

## 2 THREE GLOBALIZATIONS OF LAW AND LEGAL THOUGHT: 1850–2000

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The study of law and development began with a particular positioning of its two terms, “law” in relation to “development.” The question was how legal reform might contribute to the takeoff into self-sustaining growth in the Cold War, postcolonial Third World of the 1960s. Trubek and Galanter’s famous article, “Scholars in Self Estrangement,”<sup>1</sup> published in 1974, stands, among other things, for the repositioning of the two terms, problematizing the relatively simple instrumental idea of law with which the field had begun, and politicizing our understanding of development. I hope this essay will contribute to the renewal of the project that this book represents.

The three globalizations of my title refer to two overlapping periods of legal institutional and conceptual change in the West: to the rise of Classical Legal Thought between 1850 and 1914, and of socially oriented legal thought between 1900 and 1968; and to the transformation of the characteristic traits of the two periods in two distinct processes of diffusion across the world of colonies and recently independent nation states. The briefer third part sketches a similar institutional and legal theoretical development – a third globalization – for the period 1945–2000 (for a summary overview, see Table 1).

These institutional and conceptual transformations might be described as one of the frameworks or contexts for what development did or did not occur in the world beyond the industrial West over these 150 years. But framework and context are misleading terms for describing the relationship between legal and economic activities. This is because economic activity can’t be understood as something autonomous in relation to a set of passive institutional and legal conceptual constraints, as the terms framework and context suggest. Legal institutions and ideas have a dynamic, or dialectical, or constitutive relationship to economic activity.

<sup>1</sup> David M. Trubek and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wisc. L. Rev. 1062–1101 (1974).

The changing "framework" described below was also a "plan," or project of those with access to the legal, administrative, and judicial processes in colonies and states, a project for influencing economic activity. Since the middle of the eighteenth century (the French Physiocrats), one of the objects of legislation, administration, and adjudication has, at least some of the time, been economic development (as it happened to be understood at the time). The first globalization can be seen as the culmination of the liberal attack on mercantilist or "early modern" economic and social policy making, and the second as the policy program of the first generation of critics of the fruits of *laissez-faire*.

But the framework is not just a plan of "policymakers." In the capitalist West and its periphery strong economic actors influence law making just as much as they are constrained by it. They too have projects, both with respect to specific legal rules that they want or don't want to constrain their pursuit of power and profit and with respect to contours of the legal regime taken as a whole. The transition from mercantilism to liberalism was as much or more their doing as that of statesmen and thinkers. And the rise of what I will be calling "the social" was a function of the rise of political parties that aggregated the interests of weak economic actors, particularly farmers and workers, in response to the influence of capital.

In struggles over the regime, the institutional and conceptual possibilities of law are at stake, the repertoire of possible policies, as well as large numbers of particular rules that make up contested wholes like *laissez-faire* or socially oriented law. In these struggles, actors with privileged access to the legal apparatus – lawyers for economic actors, lawyers working as legislators, judges and legal academics – have a professionally legitimated role to play, a role that parallels and overlaps that of the economic power holders. They change what the public understands about law and its appropriate role as they argue about how to channel or direct economic and social change, and they participate in the continuous transformation of how the society understands economic development.

This chapter provides an introduction to these processes, but it seems only fair to warn the reader that it is very much a version of a work in progress. It covers a very large amount of material, both in time and in space, and I am sure I've made significant errors both of detail and of substance. The sweeping assertions in the text are supported by a minimal footnote apparatus that reflects the vagaries of my interests and reading over the years rather than sustained research on each topic covered. I hope readers will challenge rather than dismiss me for this weakness, so that I can improve the next version.

Between 1850 and 1914 what globalized was Classical Legal Thought (CLT). It had no essence. But among its important traits were that it was a way of thinking about law as a system of spheres of autonomy for private and public actors, with the boundaries of spheres defined by legal reasoning understood

TABLE 1. The Three Globalizations of Legal Thought

	1 <sup>st</sup> : 1850–1914, Classical legal thought	2 <sup>nd</sup> : 1900–1968, The social	3 <sup>rd</sup> : 1945–2000, Policy analysis, neoformalism, and adjudication
<i>Rights</i>	Individual rights, property rights	Group rights, social rights	Human rights
<i>Equality</i>	Formal equality	Social justice	Nondiscrimination
<i>Legal ideal</i>	Freedom, system, and legal science	Solidarity, evolution, and social science	Democracy, rights, rule of law, and pragmatism
<i>Legal core</i>	Private law	Social law	Constitutional law
<i>Legal philosophy</i>	Legal positivism	Legal pluralism	Multiple normative reconstruction projects
<i>Normative ideas</i>	Right, will, fault	Social welfare	Human rights and social policies
<i>Governance idea</i>	Unitary state	Corporatism	Federalism
<i>Societal unit</i>	People	Social classes, national minorities	Plural identities
<i>Sociolegal unit</i>	Nation state	The institution	Civil society
<i>Boundary</i>	Law/morality	Law/society	Law/politics
<i>Legal instrument</i>	Code	Special legislation	Constitution, treaty, charter
<i>Legal technique</i>	Deduction within coherent and autonomous legal order	Rational development of law as means to social ends	Public law neoformalism and balancing of conflicting considerations
<i>Legal agency</i>	Law professor (drafts code and expounds it)	Legal sociologist and legislator and administrator	The judge (and the litigants)
<i>Economic image</i>	The free market	Alternatives to the market	The pragmatically regulated market
<i>Family image</i>	<i>Patria potestas</i> with unenforceable high moral duties	The family regulated in the interest of the state/society	The liberal family
<i>Public international law</i>	Nation states + colonies + treaties	International institutions	International civil society, human rights, and adjudication
<i>International economic law</i>	Gold standard, free trade, private international law	Autarchy, bilateralism, blocs, IMF, World Bank, GATT	EC, NAFTA, WTO, structural adjustment
<i>Privileged legal fields</i>	Contract law, commercial law	Labor law, administrative law, family law, international law	Constitutional law, business law, international law

as a scientific practice. The mechanisms of globalization were direct Western imposition in the colonized world, forced "opening" of non-Western regimes that remained independent, and the prestige of German legal science in the European and Western Hemisphere world of nation states.

Between 1900 and 1968, what globalized was The Social, again a way of thinking without an essence, but with, as an important trait, preoccupation with rethinking law as a purposive activity, as a regulatory mechanism that could and should facilitate the evolution of social life in accordance with ever greater perceived social interdependence at every level, from the family to the world of nations. The agents of globalization were reform movements, of every political stripe, in the developed West, nationalist movements in the periphery, and the elites of newly independent nation states after 1945.

Between 1945 and 2000, one trend was to think about legal technique, in the aftermath of the critiques of CLT and the social, as the pragmatic balancing of conflicting considerations in administering the system created by the social jurists. At the same time, there was a seemingly contrary trend to envisage law as the guarantor of human and property rights and of intergovernmental order through the gradual extension of the rule of law, understood as judicial supremacy. The mechanisms of globalization were American victory in World War II and the Cold War, the "opening" of nation states to the new legal consciousness through participation in the world market on the conditions set by multinational corporations and international regulatory institutions, and the prestige of American culture.

The "thing" that globalized was not, in any of the three periods, the view of law of a particular political ideology. Classical Legal Thought was liberal in either a conservative or a progressive way, according to how it balanced public and private in market and household. The Social could be socialist or social democratic or Catholic or Social Christian or fascist (but not communist or classical liberal). Modern legal consciousness is the common property of right wing and left wing rights theorists, and right wing and left wing policy analysts.

Nor was it a philosophy of law in the usual sense: in each period there was positivism and natural law within the mode of thought, various theories of rights, and, as time went on, varieties of pragmatism, all comfortably within the Big Tent. And what was globalized was most definitely not a particular body of legal rules: each mode provided materials from which jurists and legislators could produce an infinite variety of particular positive laws to govern particular situations, and they did in fact produce an infinite variety, even when they claimed to be merely transplanting rules from milieu to milieu.

The mode of thought provided a conceptual vocabulary, organizational schemes, modes of reasoning, and characteristic arguments. These were used in everything from jurists' writings for lay audiences to legal briefs, judicial opinions, treatises and doctrinal writing and legal philosophy. Using the mode

of thought, jurists in each period critiqued the previous mode, and reconceptualized, and to one degree or another substantively reformed, every area of law. We can find The Social, for example, at work everywhere from family law to civil procedure, to criminal law, to contracts, to administrative, international, and constitutional law.

I will refer repeatedly to the consciousness, understood as a vocabulary, of concepts and typical arguments, as a *langue*, or language, and to the specific, positively enacted rules of the various countries to which the *langue* globalized as *parole*, or speech. Just as a specific sentence, for example, "shut the door," is uttered in a specific language, in this case, English, a legal norm is binding utterance in a specific legal discourse, say, that of Classical Legal Thought or The Social. Just as there are an infinity of grammatically correct sentences that can be uttered in English, there are an infinity of regulatory statutes that can be formulated in the conceptual vocabulary of the social and defended through an infinite variety of specific justificatory arguments formulated by combining and recombining the policy "sound bites" of the social.<sup>2</sup>

The elements of the mode of thought were produced piecemeal in different civil and common law countries. We can distinguish two processes. There is that by which a transnational mode of thought comes into existence as jurists combine ideas with distinct origins, displacing a *previous transnational mode*. And the process of *geographic diffusion* of a transnational mode, either by direct and complete replacement of an earlier legal regime by a new one, as in colonial expansion, or through the "reception" of an emergent transnational mode, combining it with "indigenous" elements, and the residuum of the previous mode, into a new national synthesis.

As Diego Lopez Medina argues,<sup>3</sup> we can identify locales of "production" of a new transnational mode, contrasting locales where what happens is reception with only minimal dialectical counterinfluence on the transnational mode, and cases in between. German legal thought was in this sense hegemonic between 1850 and 1900, French legal thought between 1900 and some time in the 1930s, and United Statesian legal thought after 1950.

I do not propose, in this chapter, an overarching theory of what caused these modes of thought to emerge when they did, of what determined their

<sup>2</sup> On 'langue' and 'parole,' see Duncan Kennedy, *A Semiotics of Critique*, 22 *CARDOZO L. REV.* 1147, 1175 (2001); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION [FIN DE SIECLE]* 133–135 (1997). On argument-bites, see Duncan Kennedy, *A Semiotics of Legal Argument*, 42 *SYRACUSE L. REV.* 75 (1991), reprinted with a European Introduction in 3 *COURSES OF THE ACADEMY OF EUROPEAN LAW*, BOOK 2 at 309 (1994).

<sup>3</sup> Diego Lopez Medina, *Teoría Impura de Derecho* (2004), and see Diego Lopez Medina, *Comparative Jurisprudence: Reception and Misreading of Transnational Legal Theory in Latin America* (2001) (unpublished doctoral dissertation, Harvard Law School) (on file with the Harvard Law School Library).

internal structural properties, of the particulars of their geographic reception, or of their effects or functions in social life. The scheme of periods, modes, and production/reception across the world is a set of boxes for the organization of facts and factoids, a structure within which to propose low-level hypotheses, and the locale of a narrative.

One can have three modest, though not negligible, ambitions for this kind of exercise. First, one hopes that the narrative will bring together and relate to one another a large number of previously disparate events in the intellectual history of Western law in the world, thereby increasing the ex post intelligibility of that history.

Second, one small notch higher on the scale of ambition, one can hope that other researchers (or oneself at a later date) will "confirm" the hypotheses by finding things that uncannily correspond to what one would have predicted given the narrative. Thus, for example, it gave me, recently, great pleasure, for reasons that will become clear, when it was brought to my attention that a survey of Scandinavian law published in 1963 claims first, that Danish-Norwegian law is part neither of the civil nor of the common law system, and, second that this body of law is "further influenced by social welfare trends than the law of most other societies."<sup>4</sup>

One can also hope that the narrative will operate in support of political interventions, in this case, I hope, of left or radical left interventions. It might do so because, in any given period, the plausibility even to ourselves of our political convictions is, to a limited but important degree, a function of how we understand our history. In this case, my hope is that the "three globalizations" narrative will support the conviction that progressive elites of the periphery can and should devise national progressive strategies, rather than accept the prescription of the center, that they simply "open" their economies and "reform" their legal systems, and accept the consequences for good or ill. But to avoid false advertising, let me emphasize that the connection between narrative and political intuition is tenuous.<sup>5</sup>

Speaking for a moment of the history of United States law, the account that follows is heterodox in four main ways. First, it portrays the United States up to the 1930s as a context of legal reception, that is, as part of the periphery or semi-periphery. Legal development was heavily determined by what was happening in Germany and later France, but the original United States synthesis had no influence on those countries. I mean here to challenge the main tradition in United States legal history, which represents

<sup>4</sup> DANISH AND NORWEGIAN LAW: A GENERAL SURVEY 70 (The Danish Committee on Comparative Law, 1963).

<sup>5</sup> For an analogous decentering effort in the context of the process of global change, and with similar methodological premises, see P.G. Monateri, *Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition*, 51 HASTINGS L. J. 479, 481 (2000).

the transformations of United States legal thought as determined by internal social and economic developments.<sup>6</sup>

Second, this account emphasizes the extent to which developments in different fields of law over the last century followed a single pattern. Histories of fields constantly attribute to internal dynamics changes that were happening in strictly analogous ways in other fields, and therefore are unconvincing in the same way as national histories that disregard the transnational movement of legal thought. Third, I depart from current fashion by treating legal realism as the critical devastation of sociological jurisprudence ("the social," in the lingo of this article), rather than as "essentially" an extension of the sociological jurists' critique of CLT. Fourth, in this account post-WWII developments are characterized just as much by the neoformalist rights consciousness of the Warren Court and the neoliberals as by the conflicting considerations consciousness of the Legal Process School, and both were responses to the demise of the social, rather than of CLT.<sup>7</sup>

In terms of classic comparative law categories, the narrative treats the contrast between civil and common law as useful in providing explanations of how the emergent transnational mode of thought penetrated and transformed different national contexts. But it rejects the notion that the Western rivals evolved through time according to distinct, internally determined system logics. This is analogous to denying that we can explain any important aspect of United States legal thought by reference to uniquely United States conditions.

