base was for this mediating activity.[144] As a first guess, it would seem plausible that the supporters of judicial review may have included the long-established colonial or precolonial cosmopolitan elites, not fully displaced, or even strengthened by the social regimes, and the newly enriched groups, moving toward a more cosmopolitan social stance as well as into the global market, who managed to establish themselves within the social dispensation. For these groups, the Washington Consensus advocates, the liberalizing NGOs, the local military, cultural nationalists, and religious fundamentalists are all threats to be managed, accommodated but not allowed to ruin the good times and the promising future.

The process of selection, as in all of these examples, is possible because, as with the first two, the third globalization diffuses a *langue*, and permits an infinite variety of *parole* by those who learn to speak proportionality, neoformalism, rights/identity, and judicial supremacy. As the *langue* diffused, it lost its distinctive Unitedstatesean quality. The U.S. solutions to the problems that local speakers address in their own national contexts come to seem just particular instances rather than paradigmatic utterances. This process is facilitated by the parochialism of U.S. legal culture, which after WWII lost

[143] David Beatty, The Ultimate Rule of Law (2004).

[144] I found Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004) helpful in this regard.

the openness to the rest of the world that had been one of its striking traits when Unitedstateseans were self-conscious dwellers in the periphery. When they want to influence the *langue*, or assert proprietorship over its use, Unitedstateseans may be ineffectual because they know it in its contemporary transnational form less well than those who have been busily developing it offshore over the last fifty years.

The centrality of the judge combines, with the problematic status of juristic method in the aftermath of critiques and with the multiplication of claimant identities, to pose a new problem. In place of the question of the extent to which law should be moral, for CLT, and the question of the relation between law and society, for the social, in contemporary legal consciousness the question is the relationship between law and politics. The judge simultaneously represents law against legislative politics domestically and sovereign politics internationally, and must answer the charge that s/he is a usurper, doing "politics by other means."

Contemporary legal consciousness harbors a plethora of normative reconstruction projects, designed to transcend the opposition of CLT and the social, and thereby restore Reason to rulership in law.[145] It also harbors a plethora of methodologies through which legal theorists attempt to achieve a distanced understanding of the relation of law to other domains. In place of, or along side, the normative projects of CLT and the social – utilitarianism, natural rights, social Darwinism, Catholic natural law, Marxism, pragmatism, Comteanism, and so on – we have Legal Process, liberal rights theory (often puzzlingly combined with analytical jurisprudence[146]), efficiency analysis, republicanism, communitarianism, legal neopragmatism, feminist legal theory, critical race theory. And that is just the Unitedstatesean array. There is no more a dominant reconstruction project today than there was a dominant philosophy of law in the late nineteenth century or between the World Wars.

Among the interpretive as opposed to reconstructive projects: analytical jurisprudence, the sociology of law, the economic analysis of law, literary theorizing of law as text, the cultural study of law, critical legal studies, postmodern legal theory. Of course, the interpretive modes are no less value saturated for having eschewed prescription. Critical legal studies, the approach of this article, includes a critique of policy analysis, for its pretension to leach out, through the notion of universalizability, the inevitable particularism of political/legal choice. And it includes a critique of public law neoformalism for suppressing the moment of "governance" in political/legal choice.[147]

[145] Pierre Schlag, The Enchantment of Reason (1997).

[146] See Lopez-Medina, *supra* note 3.

[147] David Kennedy, *When Renewal Repeats: Thinking Against the Box*, in Left Legalism, Left Critique (Janet Halley & Wendy Brown, eds., 2002); David Kennedy, *The Human Rights Movement Part of the Problem*, 15 Harv. Hum. Rts. J. 99 (2002); Duncan Kennedy, Critique of Adjudication, *supra* note 2; Duncan Kennedy, *Distributive and Paternalist Motives in Contract and*

CONCLUSION

The left and right political ideologies pursued through contemporary legal consciousness are no more internally coherent than the legal dogmatics of CLT or the organicist dogmatics of the social. This point is an important antidote to the tendency to see a discussion of the politics of law, like the one above, as reducing law to politics. As I've argued at length elsewhere, the reduction is impossible because, for example, the projects of the right oscillate between libertarianism and social conservatism; those of the left, say for the family law issues just mentioned, between a feminist identity politics of protection and a queer theoretical antiidentity politics of sexual liberation.[148]

In other words, the content of left and right projects is no more reliably "axiologically decidable" (or "determinate," as we used to say in critical legal studies) than the pure question of legal validity. When one traces the phenomenology of decision under uncertainty into the choice of an interpretation of one's own politics, it turns out that there is an "hermeneutic circle." Commitments as an actor within a legal consciousness shape politics as well as the reverse.[149]

Even in Clausewitz's famous formulation,[150] war is politics *by other means*, not "just" politics. In Carl Schmitt's flip of Clausewitz, politics is war by other means, but not reducible to war.[151] War as "means" can be an end, or a means to other ends than politics. If law is politics, it is so, again, by other means, and there is much to be said, nonreductively, about those means. By analogy with Schmitt, it seems to me also true that politics is law by other means, in the sense that politics flows as much from the unmeetable demand for ethical rationality in the world[152] as from the economic interests or pure power lust with which it is so often discursively associated.

The narrative begun in this article attempts to historicize "our" situation, in the mode of left critical theory combined with modernism/postmodernism. The three globalizations are incidents in the story of military force, economic power, and ideological hegemony within the capitalist period of world history. But I understand this period not as playing out the logic of capital, but rather as the period of universal rationalization paradoxically intertwined with the death of reason.[153] The death of reason permits (but does not require or

Tort Law with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Mn. L. Rev. 563 (1983).

[148] Janet Halley, *Sexuality Harassment*, in Left Legalism, Left Critique, *supra* note 144.

[149] Kennedy, Critique of Adjudication 187–191, *supra* note 3.

[150] Carl von Clausewitz, On War (Michael Howard & Peter Paret, trans., 2d ed. 1989) (1832).

[151] Carl Schmitt, The Concept of the Political (1976).

[152] Cf. Max Weber, *Politics as a Vocation*, in From Max Weber (Gerth & Mills, eds., 1946).

[153] *Id.*

in itself bring about) the taking back of alienated powers that can be used for local or national or transnational change toward equality, community, and wild risky play. But they are powers whose ethical exercise starts from accepting the existential dilemmas of undecidability that legal discourse has, from globalization to globalization, staunchly denied.