## THE FIRST GLOBALIZATION

The first globalization occurred during the second half of the nineteenth century and was over by WWI. What was globalized was a mode of legal consciousness. According to its social critics<sup>8</sup> and according to most (not all) of today's historians,<sup>9</sup> the late nineteenth-century mainstream saw law as "a system," having a strong internal structural coherence based on the three traits of exhaustive elaboration of the distinction between private and public law, "individualism," and commitment to legal interpretive formalism. These

<sup>6</sup> E.g., MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860* (1977); Thomas Grey, *Langdell's Orthodoxy*, 45 U.PITT L. REV. 1 (1983) (paying more attention to European analogies, but ironically, missing both the will theory and what was uniquely United States about the story, namely the extension of CLT to public law).

<sup>7</sup> Contrast MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992).

<sup>8</sup> E.g., Roscoe Pound, *The End of Law as Developed in Juristic Thought II*, 30 HARV. L. REV. 201, 202, 223-225 (1917); see *infra* notes 42-119 and accompanying text.

<sup>9</sup> See HORWITZ, *supra* note 7; Grey, *supra* note 6; Duncan Kennedy, *Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought*, 3 RES. IN LAW AND SOC., 3-24 (1980).

traits combined in "the will theory."<sup>10</sup> The will theory was that the private law rules of the "advanced" Western nation states were well understood as a set of rational derivations from the notion that government should protect the rights of legal persons, which meant helping them realize their wills, restrained only as necessary to permit others to do the same.

The will theory was an attempt to identify the rules that should follow from consensus in favor of the goal of individual self-realization. It was not a political or moral philosophy justifying this goal; nor was it a positive historical or sociological theory about how this had come to be the goal. Rather, the theory offered a specific, will-based and deductive interpretation of the interrelationship of the dozens or hundreds of relatively concrete norms of the extant national legal orders, and of the legislative and adjudicative institutions that generated and applied the norms.

"Outside" or "above" legal theory, there were a variety of rationales for the legal commitment to individualism thus understood. Of these, only natural rights theory was also highly relevant on the "inside," that is, in the development of the technique of legal analysis based on deduction. Natural rights theorists had elaborated the will theory, beginning in the seventeenth century, as a set of implications from their normative premises, and their specific legal technique was the direct ancestor of the legal formalism that the socially oriented reformers were to attack in its positivized form.<sup>11</sup>

In the nineteenth century, the German historical school developed a positivist version of normative formalism. A national system of law reflects as a matter of fact the normative order of the underlying society; such a normative order is coherent or tends toward coherence on the basis of the spirit and history of the people in question; "legal scientists" can and should elaborate the positive legal rules composing "the system" on the premise of its internal coherence.<sup>12</sup> In the late nineteenth century, the German pandectists (e.g., Windschied) worked at the analysis of the basic conceptions of the German common law version of Roman law (right, will, fault, person) with the aim of establishing that this particular system could be made internally coherent, and also be made to approach gaplessness. Many Continental legal scholars understood the German Civil Code of 1900 as the legislative adoption of this system.<sup>13</sup>

<sup>10</sup> See Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form,'* 100 COLUM. L. REV. 94, 106-108, 115-116 (2000).

<sup>11</sup> On the history of the will theory, see FRANZ WIEACKER, *HISTORY OF PRIVATE LAW IN EUROPE WITH SPECIAL REFERENCE TO GERMANY* (1995, 1967); JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991).

<sup>12</sup> See FRIEDRICH CARL VON SAVIGNY, *ON THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (London, Littlewood and Co., 1831); FRIEDRICH CARL VON SAVIGNY, *THE SYSTEM OF MODERN ROMAN LAW, I* (William Holloway, trans., Hyperion Press, 1979) (1839).

<sup>13</sup> See FRANZ NEUMANN, *The Change in the Function of Law in Modern Society, in THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 22 (Herbert Marcuse ed., 1957).



The hero figure of the first globalization was the law professor (author of codes and statutory modifications of codes, as well as of treatises), and the great and inspiring precursor initiator was the founder of the historical school, Friedrich Carl von Savigny (1779–1861). The paradox of Savigny, and the probable source of his seminal importance, was the combination, in the single idea of legal science as the elaboration of “the system,” of a universalizing legal formalist will theory with the idea that particular regimes of state law reflect diverse underlying nonlegal societal normative orders. His approach sharply attacked the notion that all national legal regimes are simply better or worse approaches to a religiously or rationally based transnational natural law. Outside Germany, the historical school was a minor tendency, but the same conception of a will theory combining individualism and deductive form gradually supplanted earlier ways of understanding private law. Austin was a follower of the Germans, and his *Lectures on Jurisprudence*, written in 1831–2 but not published until 1863, was the manifesto of CLT for the common law world.<sup>14</sup> The normative or “outside” force for the theory might come from utilitarianism, or from Lockean or Kantian or French revolutionary natural rights, or from a variant of evolutionism (the movement of the progressive societies has been from contract to status; social Darwinism). But however derived, normative individualism was closely connected with logical method in the constitution of some version of the will theory.<sup>15</sup>

The will theory in turn served a variety of purposes within legal discourse. It guided the scholarly reconceptualization, reorganization, and reform of private law rules, in what the participants understood as an apolitical rationalization project. But it also provided the discursive framework for the decision of hundreds or perhaps thousands of cases, throughout the industrializing West, in which labor confronted capital and small business confronted big business. And it provided an abstract, overarching ideological formulation of the meaning of the rule of law as an essential element in a Liberal legal order.

Left and right political projects could coexist within Classical Legal Thought in its heyday because the “will theory,” for all its pretensions to scientificity, was highly manipulable when it came to defining just what fell into the categories of right and will (not to speak of the ambiguities of the notion of legal personality, as applied to private corporations and labor unions). CLT firmly excluded only hierarchical organicism in the mode of monarchism or neofeudalism (DeMaistre), and left wing collectivism in the mode of communism or utopian socialism (Fourier).

A minority current in CLT, but a major current in lay left thinking in the late-nineteenth and early-twentieth centuries developed the two ideas that the legal order gave inadequate protection to “workers rights,” and that bargains

<sup>14</sup> JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* (1863).

<sup>15</sup> Pound, *supra* note 8.

under capitalism did not represent "free will."<sup>16</sup> For all Karl Marx's railing against it,<sup>17</sup> the populist idea that the problem was that the rules were skewed against the masses, and in favor of "the interests," never lost its hold, and was available for appropriation by pre-1914 feminists and anticolonialists. While progressives generally abandoned rights rhetoric during the period of the social, they revived it after WWII, as we will see, in the two forms of civil libertarianism and international human rights ideology.

Nonetheless, it is fair to say that a large majority of the juristic elite that developed and propagated CLT was conservative, and that, over the course of the twentieth century, the mainstream ideas of the first globalization turned from a "consciousness," within which a multitude of political projects were at least possible, into an "ideology," classical liberalism and then neoliberalism, one of the central political theoretical projects of the modern right wing (the other one being "tradition").

The mechanism of the first globalization was a combination of influence within the system of autonomous Western nation states, and imperialism broadly conceived. The German model spread not just to France<sup>18</sup> but across Europe (both Western and Eastern) and across the Channel and to the United States and Latin America. The United States and British colonies, like Britain itself, adopted German legal science and vast numbers of statutes, while resisting codification. The former Spanish colonies were more influenced by France, and codified.

The English, French, and Dutch, and later the Germans, Americans, and Belgians, spread their national versions of CLT directly to their colonies, with or without codification. (The Portuguese and Spanish did the same in the remains of their empires in decline.) The Great Powers forced "opening" to Western law, as a mandatory aspect of opening to Western trade, on states not directly colonized, such as the Ottoman Empire, Japan, China, Thailand, Egypt, and Iran. These sometimes adopted codes on the European model and sometimes submitted to the creation of special courts to apply European law in transactions with Europeans.

A more subtle mode of globalization of CLT was implicit in the eventual universalization (that is, literally, globalization) of a single Classical system of public international law, devised by the Western Great Powers, based on the conceptual innovations of the seventeenth century natural law theorists of sovereignty as a territorial (not personal) power absolute within its

<sup>16</sup> WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991).

<sup>17</sup> KARL MARX, *CRITIQUE OF THE GOTHA PROGRAMME* (Scientific Socialism Series, Progress Publishers, 1971) (1875).

<sup>18</sup> Mikhail Xifaras, *L'école de l'exegèse était-elle historique?*, in *INFLUENCES ET RECEPTIONS MUTUELLES DU DROIT ET DE LA PHILOSOPHIE EN FRANCE ET EN ALLEMAGNE* (Kervegan & Mohnhaupt eds., 2001).

sphere.<sup>19</sup> In CLT, the "nation state and colonies" model was universal except for anachronisms, and the heterogeneous mish mash of governance structures of the world in 1800 was no more than a memory.

Finally, there was the creation of a first global system of international economic law, based on free trade, the gold standard, and private international law (often applied by arbitrators) to settle disputes. Money was depoliticized,<sup>20</sup> and an international capital market, with accompanying gunboat diplomacy, came into existence. Within this complex (and fragile, and violent) structure, the combination of the growth of world trade and the infrastructural and primary product investments of the center in the periphery unleashed a process of social transformation, irreversible as it has turned out, out of which emerged (only in the second half of the nineteenth century) the "tradition/modernity" dichotomy that still rules our lives.<sup>21</sup>

The historicist idea (Savigny), as I remarked above, was double, if not contradictory. The law of a nation was a reflection of the spirit or culture of its people, and in this sense inherently political, but could be developed in a scientific manner by jurists who presupposed its internal coherence. In Germany, according to Savigny, the people had received Roman law, and Christianized and modernized it through evolutionary popular action. This particular law revealed itself, when worked over by the science of the jurists, to be based on the highly abstract ideas of right and will. Moreover, it corresponded in its fundamentals to the *ius gentium*, or law of peoples, the minimal substratum of legal rules that were shared, as a matter of fact, or at least should be shared, by all peoples. This formulation "fit" globalization in the mode described in the last four paragraphs.<sup>22</sup>

Of course, when what happened was direct colonization, there was, initially, little effective resistance to whatever legal ideas the colonizer chose to impose. But in Western and Eastern Europe, and North and South America, CLT had to win over the elites of independent nation states. In the territories of the Ottoman Empire and in Southeast and East Asia, what was happening was "opening," not direct conquest. In the Ottoman lands and across Asia, there were highly developed preexisting modes of legal consciousness

<sup>19</sup> See ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW?* (1986); David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1 (1986); David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 65 NORDIC J. INT'L L. 385 (1996); Richard Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 922-927 (1999); Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321 (1996); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 54-57 (1999).

<sup>20</sup> BARRY EICHENGREEN, *GLOBALIZING CAPITAL: A HISTORY OF THE INTERNATIONAL MONETARY SYSTEM* (1998); Christine Desan, *The Market as a Matter of Money: Denaturalizing Economic Currency in American Constitutional History*, 30 LAW & SOC. INQUIRY 1 (2005).

<sup>21</sup> See KARL POLANYI, *THE GREAT TRANSFORMATION* (1957).

<sup>22</sup> SAVIGNY, *THE SYSTEM OF MODERN ROMAN LAW*; *supra* note 12.

(Islamic, Hindu, Confucian, Shinto) that had at least a chance of resisting or transforming themselves into local competitors. For example, the *Majalla*, the Ottoman codification of the Islamic Hanafi law of obligations, 1869–76, was a serious peripheral attempt to adapt the European legal form of codification (not without earlier Ottoman analogues) to Islamic substance.<sup>23</sup> Something at least resembling “selection,”<sup>24</sup> along with “imposition,” was probably a factor, in these complex contexts, in the success of CLT. In other words, CLT probably had some intrinsic appeal to the elites that chose it.

CLT replaced an earlier Western transnational mode of thought that had asserted the existence of a universal law of reason, either Catholic or based on natural rights theory, and a sharp legal distinction between civilized (participant in the *ius gentium*) and barbarous nations. CLT offered the legal elites of the peripheral, newly formed nation states of Europe, North and South America, and Asia something at least superficially more attractive. The national elites could identify themselves with their respective “peoples,” and sharply dissociate, if they were English or Russian, or for that matter Argentinean, or Egyptian, or Japanese, from the Germans and French.

They could deploy European historicist legal theory to defend themselves against European legal hegemony – only Latin American jurists could “own” a Latin American law reflecting *criollo* consciousness,<sup>25</sup> Japanese law should reflect the “spirit” of the Japanese people. The mission was the development of that law in particular, not universal or natural law, and its development in a world of formally equal nation states, rather than in the outer darkness of “barbarism.”<sup>26</sup>

On the other side of the contradictory structure, CLT affirmed that every country with a Western legal heritage shared the Roman legacy along with Savigny’s Germans, including, for example, the newly independent Bulgarians (1878/1908) and the Bolivians (1825), and that every nation that participated in the global order of commerce and finance participated in the *ius gentium*. Along with the particularist notion that every people had its own unique normative order, the jurists scattered across the periphery of independent nations and modernizing empires could affirm their participation in the developing sciences of legal obligation and international law, based as they were on an analytics of will, right, and sovereignty that had no obvious national particularity at all. They could develop their own slightly modified

<sup>23</sup> NİYAZI BERKES, *THE DEVELOPMENT OF SECULARISM IN TURKEY 160–169* (1988); Hava Güney, *The Ottoman Codification Movement Compared with the American* (2002) (unpublished manuscript on file with the Suffolk University Law Review).

<sup>24</sup> See JARED DIAMOND, *GUNS, GERMS AND STEEL* (1997).

<sup>25</sup> Liliانا Obregón, *Completing Civilization: Nineteenth Century Criollo Interventions in International Law* (2002) (unpublished doctoral dissertation, Harvard Law School) (on file with the Harvard Law School Library).

<sup>26</sup> See JOSEPH LEVINSON, *CONFUCIAN CHINA AND ITS MODERN FATE: A TRILOGY* (1972); MASAO MARUYAMA, *STUDIES IN THE INTELLECTUAL HISTORY OF TOKUGAWA JAPAN* (1974).

national versions of the Civil and Commercial Codes of the commercially, financially, and militarily dominant European powers, facilitating integration into the world market, without seeing themselves as traitors to their national constituencies. And they could work, as jurists, for their nations' interests within the structure of international law, deploying the norms of sovereign equality and autonomy against the Great Powers. At home, the universal, transnational element in CLT was the basis of a claim to power as mediators of the participation of the periphery in the normative order, as well as the culture, of the metropolises.<sup>27</sup>

There are no fewer than three other structural characteristics of CLT that may have facilitated its reception, first across Europe and then across the non-European periphery. These are: the distinction between the "subjects" of municipal law and international law; the distinction between public and private law; and the distinction between the law of the market and the law of the household.

The "subjects" of municipal law include "persons," but the "subjects" of international law were, in CLT, only "sovereigns." Citizens as citizens had no rights at all under international law. If they had no rights under international law, then sovereigns, and in particular powerful sovereigns, had no legal basis for interfering with the way independent states treated their citizens. This was the globalization of a legal consciousness within which a basic structural trait was that *jurisdiction* must *not* be global. The people doing the receiving were legal elites scattered around the world. They were closely integrated with, but not everywhere identical with, the political and economic elites of their respective countries. Receiving CLT permitted a gesture of striking cosmopolitanism, without any sacrifice of local autonomy (in the sense of legal autonomy vis à vis other countries).

In CLT, everyone understood (and jurists often explicitly affirmed) that private law was the core of law.<sup>28</sup> That distinguished not only international law, but public law as well, as not part of the core. Public law was the law of the state: criminal law, administrative law (law of the bureaucracy – every state has one), and constitutional law. Public law differed from private law because it was less scientific and more political than private law. It was more political because criminal law directly reflected the normative order of the common people; administrative law was the law of the sovereign, whose legal autonomy was, arguably, inherently unlimited; and constitutional law was created by the people, or by the constituent orders of civil society, in their capacity as ultimate legal authors.

International law had only sovereigns as subjects, so the jurist could not be called on to denounce, in the name of international law, the conduct of his sovereign toward his fellow citizens – indeed must resist the illegal efforts of

<sup>27</sup> See Jorge Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 *UTAH L. REV.* 425 (1997).

<sup>28</sup> E.g., SAVIGNY, *THE SYSTEM OF MODERN ROMAN LAW*, *supra* note 11.

other sovereigns to interfere. Public law was political rather than scientific, with the same result: science did not oblige the jurist one way or another on the issue of local dictatorship or oligarchic rule by large landowners. At the same time, public law was still, in spite of all, "Law," so the jurist could, if he wanted to risk it, try to parlay Law's prestige in favor of one outcome or another at the moment of coup d'état, and the jurist should certainly be in charge of drafting when the new regime required a new constitution.

CLT dealt with the issue of patriarchy, meaning not just "gender" but the whole "household," through the distinction, within private law, between the law of obligations and family law. The first globalization globalized a compromise in which the will theory came to an end at the family. There was a big difference between liberalism in the economy and liberalism with respect to the relations of seducers and virgins; husbands and wives; fathers and abused or rebellious daughters; husbands and mistresses; ex-husbands, ex-wives; and their children; rich patriarchs and their proletarian boy lovers; and so on.

The starting point was the "early modern" system of family law described, for example, by Blackstone,<sup>29</sup> in which the patriarch was legally obliged to support his wife and minor children, entitled to their obedience, which he could enforce through moderate physical punishment, had arbitrary power with respect to many aspects of their welfare and property, and was protected against sexual and economic interference by third parties.

This was a limited, Christianized, supervised form of patriarchy, nothing like the Roman *patria potestas*. The father was understood to be subject to "natural" obligations to family members, obligations of care and protection that went well beyond those owed one another by market actors. These were legally enforceable against the patriarch in court, when he went beyond the bounds of culturally sanctioned physical abuse or denial of necessities, but only at the outer limits of outrage. Fathers legally owed less to family than to strangers except that in exceptional cases they owed more. Within the wide range of discretion thus granted him by positive law, jurists presented his high altruistic obligations as moral or ethical rather than properly legal (therefore described as of "imperfect obligation," by contrast with obligations "perfected" by the addition of state enforcement mechanisms).

The regimes in place in the North Atlantic when CLT began to take off around 1850 also included some or all of the following: divorce only for fault or not all, inheritance rules designed to preserve legitimate family assets, criminal prohibition of "unnatural" and "dishonorable" sexuality, including same-sex sex and female adultery (male adultery was usually punished only if there was also cohabitation or concubinage), snuffing of legal claims arising out of "immoral" relationships (particularly the claims of mistresses and

<sup>29</sup> WILLIAM BLACKSTONE, COMMENTARIES, \*421-447 (1765-9).

illegitimate children), and child custody in the father. Within these broad initial contours, family law moved toward liberalization at different speeds in different countries, with different political and religious balances of power producing diverse and unstable bodies of positive law.

The Code Napoleon (1804), for example, was liberal in that it permitted divorce by mutual consent. That provision was abrogated in 1815 (at the Restoration), and not restored until 1975. The Chilean Bello Code of 1857 adapted much of the liberal law of obligations of the French Code, but remitted the whole of the law of marriage and divorce to the Catholic Church for administration under canon law. The Bello Code in some cases adopted and in others rejected liberal rules designed to impede the formation of stable dynastic families (e.g., forbidding entails, increasing the rights of illegitimate children, reducing forced shares in inheritance), according to the balance of local forces.<sup>30</sup>

In 1850, the family law of the North Atlantic countries still looked, at the formal level, quite similar to the then existing regimes of Muslim or Hindu or Confucian family law. In some cases, for example the Muslim law of marriage, which recognized the wife's separate property and treated domestic violence and the husband's duty of support as fully justiciable, the West was well "behind" the East.<sup>31</sup> North Atlantic family law was only somewhat more liberal than the traditionalist Catholic regime that Spain had imposed on its American colonies.<sup>32</sup> In North and South America, Eastern Europe and the Ottoman lands, exactly as in Western Europe, local elites did battle as to how far the reforms of the middle of the nineteenth century should go in a liberalizing direction.

The substance of the North Atlantic regime changed rapidly, by historical standards, at the same time that it was reconceptualized by the Classical jurists. Legally legitimized hierarchy gave way, step by step, sometimes with steps backward, in the direction of a regime of formal equality with reciprocal duties. For family relations, it was formal equality within what the Classics defined as a "status" rather than a contract, so that it was the "will of the state" rather than that of the parties that fixed the relations of the parties. In this way, CLT sharply split family law from the law of obligations (contract, property, and tort), placing it on the side of morals and politics, rather than science and will.<sup>33</sup>

<sup>30</sup> M. C. Milrow, *Borrowing Private Law in Latin America: Andres Bello's Use of the 'Code Napoleon' in Drafting the Chilean Civil Code*, 61 LA. L. REV. 291 (2001).

<sup>31</sup> Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt* 37 VAND. J. TRANSNAT'L L. 1043 (2004).

<sup>32</sup> See Isabel Cristina Jaramillo, *A History of Family Law in Colombia, 1800-2000* (2003) (unpublished manuscript on file with the Suffolk University Law Review).

<sup>33</sup> MICHAEL GROSSBERG, *GOVERNING THE HEARTH* (1985).

It was no less and perhaps more important that CLT combined movement toward formal equality with a powerful doctrine of legal nonintervention in the family that rendered many of the formally equal rights of wives unenforceable (e.g., domestic violence, marital rape).<sup>34</sup> Nonintervention was rationalized on the CLT ground that the "sphere" of the family, based on the principle of egalitarian altruism, would be corrupted or destroyed by judicial intervention that would have to use legal tools closely associated with the conflictual individualist ethos of market law.<sup>35</sup>

The colonial powers everywhere declined to replace "native" family law with their own systems. Even the French, famous for "direct rule" and "assimilation," did no more than promote the codification of Muslim family law in the Maghreb. The British did the same in India, with separate Hindu, Muslim, and Christian rules. In the Netherlands Indies, the Dutch preserved *adat* law for the family. But everywhere the process of formalization within the colonial legal and political system included some deliberate change (for example, with respect to practices like widow burning in India),<sup>36</sup> and initiated many indirect, intended and unintended changes.<sup>37</sup> These might reinforce rather than weaken the powers of heads of households by reducing responsibilities of titular landholders to extended family members.<sup>38</sup>

There seem to have been a very large number of solutions, along a highly predictable continuum of options, with the outcome in many countries determined in sharp conflicts between the Catholic Church, socially conservative Protestant sects, or Muslim clerics, on one side, and "modernizing" secular forces on the other. Though the continuum of solutions and the arguments back and forth seems to have been the same everywhere, the solutions adopted in North America were much more "liberal" than those in South America and the ex-Ottoman Empire. As in Europe, there were as many compromises as there were countries, and they were everywhere unstable, with change generally in the liberalizing direction interrupted by periods of reaction.<sup>39</sup>

It seems plausible that the distinction between market law and family law functioned in the same way that the municipal/international and public/private distinctions did in the context of historicism. CLT did *not*

<sup>34</sup> See Frances Olsen, *The Myth of State Intervention in the Family*, 18 MICH. J. LAW REFORM 835 (1985); Reva Siegal, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L. J. 2117, 2196-2206 (1996).

<sup>35</sup> See Frances Olsen, *The Family and the Market*, 96 HARV. L. REV. 1497 (1983).

<sup>36</sup> See RATNA KAPUR AND BRENDA COSSMAN, SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH THE LAW IN INDIA (1996).

<sup>37</sup> See *id.*

<sup>38</sup> J. S. FURNIVALL, COLONIAL POLICY AND PRACTICE 296 (1948); Celestine Nyamu, Gender, Culture and Property Relations in a Pluralistic Social Setting (2000) (unpublished doctoral dissertation, Harvard Law School) (on file with the Harvard Law School Library).

<sup>39</sup> See, e.g., Jaramillo, *supra* note 32.



claim substantive universality – quite the contrary. Beginning with Savigny, it offered peripheral elites the categorization of their family law as popular, political, religious, cultural, and particular, and therefore as eminently *national*. In exchange they accepted (usually with alacrity) that the law of the market would be, not positively and in every detail, but generally and “essentially,” the property and contract-based law of a national “free” market, linked to other free markets by free trade, the gold standard, and a private international law that was conceptually identical to municipal civil law.

In the first half of the nineteenth century, the major boundary issue that had to be resolved before the consciousness of the first globalization could gel had nothing to do with the blood family. For the blood family, the solution according to which full liberalization didn't apply, and every country could have its own compromise between equality and tradition, produced a stable overarching context for local battles. The more difficult question was the status of what the eighteenth century had conceived as domestic labor, the labor of slaves, apprentices, indentured servants, and dependent agricultural laborers.

In the North Atlantic, the ultimate resolution came about through the emergence of the factory, the small farm, and the bourgeois (as opposed to aristocratic) institution of domestic service as the dominant labor forms. All of these classes of labor were categorized, within the liberal CLT regime of will theory and free contract, through the notion of “self-ownership,” rather than within the eighteenth-century model of the servant as part of the household. Duties of obedience were eliminated along with rights to support; the arbitrary authority of the employer replaced the arbitrary authority of the patriarch.

The intermediate forms of semifree labor (serfdom, apprenticeship, the indenture) disappeared – through the French Revolution and Napoleon's conquests in Western Europe, at the moment of independence from Spain in Latin America, after the middle of the century in Russia. Slavery flourished in many countries of the Americas over the nineteenth century, and wasn't abolished in the United States until 1863, Brazil in 1871, and, finally, Cuba in 1886. At this point, all that was left of the legal household was the family.<sup>40</sup>

In the world's South, or the capitalist periphery broadly conceived, what emerged was not the small farm so central to North Atlantic republican ideology. European diseases and slaughtering eliminated most of the remaining hunter gatherers and nomadic pastoralists, and amalgamated tribal societies and small states into colonies. At the same time, the precapitalist empires

<sup>40</sup> See generally ROBERT STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATIONSHIP IN ENGLISH AND AMERICAN LAW AND CULTURE: 1350–1870* (1991).

disintegrated into nation states and/or colonies. Within this structure, a very large part of the world's population came to be organized either in *latifundia*, large estates or plantations, owned first by planters and then by multinationals, worked by nominally free but factually dependent laborers, or in *minifundia*, small plots worked by peasant villagers with various forms of customary or sharecropping tenure. Both types produced old or new cash crops for a new world market, but the smallholders did so in unstable combination with subsistence crops. The *latifundia*/*minifundia* contrast has something to say about Latin America, Africa, India, Eastern Europe, the Ottoman Empire successor states, Indonesia, China, and the post-Reconstruction United States South.<sup>41</sup>

Incorporation of these labor forms through CLT's categories – the sale of labor power for the agricultural laborer, private property in land for the peasant – meant sometimes that the colonial powers and the independent states of the periphery simply ratified, by adopting a formal, abstract idea of free will rather than a more substantive one, whatever schemes of economic and social hierarchy emerged out of the play of violence and culture on the ground. And sometimes they transformed, in their own interests, but without understanding exactly what they were doing, the preexisting social arrangements by forcing them into the mold of the "Western idea of property."<sup>42</sup> Through the long transition, a whole series of legal dodges were available so that something like serfdom could be maintained within liberal forms, and something like capitalism maintained within feudal forms. (The great exception is British India, where land reform was a major strategy of control and colonial reconstitution from the middle of the nineteenth century.<sup>43</sup>)

Once again, it seems plausible that CLT could globalize precisely because it had so little to say one way or the other about the legal treatment of the legally free but obviously subordinated peasants and agricultural laborers of the South.

As we will see, it is no more possible to understand the second and third globalizations than the first without an analysis of how the liberal idea (of a regime based on state action to guarantee the exercise of free will and also the limits on free will necessary for everyone to enjoy it) worked in symbiosis

<sup>41</sup> ERIC R. WOLF, *EUROPE AND THE PEOPLE WITHOUT HISTORY* (1983).

<sup>42</sup> J. S. FURNIVALL, *AN INTRODUCTION TO THE POLITICAL ECONOMY OF BURMA* (3d ed., 1957); Sylvia Kang'ara, Analytical, Prescriptive and Resistant Characterizations of "African" Conceptions of Property: A Critique of Mainstream Assumptions about African-Western Incompatibility (2003) (unpublished doctoral dissertation available from the author); Joel Ngugi, Searching for the Market Criteria: Market Oriented Reforms in Legal and Economic Development Discourses (2002) (unpublished doctoral dissertation, available in the Harvard Law School Library).

<sup>43</sup> ERIC STOKES, *THE ENGLISH UTILITARIANS AND INDIA* (1959); ROBERT ERIC FRYKENBERG, *LAND CONTROL AND SOCIAL STRUCTURE IN INDIAN HISTORY* (2d ed. 1979).

with or in contradiction of the counterideal, counterethic, counterreality represented by the household.

## THE SECOND GLOBALIZATION

society	national socialism	social problem
sociology	social democracy	social policy
social anthropology	social Catholicism	social law
social science	social Christianity	social rights
social function	social welfare	social legislation
social justice	social purpose	social insurance
social revolution	social need	social work
socialism	social question	

The second globalization began around 1900 and had spent its force by the end of WWII, but strongly influenced thinking both about the international and about third world economic development strategies through the 1960s. What was globalized this time was a critique of the first globalization and a reconstruction project. The critique was that the late nineteenth-century European mainstream abused deduction in legal method and was "individualist" in legal substance. The slogan of the second globalization was "the social," an abstraction that played much the same role during this period that will, right, and fault played in CLT.

### The social as a transnational legal consciousness

The initial innovators of the social were German-speaking, including Jhering,<sup>44</sup> Gierke,<sup>45</sup> and Ehrlich,<sup>46</sup> but the main globalizers were French-speaking.<sup>47</sup> Saleilles,<sup>48</sup> Geny,<sup>49</sup> Duguit,<sup>50</sup> Lambert,<sup>51</sup> Josserand,<sup>52</sup> Gounod,<sup>53</sup>

<sup>44</sup> RUDOLF VON JHERING, *LAW AS A MEANS TO AN END* (Isaac Husik trans., Macmillan 1924) (1914).

<sup>45</sup> OTTO VON GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* (Frederic William Maitland trans., 1913).

<sup>46</sup> EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Walter L. Moll trans., 1936, 1913).

<sup>47</sup> Marie-Claire Belleau, *The 'Juristes Inquiets': Legal Classicism and Criticism in Early Twentieth Century France*, 1997 *UTAH L. REV.* 379.

<sup>48</sup> RAYMOND SALEILLES, *DE LA DECLARATION DE LA VOLONTE* (1901).

<sup>49</sup> FRANCOIS GENY, *METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW* (Louisiana State Law Institute trans., 2d ed. 1963) (1899).

<sup>50</sup> LEON DUGUIT, *Theory of Objective Law Anterior to the State*, in *MODERN FRENCH PHILOSOPHY*, VII THE MODERN LEGAL PHILOSOPHY SERIES (1916).

<sup>51</sup> EDOUARD LAMBERT, *LA FONCTION DU DROIT CIVILE COMPARE* (1903).

<sup>52</sup> JOSSERAND, *DE L'ESPRIT DES DROITS ET DE LEUR RELATIVITE: THEORIE DITE DE L'ABUS DES DROITS* (1927, 1939).

<sup>53</sup> EMMANUEL GOUNOD, *LE PRINCIPE DE L'AUTONOMIE DE LA VOLONTE* (1912).

and Gurvitch.<sup>54</sup> They had in common with the Marxists (the other significant early twentieth-century school critical of CLT) that they interpreted the actual regime of the will theory as an epiphenomenon in relation to a "base," in the case of the Marxists, the capitalist economy and in the case of the social, "society" conceived as an organism. The idea of both was that the will theory in some sense "suited" the socioeconomic conditions of the first half of the nineteenth century. But the social people were anti-Marxist, just as much as they were antilaissez-faire. Their goal was to save liberalism from itself.<sup>55</sup>

Their basic idea was that the conditions of late nineteenth-century life represented a social transformation, consisting of urbanization, industrialization, organizational society, globalization of markets, all summarized in the idea of interdependence.<sup>56</sup> Because the will theory was individualist, it ignored interdependence, and endorsed particular legal rules that permitted antisocial behavior of many kinds. The crises of the modern factory (industrial accidents, pauperization) and the urban slum, and later the crisis of the financial markets and the Great Depression, all derived from the failure of coherently individualist law to respond to the coherently social needs of modern conditions of interdependence. After 1919, they extended this analysis to the problem of war, understood as the product of failures of an international order based on the logic of sovereignty, highly analogous to the problems of markets based on the logic of property.<sup>57</sup>

From this "is" analysis, they derived the "ought" of a reform program, one that was astonishingly successful. There was labor legislation, the regulation of urban areas through landlord/tenant, sanitary and zoning regimes, the regulation of financial markets, and the development of new institutions of

<sup>54</sup> GEORGES GURVITCH, *L'IDEE DU DROIT SOCIAL* (1932).

<sup>55</sup> See generally on the social as legal consciousness, WIEACKER, *supra* note 7; G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972); ANDRE-JEAN ARNAUD, *LES JURISTES FACE A LA SOCIETE DU XIXIEME SIECLE A NOS JOURS* (1975); HOBWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY*, *supra* note 6; NESTOR DE BUEN, *LA DECADENCIA DEL CONTRATO* (1965); Duncan Kennedy and Marie Claire Belleau, *Francois Geny aux Etats in FRANCOIS GENY: MYTHES ET REALITES* (2000); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COL. L. REV. 94 (2000); Christophe Jamin, *Une breve histoire politique des interpretations de l'article 1134 du code civil*, *Le Dalloz*, March 14, 2002, p. 901.

<sup>56</sup> On the social as characteristic of early nineteenth-century thought in general, see MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1949); BEN SELIGMAN, *1 MAIN CURRENTS OF ECONOMIC THOUGHT: THE REVOLT AGAINST FORMALISM* (1962); EDWARD PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* (1973); YVES DONZELOT, *L'INVENTION DU SOCIAL* (1984); MICHEL BORGETTO AND ROBERT LAFORE, *LA REPUBLIQUE SOCIALE: CONTRIBUTION A L'ETUDE DE LA QUESTION DEMOCRATIQUE EN FRANCE* (2000); FRANCOIS EWALD, *HISTOIRE DE L'ETAT PROVIDENCE* (1986).

<sup>57</sup> ALEJANDRO AIVAREZ, *THE NEW INTERNATIONAL LAW* (1924).

international law. The is-to-ought move appealed to a very wide range of legitimating rhetorics. These traversed the left/right spectrum, leaving out only Marxist collectivism at one extreme and pure Manchesterism at the other.

So the social could be based on socialist or social democratic ideology (perhaps Durkheimian), on the social Christianity of Protestant sects, on neo-Kantian "situational natural law," on Comtean positivism, on Catholic natural law, on Bismark/Disraeli social conservatism, or on fascist ideology.<sup>58</sup> In other words, the social, like CLT, was initially a consciousness (though always in an embattled relationship with CLT, rather than straightforwardly hegemonic in the way CLT had been in the brief period between about 1850 and 1890) within which it was possible to develop different and conflicting ideological projects. Regardless of which it was, the slogans included organicism, purpose, function, reproduction, welfare, instrumentalism (law is a means to an end) – and so antideduction, because a legal rule is just a means to accomplishment of social purposes.

A crucial part of the social critique of classical legal thought was the claim that it maintained an appearance of objectivity in legal interpretation only through the abuse of deduction. According to the social people, CLT people understood themselves to operate as interpreters (judges, administrators, law professors) according to a system of induction and deduction premised on the coherence, or internal logical consistency, of the system of enacted legal norms. One mode was to locate the applicable enacted rule; a second was to develop a rule to fill a gap by a chain of deductions from a more abstract enacted rule or principle; a third, the method of "constructions," was to determine what unenacted principle must be part of "the system," given the various enacted elements in it, if we were to regard it as internally coherent, and then derive a gap-filling rule from the construction.

In the social analysis, because interpreters within CLT had always to understand themselves as logically compelled in one of these ways, they could never legitimately work consciously to adapt the law to the new conditions of the late nineteenth century. Nonetheless, those conditions constantly presented them, as interpreters, with gaps. What the CLT people had to do, to stay loyal to their role as they conceived it, was to "abuse deduction."<sup>59</sup> They had to make decisions reached on other grounds look like the operation of deductive work premised on the coherence of the system. And the abuse of deduction permitted the smuggling in not of the general desiderata of social evolution, but of

<sup>58</sup> See DeBUEN, *supra* note 55.

<sup>59</sup> On the role of "abuse of deduction," see DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION [*FIN DE SIÈCLE*] 82–92 (1997); Kennedy, *From the Will Theory*, *supra* note 9; Duncan Kennedy, *Legal Formalism*, in 13 *ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES* 8634 (2001); KENNEDY & BELLEAU, *supra* note 55. See also, ESQUIROL, *supra* note 27.

the partisan ideologies of the parties to the conflicts between labor and capital, large and small business, of the century's end. (Important antiformalists, aside from the social people, were Demogue,<sup>60</sup> Heck,<sup>61</sup> Holmes,<sup>62</sup> Hohfeld,<sup>63</sup> and Llewellyn.<sup>64</sup>)

The social people had four positive proposals: (1) from the social "is" to the adaptive ought for law, (2) from the deductive to the instrumental approach to the formulation of norms, (3) not only by the legislature but also by legal scientists and judges and administrative agencies openly acknowledging gaps in the formally valid order, and (4) anchored in the normative practices ("living law") that groups intermediate between the state and the individual were continuously developing in response to the needs of the new interdependent social formation.

**Pluralism.** Many advocates of the social argued that various groups within the emerging interdependent society, including, for example, merchant communities and labor unions, were developing new norms to fit the new "social needs." These norms, regarded as "valid" "living law," rather than deduction from individualist postulates, should, and also would, in this "legal pluralist" view, be the basis for legislative, administrative and judicial elaboration of new rules of state law. The pluralist position, like so much in the social, was a complex is/ought mixture. Pluralists identified the multiple substate and suprastate normative orders in actual operation in the modern world, and the various kinds of institutionalized or informal sanctioning systems that contributed to their effectiveness in influencing behavior. In this mode, the Mafia code of *omerta* and canon law were as important and interesting as any other nonstate order. But in their normative role, the pluralists were much more interested in medieval corporations, the law of merchants, the law of the industrial shop, and customary international law. My hypothesis is that this was because in each of these, it was possible to argue that nonstate law was more "social" than state law, and provided a basis for reform of the latter in the particular direction they favored.<sup>65</sup>

<sup>60</sup> Rene Demogue, *Fundamental Notions of Private Law*, in MODERN FRENCH PHILOSOPHY, VII THE MODERN LEGAL PHILOSOPHY SERIES (1916).

<sup>61</sup> Phillip Heck, *The Jurisprudence of Interests: An Outline*, in THE JURISPRUDENCE OF INTERESTS (Magdalena Schoch, trans. & ed., 1948).

<sup>62</sup> OLIVER WENDELL HOLMES, *Privilege, Malice and Intent*, in COLLECTED LEGAL PAPERS OF OLIVER WENDELL HOLMES (1920); HOLMES, *The Path of the Law*, in COLLECTED PAPERS, *supra*; HOLMES, *Natural Law*, in COLLECTED PAPERS, *supra*.

<sup>63</sup> Wesley Hohfeld, *Fundamental Conceptions in Legal Reasoning*, 26 YALE L. J. 710 (1917).

<sup>64</sup> E.g., Karl Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581 (1940).

<sup>65</sup> See EHRlich, *supra* note 63; SANTI ROMANO, L'ORDINAMENTO GIURIDICO (1918); GURWITCH, *supra* note 62, for a listing of the most important pluralists up to the 1930s. See John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1 (1986); B. DE SOUSA SANTOS, TOWARD A NEW COMMON

**Institutionalism.** This was the view that in order to understand nonstate orders, within the pluralist enterprise broadly conceived, it was necessary to do two things: identify the social practices distinguishing nonstate law from mere customs or mores, and explain how to conceptualize the coherence of nonstate law, that is, how we know that a given specific norm is part of a system of nonstate law. The notion of the institution served both of these purposes: the reference was to an organization, a set of roles, persistent in time but with shifting personnel, oriented in a founding moment to some set of (changeable) purposes going beyond the individual interests of the role incumbents. A purely for-profit private corporation is an institution if it has, as all do, an explicit or implicit business plan. (The State becomes an institution among many, in this mode of analysis.)

We observe that as a matter of fact institutions develop complex normative orders, enforced by a wide variety of sanctions, from formal "staff" (Weber) to popular assemblies to mere social pressure. The institutionalist idea was that the norms derived both their rational coherence and their "validity" from the combination of the devotion of the institution to a purpose or purposes and its history of development in response to changing circumstances. The is/ought move was to say that institutions should define and develop norms in ways that furthered their purposes. And the state, as an institution with the purpose of coordinating normative orders, should recognize and facilitate, rather than ignore or oppose, this process of internal institutional development.<sup>66</sup>

**Corporatism.** This was the view that the plural institutions all had purposes that contributed to the self-preservation or reproduction and evolution of society as a whole, and that taken together they were a better "representative" of society than, say, an electoral process based on voting by individuals. Moreover, a legislative process that emerged from individual voting was unlikely to perform in a rational way the function of overseeing the self-regulating activities of institutions.

In the corporatist view, it would be better to give the institutions one mode or another of direct access to state power, rather than constituting the state either in opposition to or without relation to them. The fascist regimes of the 1930s embraced corporatism along with presidentialism as an alternative to parliamentary democracy. They so thoroughly discredited it in the process that it is hard to remember that, in the form of industry labor/management

SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION (1995) and the excellent review article, Brian Tamanaha, *A Non-essentialist Version of Legal Pluralism*, 27 J. Law & Soc. 296 (2000), for a sampling of modern pluralism.

<sup>66</sup> See THE FRENCH INSTITUTIONALISTS: MAURICE HAURIOU, GEORGES RENARD, JOSEPH T. DELOS (Albert Broderick ed., 1970); and SANTI ROMANO, *supra* note 73.

councils with power to make legally binding regulations, it was the central element of Roosevelt's First New Deal.<sup>67</sup>

**Social legislation.** One way to understand the social is as a transformation of the CLT model in which individuals constitute a people, with rights secured by a state, that is sovereign, in decentralized association with other sovereign states, representing and securing the rights of other peoples. In the social, there was an intense focus not just on the plurality of institutions below and above the level of the state, but also on groups between the level of the individual and the people. The most important of these were social classes, and particularly labor and capital, and national minorities. Whereas Marxism was a "conflict ideology," prophesying the triumph of the working class in death struggle with the capitalist class, the social was a "harmony ideology," preaching a function for each organized interest, and the existence of a "public interest" in the coordination of their interdependent activities in order to maximize social welfare.<sup>68</sup> So the social people were against the tendency in CLT to deny the juristic reality of anything other than an individual or a state.

In labor law, the goal was to devise new legal forms, such as social insurance against industrial accidents as a compulsory element of the wage bargain, the labor union as an involuntary association, and compulsory collective bargaining, all in the context of pervasive regulation from above. The notion was that given the interdependence of labor and capital, and the interdependence of all the different sectors of a modern economy, "industrial warfare" (or "strife" or "class war") threatened the whole society with breakdowns of production that might be truly catastrophic. In this situation, the "public interest" was in "industrial peace," and the public interest justified jettisoning individualist and formalist notions, such that it would violate basic premises if a union's collectively bargained agreement could determine the terms of employment of a worker who was not a member.<sup>69</sup>

In CLT, as we saw, plurality was an essential part of the picture, but it was, first of all, the plurality of right bearing individuals. Second, there was the plurality of *volksgeists*, the plurality of family law regimes corresponding to different national cultures, the plurality of public law arrangements corresponding to the different modes of political life of different peoples. These pluralities were peripheral in relation to the legal core, which consisted of the private law of obligations, with contract law, the law of free will from the starting point of property rights, as the core of the core.

<sup>67</sup> See DONALD BRAND, *CORPORATISM AND THE RULE OF LAW* (1988). On the influence of corporatism on U.S. legal realism, see also Allen Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949-1954*, 49 BUFFALO L. REV. 359 (2001).

<sup>68</sup> See REXFORD TUGWELL, *THE ECONOMIC BASIS OF PUBLIC INTEREST* (1922).

<sup>69</sup> See Karl Klape, *The Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978).



Social legislation meant expanding the regulatory functions of the state, carving out and redefining as public law vast areas that had fallen safely within the domain of right, will, and fault. Social law coordinated the various individual willing subjects of CLT in the public interest, through public agencies that were to make rules to instantiate relatively abstract and vague legislative pronouncements (for example, in the U.S. context, a federal statute banning "contracts in restraint of trade" or "unfair competition," "unfair labor practices," or "deceptive practices" in securities law).

*Expertise and studies.* The agencies were supposed to bring "expertise" to bear, meaning both social science and concrete pragmatic knowledge. They were to act through inspectorates applying low-level criminal sanctions or injunctions, in proceedings much less formal than those emblematic of CLT. In place of the law of obligations, the salient fields were administrative law, applicable to all social legislation, and then labor law, family law, and international law.<sup>70</sup> By the 1930s, the social people had flipped the structure of CLT and the periphery had become the core.

After a brief flirtation with the judge (both in France and in Germany at the beginning of the twentieth century), the hero figures of the social current became, in principal, the legislators who drafted the multiplicity of special laws that constituted the new order, along with the administrator who produced and enforced the detailed regulations that put legislative regimes into effect. The literature of the social, however, was the product of a new breed of law professors. These were not the magisterial authors of codes and expounders of their inner logic. They were law reformers, writing theory, doing studies, drafting legislation, overseeing, in doctrinal literature, its implementation and eventual amendment in the light of practical experience.

Because of the diverse political currents that supported reform, the professors of the social weren't pigeonholed politically. Nor were they open to the charge that they rejected scientific objectivity. The social was social scientific. The legal science of CLT was the science of legal categories. It was the science of the technique of law. The social, by contrast, was associated with sociology, economics, and psychology.

A key element of is-to-ought was the "study," beginning with industrial accidents at the beginning of the century. The premise of the "study" was that there was a politically powerful, centrist, middle-class audience, that tended to assume that things in general were going fine. When alerted by a study either to dangers to themselves (e.g., unsanitary food processing) or to sufficiently flagrant abuse of others (conditions in the mines), this group would support a regulatory regime on "public interest" rather than partisan political grounds.

<sup>70</sup> See JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

The social and its studies were scientific in the way characteristic of the social science of that period, which was a mish mash of evolutionism, pragmatism in the Dewey tradition, and diverse forms of positivism, such as statistics-based empirical surveying. When the social jurist squared off against his Classical legal positivist colleague, treating him as a formalist dinosaur, hopelessly rigid and out of contact with reality, he did not do it in the name of subjectivism or whatever his political preferences might be. He did it in the name of his own discipline, because the social was a discipline, not just a political position.

The combination of pluralism, institutionalism, and commitment to empirical investigation, in the is-to-ought context, meant that the "other" of law was no longer morality, as it had been in CLT, but "society." Law did or did not adapt to it, did or did not constitute while pretending to merely mirror it; society did or did not have powerful long-run immanent tendencies, and so on.

*Innovation across the whole juristic field.* One juristic response to social legislation was to assimilate it to the Classical positivist model by adding new legal topics corresponding to new statutes, without modifying the premises or the methods of doctrinal analysis in any way. The advent of the social added norms and provided new fields for legal science. In every country that has a Western system of legal education, it seems that something between a part and a very large part of instruction proceeds in this way, with classical fields coherent in a classical way, and social fields coherent in a social way.

The social jurists themselves were more ambitious. Their notion was that the reform effort to make law adapt to society required a thorough revamping of the juristic universe. In civil procedure, for example, the adversary system was obviously maladapted to a modern, interdependent, flexible complex industrial system. We needed many new types of procedures that would get us out of the typical individualist battle model.<sup>71</sup> In criminal law, we needed to individualize punishment but also to make it socially effective by identifying the types of criminals and the social causes of crime.<sup>72</sup> Even contract law, the core of the core, needed revision, in the direction, for example, of pre-contractual duties, liberalization of excuses, functional rather than formalist interpretation of formalities.<sup>73</sup>

We needed new types of courts – labor courts, merchant courts, juvenile courts, and family courts – as well as new types of procedure. Commercial law needed to be reformed to meet the requirements of the new style of

<sup>71</sup> See Charles C. Clark, *The Federal Rules of Civil Procedure, 1938–58, Two Decades of the Federal Civil Rules*, 58 *COLUM. L. REV.* 435 (1958).

<sup>72</sup> See Richard Wasserstrom, *Some Problems in the Definition and Justification and Punishment*, in *Values & Morals*, 299–315 (Alvin Goodman and Jaegwon Kim eds., 1978).

<sup>73</sup> See KENNEDY, *From the Will Theory*, *supra* note 10.

enterprise, particularly the fact that most transactions were between very large companies, or between large enterprises and individual actors with no bargaining power at all. Corporate law needed to be revamped on the basis of the notion of the radical separation of ownership and control.<sup>74</sup>

It was not just a matter of reconceptualizing, reformulating, and then reforming the maladaptive, ideologically individualist doctrinal substance that had emerged in the late-nineteenth century. The antiformalist strand in the social current emphasized gaps, conflicts, and ambiguities in the corpus of positive law, and consequently the role of the judge, either as an abuser of deduction or as a rational lawmaker. In the United States, *stare decisis* was discredited as abuse of deduction par excellence, and layers of socially oriented early case law were discovered in order to multiply conflicts and open the space for reform.

The civilian dispute about what counted as a "source of law" was resolved in favor of the legitimacy of *jurisprudence* (judge-made law), whatever the "official portrait" might continue to be.<sup>75</sup> Moreover, all law interpreters, in the social vision, including professors and administrators, and lawyers when they draft contracts, lawyers when they choose litigation and settlement strategies, and lawyers when they give advice on liability, are engaged in law making. What the enterprise does will be effected at every stage by interpretations made by the lawyers that will be contestable.

They will be contestable because, given gaps, there will often be a plausible social interpretation and an individualist or formalist or positivist interpretation of the relevant valid norms. The social could be snuffed out by judicial hostility – labor courts or family courts required judges who didn't hate the whole idea of new juridical institutions. If they did, they would find means of sabotage or just bungle things. Only if judges, administrators, and lawyers understood not just the rationale but also the technique of reform would reform work.

That produced new ideas about the law school curriculum. The person teaching a new course on the new labor law statute should know some sociology, economics, and psychology, and it would be a good idea to have a small number of docile economists, sociologists, and psychologists on the faculty. Ones who would never claim to know anything about law, but would be a useful resource for us in developing our interdisciplinary projects. Interdisciplinarity for the social meant the law professor as a generalist whose skills allowed acquisition of all other disciplines without formal training.<sup>76</sup>

<sup>74</sup> See ADOLPH BERLE AND GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

<sup>75</sup> Mitchel de S.-O.-l'É. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 *YALE L. J.* 1325 (1995).

<sup>76</sup> See Harold D. Lasswell and Myres S. McDougall, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L. J.* 203 (1943).

As I've said already, this was not about politics. It might be true that their version of social justice could be characterized politically as more corporatist, communitarian, antiformalist, and pluralist than the thought of their enemies in the liberal traditions of the center and right. But they didn't think that the mere commitment to social justice in the is-to-ought mode of the social put them in the danger of eroding the distinction between law and politics.

The social jurists generally conceded the internal coherence of individualist deductive law (emphasizing gaps, not inescapable contradictions); they claimed the same kind of coherence for social law. The latter claim was strongly contested. Those we might broadly denominate liberals stuck to the apparatus and aspirations of CLT, while being willing to modernize, say by reading the concepts of *ordre publique* and "good faith" very broadly. But they understood the social to be chaotic, without a single counterprinciple to oppose to right and will. Moreover, while they recognized that the social had many different forms of politics, from left to right, they saw this as a symptom of the tragic politicization of law that followed the premature renunciation of legal science for social science, rather than as evidence of the suprapolitical truth of the social.<sup>77</sup>

### The global reception of the social

The second globalization followed the channels established by the first. Students from all over Europe went to France and Germany to study law.<sup>78</sup> From the middle of the nineteenth century up to the 1930s, students from the part of the rest of the world under Western influence flocked to Europe. From the colonies, they went to their respective "metropolises," the Senegalese to Paris, the Indonesians to Amsterdam, and so forth. If they had a choice, they went to the European capital with most prestige in their part of the periphery (Latin Americans to Paris, United Statesians to Germany).

First Germany and later France were the fountains of the social, but it developed simultaneously in many places, even though most of those places imported elements from Germany and France and had relatively little or no influence back.<sup>79</sup> In Italy it was first moderately left, and then fascist.<sup>80</sup> In Spain (Franco), Portugal (Salazar), and Greece (Metaxas), it was fascist; in the

<sup>77</sup> See WIEACKER, *supra* note 11; KENNEDY, *From the Will Theory*, *supra* note 10.

<sup>78</sup> See Lopez Medina, *supra* note 3.

<sup>79</sup> See GENY, *Appendix to METHOD OF INTERPRETATION*, *supra* note 49 (providing an egocentric summary of developments up to 1919).

<sup>80</sup> See PAOLO GROSSI, *SCIENZA GIURIDICA ITALIANA: UN PROFILO STORICO, 1860-1950* (2000); Alessandro Somma, *Il diritto fascista dei contratti: raffronti con il modello nazionalsocialista*, 18 *RIVISTA CRITICA DEL DIRITTO PRIVATO* 639 (2000); Alessandro Somma, *Fascismo e diritto: una ricerca sul nulla?*, 55 *RIVISTA TRIMESTRIALE DI DIRITTO E PROCEDURA CIVILE* 597 (2001).

Netherlands<sup>81</sup> and (Fabian) Britain,<sup>82</sup> moderately left. The United Statesean sociological jurists (Pound,<sup>83</sup> Cardozo,<sup>84</sup> and Brandeis<sup>85</sup> were the most important) developed a version that was first moderately left and then moderately right. They drew extensively on the French and Germans, but were also strongly influenced by Holmes, who developed, before Geny, a peculiarly American variant of the "abuse of deduction" thesis.<sup>86</sup>

**Nationalism.** As the social established itself in the West, students from Eastern Europe, Latin America, South, East, and Southeast Asia, the Arab world, and Africa appropriated it and took it home. A crucial dimension of the spread of the social was nationalism, but in at least three modes, rather than as a unitary phenomenon. First, nationalism, as irredentism and as the drive for ethnic purity, was understood by the progressive European social people to be, along with class conflict, the scourge that might well destroy European civilization. Theorists of the social undertook a deep rethinking of public international law in an effort to contain and shape nationalism understood as a life-creating and also life-destroying irrational force. In public international law, the mandate system, the move to institutions (the League of Nations), the creation of bricolage type governing institutions such as the free city of Danzig, and the interwar regimes of minority protection all involved innovative forms, and the self-conscious rejection of the "logic of sovereignty."<sup>87</sup> They were inspired by and in turn inspired the innovations in labor law described above ("industrial warfare" contained in ways analogous to "real" warfare; flaws of the logic of property parallel the flaws of the logic of sovereignty).<sup>88</sup>

At the very same time, the social was one of the key slogans of nationalism itself, in its fascist form, and also in authoritarian right wing variants in many parts of the world, including the new states carved out of the Ottoman and

<sup>81</sup> PAUL SCHOLTEN, *ALGEMEEN DEEL* (1974) is the *locus classicus*, not translated into English.

<sup>82</sup> HAROLD LASKI, *THE STATE IN THE NEW SOCIAL ORDER* (1921).

<sup>83</sup> Compare POUND, *supra* note 8, with the more conservative version in *The New Feudal System*, 35 *COM. L.J.* 397 (1930).

<sup>84</sup> BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>85</sup> See Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890) for a typical early example of the social; see also Brandeis' famous brief in *Muller v. Oregon*, in which the U.S. Supreme Court upheld protective labor legislation for women on conservative social grounds.

<sup>86</sup> HOLMES, *supra* note 62; Kennedy and Belleau, *supra* note 55.

<sup>87</sup> David Kennedy, *The Move to Institutions*, 8 *CARDOZO L. REV.* 841 (1987); David Kennedy, *The International Style in Post-War Law and Policy*, 1994 *UTAH L. REV.* 7; Nathaniel Berman, *But the Alternative is Despair: Nationalism and Modernist Renewal of International Law*, 106 *HARV. L. REV.* 1792 (1993); Nathaniel Berman, *Modernism, Nationalism and the Rhetoric of Reconstruction*, 4 *YALE J. LAW & HUM.* 351 (1992).

<sup>88</sup> Hani Sayed, *A Genealogy of Third World Approaches to International Law: The Social in Public International Law* (2004) (unpublished doctoral dissertation on file with the Suffolk University Law Review).

Austro-Hungarian Empires, and Latin American countries such as Argentina (Peron)<sup>89</sup> and Brazil (Vargas). This meant that, during the interwar period, progressive or revolutionary left wing reformers in countries like Colombia and Mexico, and their right wing enemies, employed virtually identical social, corporatist, anticapitalist, antiliberal rhetorics. The Mexican federal labor laws of the 1930s, a famous accomplishment of the revival of the Mexican left under Cardenas, closely resembled, if they were not actually modeled on, Mussolini's *Carta di Lavoro*.<sup>90</sup>

Finally, in the colonies, nationalism meant national independence, and was the call of the people as a whole to arms against the colonial master. The colonial powers recruited natives to staff the lower levels of their administrations, and elements from precolonial elites survived and pursued success in the new order through European education. Some of them found French, British, Dutch, and United States academic mentors-turned-allies to help them transform the progressive metropolitan social ideology into an argument for everything from "native welfare" to national independence (Furnivall,<sup>91</sup> some Dutch *adat* law sociologists,<sup>92</sup> Lambert,<sup>93</sup> Tugwell<sup>94</sup>).

There was a pattern, identified for the Egyptian case by Amr Shalakany,<sup>95</sup> to the process by which a part of the legal elite of one country after another made the social its own. In case after case, the importing elite found something in the national culture that would make the social, as opposed to the formalist individualism imputed to CLT, *uniquely appropriate to the nation in question*.

In Europe, the Catholic South (Portugal, Spain, Italy, along with Hungary) could emphasize that the social was the philosophy of the Church enunciated in *Rerum Novarum* (1897), which means "Of new things," and the "new things" were industrialization, urbanization, interdependence, and the rest of the social. In the thirties the Vatican struck its infamous deal with fascism, memorialized in the social rhetoric of *Quadragesimo Anno* (the encyclical of 1937 marking the fortieth anniversary of *Rerum Novarum*). In the Protestant North, the Dutch were able to interpret the social as particularly appropriate

<sup>89</sup> See DAVID ROCK, *AUTHORITARIAN ARGENTINA: THE NATIONALIST MOVEMENT, ITS HISTORY AND ITS IMPACT* (1993).

<sup>90</sup> Compare LOPEZ MEDINA, *supra* note 3, with Alvaro Santos, *The Reception of Social Law in Mexico and the Supposed Originality and Progressiveness of Mexican Labor Law* (2004) (unpublished paper on file with the Suffolk University Law Review).

<sup>91</sup> See J. S. FURNIVALL, AN INTRODUCTION TO THE POLITICAL ECONOMY OF BURMA, *supra* note 42.

<sup>92</sup> J. Griffiths, *Current Legal Anthropology in the Netherlands: A Trend Report*, in *SOCIOLOGY OF LAW AND LEGAL ANTHROPOLOGY IN THE DUTCH SPEAKING COUNTRIES* (J. van Houste, ed. 1985).

<sup>93</sup> Amr Shalakany, *Sanhuri and the Historical Origins of Comparative Law in the Arab World*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 152 (ANNEISE RILES, ed. 2001).

<sup>94</sup> REXFORD GUY TUGWELL, *THE STRICKEN LAND: THE STORY OF PUERTO RICO* (1946).

<sup>95</sup> Amr Shalakany, *Between Identity and the Redistribution: Sanhuri, Genealogy and the Will to Islamise*, 8 *Islamic Law & Society* 201 (2001).

to the interdependent culture of dike-based land reclamation. In Russia, there was the famous peasant village community, or *mir*.<sup>96</sup>

In a striking essay published in the *Harvard Law Review* in January 1917,<sup>97</sup> Roscoe Pound laid the ills of modern United States society at the door of the "Romanization" of United States law during the second half of the nineteenth century. He presented CLT as an "alien" mode of legal thought, whose formalist individualism had displaced the "organic" common law mode based on the notion of "relation" (husband and wife, master and servant, landlord and tenant). The rediscovery of common law medieval tradition was to be the basis for bringing United States law into harmony with twentieth-century conditions of social interdependence. Citations to the German and French civilian originators of the program he proposed were few and far between (though plentiful in his later works<sup>98</sup> representing the social as the consensus of advanced European legal thought).

In Latin America, the right wing authoritarians appealed to *Hispanidad*, whose social essence was Catholic but also uniquely American.<sup>99</sup> In Mexico, land reform and the *ejido* system of state regulated and subsidized cooperative peasant agriculture was supposedly a return to pre-Colombian modes of social organization.<sup>100</sup> In Egypt, Sanhoury's eclectic, socially oriented civil code, later adopted or adapted in many other Arab countries, was indigenous and eminently traditional, as well as ultramodern, because Islamic law was and had always been social.<sup>101</sup>

In Africa, there was Senghor's *negritude*, Kenyatta's "African idea of property," and Nyerere's African socialism or *Ujamaa*.<sup>102</sup> Sun Yat Sen and then Chiang Kai-shek in China developed the nationalist ideology of the Kuomintang, the main opponent of Chinese communism, as a complex and subtle blend of Confucian "social" and liberal elements.<sup>103</sup> After World War II, Chiang hired Roscoe Pound as a legal consultant on the construction of the legal regime of the Republic of China on Taiwan.<sup>104</sup>

The social could be the public law ideology of a disempowered subgroup in a British colonial structure, for example, of the Quebecois in Canada,<sup>105</sup> or the

<sup>96</sup> See PEASANT ECONOMY, CULTURE, AND POLITICS OF EUROPEAN RUSSIA, 1800-1921 (Esther Kingston-Mann & Timothy Mixer, eds. 1991).

<sup>97</sup> POUND, *supra* note 7.

<sup>98</sup> E.g., ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922).

<sup>99</sup> ROCK, *supra* note 89.

<sup>100</sup> EYLER N. SIMPSON, THE EJIDO: MEXICO'S WAY OUT (1937).

<sup>101</sup> Shalakany, *supra* note 91.

<sup>102</sup> Kang'ara, *supra* note 42.

<sup>103</sup> Levinson, *supra* note 25.

<sup>104</sup> Roscoe Pound, *Progress of the Law in China*, 23 WASH. L. REV. 345, 353 (1948); Pound, *The Chinese Civil Code in Action*, 29 TUL. L. REV. 279 (1955).

<sup>105</sup> Marie-Claire Belleau, *La dichotomie droit privé/droit public dans le contexte quebecois et canadien et l'intersectionnalite identitaire*, 39 C. DE D. 177 (March, 1998).

Afrikaaners in South Africa,<sup>106</sup> with civilian private law retaining the formalism of the minority's metropole as a symbol of resistance to the common law of the colonial power. In Palestine, jurists influenced by Savigny and Ehrlich developed a secular "Hebrew law" that was first supposed to be individualist and then social, and then went out of fashion, at the moment when the State of Israel began to develop a highly social regime of public law.<sup>107</sup>

Savigny's formalist derivation of all private law from right and will gave way to Savigny's insistence that national legal orders did and should represent the particular normative order of the people involved. But we are left with the question of why, at the moment of discovering national particularity, *each nation discovered the same thing?*

A facile, but initially plausible interpretation would be that the social was a tool of elites facing precisely the absence of the social. That is, of elites put in charge of governing territories torn apart by class conflict, or containing wildly heterogeneous tribal, cultural, racial, and religious groups, first assembled as colonies according to the interests of the Empires and Great Powers, and then re-parceled at the moment of national independence according to the interests of the Great Powers and of the local elites who were to take their place. The ideology of the social was (perhaps) not a reflection of national particularity, but an instrument in the "imagining" of presently nonexistent national communities.<sup>108</sup> This hypothesis gets some support from the story of gender in the social.

**Sex and family.** In the second globalization, the idea of the "social" was dramatically ambiguous when applied to familial and sexual relations. The social involved the demand that employers treat workers and that merchants treat consumers according to a social ethic, and the rhetoric was one of solidarity and community. The construction of relations of family members as intrinsically altruistic and protective was an obvious reference and support for the demands of workers and consumers. In a sense, the demand was to roll back the nineteenth-century disintegration of the household, and reimpose on the capitalist the duties of the patriarch, this time with state enforcement of solidarity, rather than the toleration of arbitrariness. Enemies of the social never tired of pointing out that it was a "regression" from contract to status, and that it was "demeaning" to the beneficiaries to be treated as though, like the member of the Roman or feudal household, they lacked legal capacity.<sup>109</sup>

<sup>106</sup> Andre Van de Waalt, *Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law*, 11 S. AFR. J. ON HUM. RTS. 169 (1995).

<sup>107</sup> Assaf Likhovski, *The Invention of "Hebrew Law" in Mandatory Palestine*, 46 AM. J. COMP. L. 339 (1998).

<sup>108</sup> ERIC HOBBSBAWM, *NATIONS AND NATIONALISM SINCE 1780* (1990); BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM* (revised ed. 1991).

<sup>109</sup> Olsen, *supra* note 33; Olsen *supra* note 34.



At the same time, the social stood for modernity, for adapting law to conditions of urbanization, global market economy, technological change, and general interdependence. The progressive social approach to sex and family in the North Atlantic was notably secular, influenced by the first wave of Western feminism, and it in turn, influenced the most secular and Westernized segments of the elites of the periphery. Its program was to ease many prohibitions of the nineteenth-century gender regime, while at the same time increasing the intrusive enforcement of the duties of the patriarch that CLT had treated as merely moral, as opposed to legal.

The social ideology treated the family as an institution with functions and purposes crucial to the social whole. The family was far from a matter of merely private concern, or something to be left to the particularities of local culture, or an area quarantined as moral rather than legal. Every aspect of family life had, given social interdependence, far-reaching consequences for all other social functions, and the "public interest" therefore justified pervasive intervention against socially pathological behavior. The "study" was a crucial instrument here, as it was in the area of industrial accidents, and the strategy was identical. Revelation of bad conditions of poor families would mobilize the sympathy of the middle class in favor of regulation.

Studies could also support decriminalization and destigmatization by showing that outdated, moralistic controls on sexuality and insistence on the formalities of marriage were socially counterproductive. The public health arguments covered the whole range from child nutrition to venereal disease spread by prostitutes forced into vice by the combination of poverty and repressive social norms ("ruined" women couldn't marry). The new science of sexology suggested reform in the interest of adult sexual pleasure, but also to stabilize traditional gender arrangements in the interest of society as a whole.<sup>110</sup>

In the progressive version of the social, the prohibitions to be relaxed were those on nonmarital sex, as for example by decriminalizing female adultery and sex between unmarried persons, permitting divorce by mutual consent, legalizing the sale of contraceptives, destigmatizing illegitimacy, legalizing abortion (so that it would be performed in medically controlled circumstances). The decriminalization of prostitution went along with its regulation in brothels through the typical social mode of an inspectorate armed with criminal penalties and injunctive powers. The social ideology tended to pathologize and medicalize homosexuality.

The duties to be increased included controlling domestic battery both of wives and children, again by establishing administrative agencies armed with low-level criminal sanctions and power to initiate the transfer of custody

<sup>110</sup> Atina Grossmann, *The New Woman and the Rationalization of Sexuality in Weimar Germany*, in *POWERS OF DESIRE* (Ann Snitow, Christine Stansell, and Sharon Thompson eds., 1983).

of children. Family and juvenile courts and the newly created profession of "social work" aimed for a deformalized legal regime oriented to welfare rather than rights (best interest of the child, rehabilitation rather than punishment, Persons In Need of Supervision, Child In Need of Supervision, and so on).<sup>111</sup>

The progressives' main opponents in the North Atlantic were the Catholic Church and socially conservative Protestant sects (e.g., the Bible Belt in the United States, Anglicanism in the United Kingdom). As in the nineteenth century, although the agenda was transnational and the arguments and elements of reform everywhere similar, there was nothing like the globalization of a particular social-legal regime. The outcomes varied from country to country and from decade to decade, according to the local balance of forces and the strategies of the contenders. The social provided, as had CLT, a scheme of categories, arguments, and elements for legislation, out of which *langue* national speakers produced the *parole* of positive law.

The authoritarian nationalist approach was very different, though no less "social." In Nazi Germany, but I think only there, it was relentlessly "modern," eugenicist about reproduction as well as about racial extinction.<sup>112</sup> Authoritarians elsewhere were frankly allied with the Catholic or Greek Orthodox Church, both in peripheral Europe and in Latin America, or with Confucian or Shinto "family values" in East Asia. The family played the role of the "heart" or "soul" of the nation exactly because it was traditional rather than modern. The whole nation was a family, for example, and the authoritarian leader was a "father."

The interests of the nation required the reform of the family in the interests of society, as in the progressive agenda, but the rhetoric was of protection, rather than of freedom and equality. The family agenda was to subsidize the traditional nuclear family and the enterprise of child rearing in order to strengthen the nation against its enemies. This involved reenforcing the power of fathers while increasing services to mothers restricted to the home, pronatalism, and maintaining the system of prohibitions on extramarital sexuality of women. The main threats for the authoritarian social were "Godless communism" and the "decadent" liberalizing trend in bourgeois humanism and socialism. Homophobia and antisemitism went hand in hand.<sup>113</sup>

The national liberation parties in the colonized world faced yet a third configuration. Nationalists were everywhere disputed in their claim to lead the opposition to the colonial power. Of course, in many places there were communist parties. But often more important were political formations representing the fragments the nationalists hoped to bring together in coalition.

<sup>111</sup> CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD* (1977).

<sup>112</sup> *WHEN BIOLOGY BECAME DESTINY: WOMEN IN WEIMAR AND NAZI GERMANY* (Renate Bridenthal, Atina Grossman, Marion Kaplan eds., 1984).

<sup>113</sup> See, e.g., ROBERT ARON, *HISTOIRE DE VICHY* 237–241 (1962).

In the Middle East, South Asia, Southeast Asia, and Africa, there were, first of all, Islamic reform parties (and Hindu parties in India). Then there were tribal political organizations (in all the above regions, not just in Africa). And there were racially organized groups, often in reaction against local minorities (for example, against the Chinese or Indians in Southeast Asia and the Pacific, against the Arabs in sub-Saharan Africa) that had arrived and prospered under colonial auspices.

The nationalist project was to develop the notion of national particularity as a secular force, against *both* the colonial power and the fragmenting elements in the local situation. The family played a big role here: the nation could be unified around its unique family values, social values, that provided a clear point of contrast with the imagined sexual and familial degeneracy of the metropole and "the West" in general.<sup>114</sup> This made possible a complex set of compromises. First, in the name of modernity, nationalists could endorse education and employment for women, under the regulated conditions that the social program attempted to establish for all workers. Second, women should (ideally through state-supported organizations) participate in national struggles as one of the social groups (along with labor, farmers, youth, intellectuals, etc.) making up the corporatist side of the national liberation coalition.

At the same time, the nationalists could compromise, in the regulation of gender roles in marriage and extramarital sexuality, with the local forces that identified with tradition. Social rights for labor, land reform, and public/private collaboration in infrastructure development and import substitution industrialization, could not just coexist with, they could harmonize with immobility on formal inequality under Islamic law, toleration of domestic violence and crimes of honor, and the celebration of female virginity before marriage.<sup>115</sup> Activists for women's rights found themselves up against the problem that modernizing secular male elites had chosen to split the difference, on issues of sex and the family, with the conservative *ulema* in the Muslim world or the priests in the Catholic world.<sup>116</sup>

Thus, the Savignian compromise took a new turn. Progressive views about labor law, consumer law, housing law, and so forth, sometimes combined with fascist or traditionalist views about family law and in general about the status of women. (In the nineteenth-century codes, it had been economic liberalism that combined with family law conservatism.) The social, which could be thoroughly progressive or thoroughly fascist in the political and

<sup>114</sup> See PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES* (1993).

<sup>115</sup> Lama Abu-Odeh, *Crimes of Honor and the Construction of Gender in Arab Societies*, in *FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES* (Mai Yamani, ed., 1996).

<sup>116</sup> Lama Abu-Odeh, *Egyptian Feminism: Trapped in the Identity Debate*, in *YALE J. LAW & FEMINISM* (2004).

market domains, could also be progressive or traditionalist on sex and family, and there were always compromises in both domains, and the compromises could go in all directions.

*The welfare state.*<sup>117</sup> The welfare state figures heavily in the social and political history of the period of the social, but as I hope is already clear, it would be wrong to treat it as the "essence" or, from the point of view of law, as the central development. The legal concepts that seem most important are those of social insurance (unemployment, accidents, health and old age pensions) and entitlements based on need, conceptualized as rehabilitative, with an administration that does the need assessment and delivers services (social work) that are supposed to reintegrate the recipient into the presumably normal universe of the labor market.

These are typical manifestations of the social, with Bismarkian German origins, adopted throughout the capitalist West. There is an easy transition to the notion of social rights, understood as "third generation" (after private law and political rights), occupying a position of juristic ambiguity typical of the innovations of the period. Social rights were both legal, and even constitutional (first in Mexico, 1917), but nonjusticiable as to the level of benefits provided, although justiciable as entitlements once legislatively established within the administrative law regime of the country in question.

Of course, the welfare state could globalize only to a limited extent, because it presupposed a particular kind of economic, social, and administrative development, a measure of political autonomy (i.e., something other than colonial status), and a political configuration. I would characterize the political configuration as one in which a significant measure of redistribution from the middle- to the lower-middle and working-class strata, and a significant measure of paternalist control of the spending decisions of those strata (that is, compelling them to insure), could be made plausible to an electoral majority (e.g., the New Deal in the United States, the Front Populaire in France, the corporatist social democracy of Austria) or an authoritarian elite (e.g., Germany, Argentina), as protection of the social whole. Note that as was the case for the liberalization of the law of the household, there developed a single transnational programmatic repertoire and policy vocabulary for social programs (*langue*), but an infinite diversity of specific national regimes (*parole*).

*Land regimes.* The social jurists took a deep interest in the agricultural workers of the South, the very ones that CLT had lumped into the *locatio operaria*, or freedom of contract regime, blithely ignoring their obvious lack of "free will."

<sup>117</sup> See generally THEDA SKOCPOŁ, SOCIAL REVOLUTIONS IN THE MODERN WORLD (1994); EWALD, *supra* note 56.

This was the period of the beginning of the population explosion in the South, as death rates in many areas began to fall while birth rates remained constant. The latifundia/minifundia structure began to come apart as the minifundia lost their capacity to absorb population increases, while latifundia, as they became more efficient through mechanization, needed less raw labor power. Up to 1930, capital continued to pour into the developing world, building infrastructure and creating primary product (mineral and agricultural) enterprises and stimulating smallholder cash cropping. After 1930, all of this stopped abruptly. The Southern style of urbanization, based not on the lure of expanding industrial employment, but on the collapse of rural life, got underway.<sup>118</sup>

This was also the period of Communist revolution in land ownership in Russia, in which both latifundia and minifundia, along with large and small landlord classes, were abolished, and agriculture collectivized. This was an epochal event, transforming the hierarchical structure of the social lives of millions of people, at a very large cost in death and suffering, and relatively little increase in calorie intake per day. Nonetheless, along with failed communist uprisings in places like Germany and Hungary (1919) and China and Indonesia (1927), it caught the attention of elites everywhere.

The challenge for the social current, after the failure of the Western powers to crush the Russian revolution militarily, was, again, to save liberalism from itself. In this domain, as in that of labor/capital and international conflict, there had to be an alternative to revolution and collectivization. The right-wing social solutions (whether in independent authoritarian regimes or in "welfare" oriented colonial ones) were right wing because they neither challenged the owners of latifundia nor tried to force foreign capitalist enterprises to subsidize the poor agricultural sector. Instead, they offered policies like road building, irrigation, and extension of power to the countryside. Another right-wing trope was resettlement. It might be internal, as in the policy of moving Javanese peasant farmers to the outer islands under the Dutch "Ethical Policy,"<sup>119</sup> or into newly acquired territory (e.g., Mussolini's North and East African imperial scheme).

The progressive version of the social adopted the same strategies, but with less tendency to privatize the agents of transformation as soon as possible. Roosevelt's Tennessee Valley Authority is a prime example. But their preoccupation was land reform, in the broadest sense, including the transformation of large into viable small properties, the agglomeration of minifundia into cooperatives, the abolition of tenure forms like sharecropping, and the substitution of various forms of cooperative or state credit for rural moneylenders. Cooperative marketing boards, with delegated state powers as

<sup>118</sup> Wolf, *supra* note 41.

<sup>119</sup> M. C. RICKLEFS, *A HISTORY OF MODERN INDONESIA 193-205* (2001).

regulated monopsonists, were to cut out the Western commercial intermediaries between cash croppers and international commodity markets. The reformers were far less successful here than elsewhere, and, with exceptions like Mexico, the Depression scuttled most of the schemes that got to the stage of implementation.

*International economic law.*<sup>120</sup> The same kind of thinking that led to the rejection of classical liberal law as formalist and individualist led to the rejection of the nineteenth-century "gold standard/free trade/private international law" regime. Starting in the 1920s, but exploding after 1929, this is the period of "autarchy," which might better be described as "national strategy" based on bilateral agreements and then on the formation of blocs, first those of the empires and then those based on ideology in the confrontation of liberalism with fascism and communism.

*Import substitution industrialization.*<sup>121</sup> The last of the pre-War innovations I'll mention began in Latin America. The colonized peripheral countries could not react in their own interests to the Depression; they suffered passively the drying up of investment from their metropolises and the collapse of the prices of their primary product exports. The last thing their colonial rulers thought of was to open them to the price-cutting trade of the Japanese or to encourage them to reduce their imports of metropolitan textiles. But this was not the case for the independent peripheral states.

One of the nineteenth-century intellectual origins of the social had been the defense of an import substitution industrialization policy (ISI) by the German school of *nationaloeconomie*. Latin American economists who had been passionate fans of the free trade/gold standard approach when it favored rapid development rethought their position and thoroughly modernized *nationaloeconomie* as "import substitution industrialization." It became the development strategy of right wing nationalist regimes in Argentina and Brazil. One part was tariffs, manipulated exchange rates, currency controls, import licensing, and subsidized credit, all designed to favor local firms in competition with imports. Another was the development, through classic social law administrative techniques, of a state-owned or heavily state-regulated sector.

### The social after WWII

If the Depression and WWII simultaneously stimulated and snuffed out institutional innovations, they made possible, through the sheer intensity of disaster, combined with the defeat of fascism and the containment of communism,

<sup>120</sup> See generally EICHENGREEN, *supra* note 20.

<sup>121</sup> VICTOR BULMER-THOMAS, *THE ECONOMIC HISTORY OF LATIN AMERICA SINCE INDEPENDENCE* (1994).

a whole collection of institutional triumphs of the progressive version of the social. The first of these was the creation, for the capitalist core countries, of the nationally and internationally regulated market economy. The second was the globalization of the Bretton Woods system. The third was the globalization, first from victors to vanquished and then from the first to the third world, of the progressive social reform program of restructuring entitlements as the basis for a highly regulated mixed capitalist economy pursuing a strategy of social peace through economic development.

*Keynes.* If Jhering is the undisputed grandfather of the social, John Maynard Keynes was perhaps its genius, even though he thought the save-it-from-itself strategy should operate at the state and international levels, leaving the CLT structure of private property and free contract intact. The Bretton Woods system that the Western industrial powers established for their intrabloc relations during the Cold War became eventually the world financial regulatory system. As initially conceived, it was a typical example of the social at work.

First of all, the IMF was premised on the idea of the interdependence of financial and currency markets, with the danger being runs on national currencies producing chain reaction downward spirals. The way to stop runs was to "nip them in the bud" from a position outside and above any single national strategic actor. There was a shared "public interest" in this kind of intervention, so long as it was carefully limited so as not to interfere with national sovereignty in monetary and fiscal policy.

Of course, macroeconomic monetary and fiscal policy were exactly what the CLT model of free trade, gold standard, and private international law were designed to eliminate. Keynes's contribution in this area was to show that fiscal and monetary policy could function rationally as "countercyclical," counteracting through strategic action from the center the individualist capitalist logic of boom followed by bust, and so benefitting everyone in the society. But fiscal and monetary policy also meant deficit spending in periods of economic contraction, and therefore opened the possibility of financing the whole program of the social reformers in the very periods when historically they had been forced to close up shop.

*Globalization of the Bretton Woods system.* The Bretton Woods institutions gradually expanded to include the whole noncommunist world. Between 1945 and the mid-1960s, decolonization brought into existence a world order of independent "nation" states. The old and new national elites of the periphery were free of direct, that is, jurisdictional control. Almost as important, without the gold standard, they were free to manipulate their currencies and national budgets for whatever sovereign purposes. They soon discovered, however, that they needed, for whatever purposes, access to world capital markets. This meant that they had to join the Bretton Woods system – either

join this game strictly on the terms proposed, that is, within the structure of legal rules already in place, or starve in the dark.

Within the social, these trends produced, after WWII, a "third worldist" or Bandung reaction (Nehru, Nasser, Sukarno) and a school of progressive public international law.<sup>122</sup> It deployed the social critique of the individualism of classical private law against the post-WWII supposedly reformed and postcolonial international law regime. The formal liberation and enfranchisement of unfree labor in Europe simply shifted the mechanism of exploitation from the transparency of feudalism to the mystification of capitalism. The formal grant of national independence to colonized peoples likewise shifted the transparency of imperial rule to the mystification of neocolonialism. In place of the exploitative wage bargain, the modern international order worked through the unequal exchange of primary products from the Third World for industrial products from the First.<sup>123</sup> This seems to me to have been the last strictly analytic accomplishment of the social consciousness.

*The globalization of regulated mixed economy.* It seems useful to distinguish two phases here. The first occurred immediately after the War when the Allies forcefully and systematically transformed the Japanese, German, and Italian systems from a fascist to a progressive version of the social, and imposed a similar transformation on the South Korean and Taiwanese social and economic systems as the price of protection from the Chinese communists. In Japan, South Korea, and Taiwan, land reform was an important part of the transformation, along with at least paper rights for labor unions, and at least paper regulation of the financial system. Germany and Italy were incorporated into the Social Democratic/Christian Democratic model propounded by the progressive social people in the United States, Britain, and France (and by German and Italian social democrats before the War).

The second phase was the extension of the import substitution industrialization strategy across Latin America and to the newly independent Third World, first to very large economies such as those of India, Egypt, Turkey, Iran, and Indonesia, and, after 1960, to the very small economies of newly independent African states. The ISI strategy, which relied heavily on public law and government intervention, was strongly supported by the various United Nations bodies, by the World Bank, and by USAID, and it was the initial economic strategy of Taiwan and South Korea (as well as Singapore) before they gradually shifted to export-led growth.<sup>124</sup> It was a product of Keynesian

<sup>122</sup> Hani Sayed, *supra* note 88.

<sup>123</sup> See ROBERT PACKENHAM, *THE DEPENDENCY MOVEMENT: SCHOLARSHIP AND POLITICS IN DEVELOPMENT STUDIES* (1992).

<sup>124</sup> JAMES CYPHER AND JAMES DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* 265–329 (1997); ALICE AMSDEN, *THE RISE OF THE REST* (2001).



liberalism as much as of democratic socialism, just as strongly anticommunist as it was against laissez-faire.

ISI typically involved the exploitation of the countryside, supposedly for the sake of industrial capital formation in the cities, through tariffs and through the marketing boards that the social people had pioneered in the 1930s.<sup>125</sup> Aside from South Korea and Taiwan at the moment of maximum communist threat and maximum liberal influence in Washington, only a very few progressive regimes (e.g., Egypt, Bolivia) actually broke up large estates. The refusal to join the Soviet bloc was more than a matter of diplomacy. Reforming third world elites adopted the economic institutions of the social current rather than those of communism. And avoided social and economic revolution without having to give up their emoluments.

### The critique of the social

It seems to me hard to overestimate the global transformation of positive law worked by the reformers in the social current. Again, what was globalized was not any particular social regime, and the rate of socialization varied from country to country and within each country from decade to decade. There was no single endpoint toward which national regimes of positive law converged, and if, as I will suggest in a moment, we take the year 1968 as a rough marker for the demise of the social as dominant legal consciousness, we would have to say that it had triumphed institutionally, but in as many forms as there were sovereigns. In other words, as *parole* rather than as structure.

The critique of the social was a cumulative phenomenon, beginning in the 1930s with the second wave of legislative reforms (the first occurred during the decade before World War I), and developing continuously along with the gradual adoption of social law over time and around the world. There was only a brief period, broadly denominated "the fifties," during which the social had no strong opponent (CLT was discredited and Marxism, in the West, disintegrating).

The critiques that reached critical mass by 1968 were, theoretically, politically and programmatically contradictory. The social at which they were directed was institutionalized, a thoroughly entrenched status quo implemented at the level of legal doctrine by a cadre of jurists who had never known anything but the social superimposed on CLT. They were administrators rather than reformers or intellectuals, and most of them ignored the critiques they happened to notice. The situation is not that different to this very day, except that the people of the social now lament the puzzling "resurgence" of CLT after 1980. By contrast, the brilliant early social people directed

<sup>125</sup> See ROBERT BATES, *MARKETS AND STATES IN TROPICAL AFRICA: THE POLITICAL BASIS OF AGRICULTURAL POLICIES* (1981); ROBERT BATES, *ESSAYS IN THE POLITICAL ECONOMY OF RURAL AFRICA* (1983).

a relatively unitary "individualism plus abuse of deduction" critique at CLT at the moment when a relatively unitary social program of law reform was emerging transnationally as a potent threat to the established order.

The first two critiques originated in the 1930s. One was the critique of the is-to-ought move deriving reform legislation from the science of society. The two main sources of the critique of is-to-ought were Max Weber<sup>126</sup> and the logical positivists.<sup>127</sup> Weber influenced European jurists like Hans Kelsen (according to whom sociological jurisprudence was nothing but a disguised vehicle for "natural law tendencies"),<sup>128</sup> and United Statesians like Karl Llewellyn.<sup>129</sup> After the War, United Statesian pragmatism, in its philosophical version, turned decisively against the "is-to-ought" version of its founders, leaving behind the more Deweyan jurists of, for example, the Legal Process school.<sup>130</sup>

The critique of is-to-ought included a move similar to the abuse-of-deduction critique of CLT. This was that the social people were able to maintain their illusion that they were deriving legal rules from social needs or functions or purposes only by ignoring the pervasive phenomenon of conflict between desiderata – thereby producing something aptly named "social conceptualism."<sup>131</sup> This first critique is the intellectual ancestor of modern policy analysis.

A second, liberal and neoliberal, critique was of the association of the social with fascism and communism.<sup>132</sup> There are many paradoxes here. First, there was a strong Marxist critique of the social as mere bandaid,<sup>133</sup> and at the same time some quite striking incorporations of it into the parts of Soviet legal ideology that seem today the least "communist."<sup>134</sup> The social people included the dominant anticommunist and antifascist intellectual currents of the inter-War period, with the agenda, as I mentioned above, of saving

<sup>126</sup> MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* (Shils & Finch, eds., 1949).

<sup>127</sup> E.g., A. J. AYER, *LANGUAGE, TRUTH AND LOGIC* (1936). As applied in law, the logical positivist critique went far beyond Weber, advocating a purely descriptive legal science that would formulate its hypotheses without using suspect mentalist categories like "legal validity." There was a self-conscious parallel with behaviorism in psychology (getting rid of everything mental, leaving only stimulus and response) and the move to "revealed preference" (getting rid of "utility" and "choice") in economics. See generally JACK SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

<sup>128</sup> HANS KELSEN, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY* 41 (1934, trans. 1992).

<sup>129</sup> Karl Llewellyn, *A Realistic Jurisprudence: The Next Step*, 30 COLUM L. REV. 431 (1930).

<sup>130</sup> See generally, MIKHAIL ALBERSTEIN, *PRAGMATISM AND LAW: FROM PHILOSOPHY TO DISPUTE RESOLUTION* (2002).

<sup>131</sup> Llewellyn, *supra* note 129. Karl Klare, *Radicalization*, *supra* note 69.

<sup>132</sup> FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* (1944).

<sup>133</sup> GERARD FARJAT, *LE DROIT ÉCONOMIQUE* (1971).

<sup>134</sup> Gianmaria Ajani, *Formalism and Anti-formalism under Socialist Law: The Case of General Clauses within the Codification of Civil Law*, *GLOBAL JURIST ADVANCES*, Vol. 2, No. 2, (2002).

liberalism from itself. And in the post-WWII period in which the social jurists gradually faded from view, the liberals who treated them as tainted rested their case against communism on the post-WWII success of the 1930s reform institutions, pushed through by the social people after the War over Liberal objections.

The remaining critiques developed during the 1960s and 1970s. They have a complex internal relationship to one another that I would describe as follows. The dominant rhetoric of critique was civil libertarian, and permitted a de facto alliance of left and right, quite similar to that which had linked the social democratic and fascist versions of the social now under attack. The critique targeted the procedural dimension of the social reform program, that is, its antiformalism. In family law, criminal law, labor law, public housing, the law of civil commitment, and in the law of prisons, mental hospitals, and juvenile homes, the social program involved the creation of new institutions. These were deliberately constructed to empower administrators operating on the basis of expertise, in the public interest, and in the interest of clients lacking full capacity.

The civil libertarians attacked the institutions as denying individual rights and their administrators as arbitrary and implicitly authoritarian manipulators of vacuous general standards and empty expertise. At one level, the demand was for procedural rights, for example, to hearings applying rationally intelligible decision criteria with judicial review, before the administrators did things to their charges. But behind this demand there was a seismic cultural and political shift, occurring more or less simultaneously all over the developed West.

At the political level, the context for the jurists' critique of the social included the discrediting of the socially oriented leadership of the U.S. Vietnam War ("the best and the brightest"), with perhaps 2,000,000 deaths, the discrediting of the Soviet alternative in Prague Spring and Afghanistan, the gradual discrediting of third world revolutionary national liberation ideology in China (the Great Leap Forward, the Red Guards), Ghana, and Algeria. Don't forget the discrediting of radicalism in the West by the Weather Underground, the Black Panthers, the Red Brigades, and the Baader/Meinhoff Gang, of Pan-Arabism in the first Arab-Israeli war of 1967, not to speak of the assassination of Israeli Olympic athletes at the Munich games.

The slaughter of 500,000 communists and sympathizers by the army and Islamists in Indonesia as U.S.-backed Suharto replaced Sukarno in the economic chaos of a failed import substitution industrialization strategy, and of 1,000,000 ordinary people by the communist Pol Pot regime in Cambodia after the United States "destabilized" the country, the descent of one African state after another from import substitution into kleptocracy – none of it was "the fault" of the social, not at all. The "good" social people hated all of this.

And yet . . . a whole "regime" was discredited, expertise was discredited, and so on indefinitely.

The noncommunist left rebellion against the social was cultural and intellectual as much as political. Behind the civil libertarians were writers like Ken Kesey,<sup>135</sup> and Jean Genet,<sup>136</sup> and Betty Friedan,<sup>137</sup> who recast the supposedly benign social institutions as forms of hell analogous to the hells of the period's public sphere, and poststructuralist theorists of the social as "discipline," in the wake of Michel Foucault.<sup>138</sup> As Donzelot<sup>139</sup> argued, the New Left around the world, when it was not Marxist Leninist, was a utopian rebellion against the social, and failed because the masses on whom it called had been transformed by the social into the strongest supporters of the status quo. The striking thing about the end of the social on the left is that what replaced it had no relation to this rebellious or utopian/anarchic strand. It was rather a revival of faith in rights, this time human rather than individual or social, in legal formality in place of the standards of the social, and in the judiciary as a nonpolitical, nonmurderous defense against the military-industrial-welfare-administrative state that the social seemed to have become.

On the right, there was a two-strand attack. Social conservatives like Christopher Lasch attacked the social institutions for undermining, through social engineering and bureaucratic service provision, the very social bonds they had claimed to be preserving.<sup>140</sup> And emerging slowly from 1968 on, there was the neoliberal charge that the social program had perverse economic consequences as well as perverse social ones, including, particularly, that it was bad for economic growth, that it required the middle classes to subsidize the lower classes, and that it hurt the people it was trying to help by forcing them to buy social protections of various kinds that were worth less to them than they cost in increased pricing, as summarized in the slogan "nondisclaimable tenants' protections force landlords to raise the rent and evict the grandmother."<sup>141</sup>

The period around 1968 involved something less distinct and final than the discrediting of CLT by the events of the period from the beginning of World War I to the Depression and the rise of fascism and communism. But I don't think it mere generational prejudice (b. 1942) to see it, in neo-Hegelian organicist terms, as the moment when the chrysalis disintegrated around the legal consciousness we call contemporary.

<sup>135</sup> KEN KESSEY, *ONE FLEW OVER THE CUCKOO'S NEST* (1962).

<sup>136</sup> JEAN GENET, *OUR LADY OF THE FLOWERS* (1963).

<sup>137</sup> BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1964).

<sup>138</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (19), Karl Klare, *Critical Theory and Labor Relations Law*, in DAVID KAJRYS, ED., *THE POLITICS OF LAW* (3<sup>rd</sup> ed., 1998).

<sup>139</sup> DONZELOT, *supra* note 56.

<sup>140</sup> LASCH, *supra* note 111.

<sup>141</sup> RICHARD POSNER, *THE ECONOMIC ANALYSIS OF LAW* 41–65 (1<sup>st</sup> ed., 1972).

## 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 CLT 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 United Statesean, 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*.<sup>142</sup>

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 Unitedstate-sean genealogy, in the sense that, starting from our present and moving back in time, we soon come upon Unitedstate-sean 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

<sup>142</sup> 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 United Statesians 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.<sup>143</sup>

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.<sup>144</sup> 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 United Statesesean 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

<sup>143</sup> DAVID BEATTY, *THE ULTIMATE RULE OF LAW* (2004).

<sup>144</sup> 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 United Statesians were self-conscious dwellers in the periphery. When they want to influence the *langue*, or assert proprietorship over its use, United Statesians 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.<sup>145</sup> 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<sup>146</sup>), efficiency analysis, republicanism, communitarianism, legal neopragmatism, feminist legal theory, critical race theory. And that is just the United Statesian 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, post-modern 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.<sup>147</sup>

<sup>145</sup> PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1997).

<sup>146</sup> See LOPEZ-MEDINA, *supra* note 3.

<sup>147</sup> 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.<sup>148</sup>

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.<sup>149</sup>

Even in Clausewitz's famous formulation,<sup>150</sup> 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.<sup>151</sup> 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<sup>152</sup> 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.<sup>153</sup> The death of reason permits (but does not require or

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

<sup>148</sup> Janet Halley, *Sexuality Harassment*, in *LEFT LEGALISM, LEFT CRITIQUE*, *supra* note 144.

<sup>149</sup> KENNEDY, *CRITIQUE OF ADJUDICATION* 187–191, *supra* note 3.

<sup>150</sup> CARL VON CLAUSEWITZ, *ON WAR* (Michael Howard & Peter Paret, trans., 2d ed. 1989) (1832).

<sup>151</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (1976).

<sup>152</sup> Cf. MAX WEBER, *Politics as a Vocation*, in *FROM MAX WEBER* (Gerth & Mills, eds., 1946).

<sup>153</sup> *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.