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THEORIZING THE DIFFUSION OF LAW IN AN AGE OF  
GLOBALIZATION: CONCEPTUAL DIFFICULTIES,  
UNSTABLE IMAGINATIONS, AND THE EFFORT TO  
THINK GRACEFULLY NONETHELESS\*

*Coming to grips with the diffusion of law in an age of globalization requires multiple, rather incommensurate, imaginations of authority. In trying to understand present situations, and heroically presuming the adequacy of raw knowledge, the legal theorist must think from more than one stance, must adopt multiple imaginations. So most of us shift from one imagination to another, trying to make sense of the matter at hand. If we were to take the admittedly risky step of acknowledging that our thinking is polyphonic, that we dance among our incommensurate imaginations of the diffusion of law, and of globalization more generally, then the criterion of approval for social theory would not be descriptive completeness or even impeccable demonstration. Instead we should strive for a certain human gracefulness of response to the world in which we find ourselves.*

Key words: *Diffusion of law. – Globalization. – Modernization. – Modern authority. – Despatialization. – Instability of theory.*

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## 1. INTRODUCTION

The thoughts that comprise this paper were first presented in a keynote address to a rather large conference. For better or worse, the text retains the amplitude and generous intentions – at the cost of a certain lack of rigor – befitting such occasions, where many different folks are to be welcomed. Such occasions have their pleasures for the speaker, too, who is given the privilege of being a bit more speculative, even provocative, than is usually expected in a scholarly setting. Needless to say, I seized the opportunity to speculate and provoke with enthusiasm, that is, I hope this paper is suggestive, because it makes no pretense of being demonstrative.

More specifically, this paper attempts to make some progress toward three interrelated intellectual objectives. First, substantively, I want to provide an introductory account of some of the ways the diffusion of law, or more generally, social authority in an age of globalization, may be rethought. Second, I hope the intellectual approach – “method” would be too strong a word – used here will be sturdy enough to aid more focused analyses. Third, I want to say a little bit about the practice of legal theory.

## 2. DIFFUSION OF LAW AND GLOBALIZATION

The phrase “diffusion of law” sounds most naturally in comparative law. Understanding what diffusion means and how it happens, what changes and what stays the same, is perhaps the central problem in the field.<sup>1</sup> Instead of plunging into the debates surrounding the diffusion of law as construed by eminent comparative law scholars, however, let me begin by considering another word, globalization. Globalization is a very problematic word, and gives rise to much bad theorizing.<sup>2</sup> Yet globalization cannot be avoided because the diffusion of law at the present time cannot be understood in isolation from those social processes discussed under the rubric of globalization. To start simply, in a globalizing world,

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<sup>1</sup> See William Twining, *Social Science and Diffusion of Law*, 32 *J.L. & Soc.* 203, 204 (2005) (citing authorities who treat diffusion of law as central) [hereinafter Twining, *Social Science*]; see also William Twining, *Diffusion of Law: A Global Perspective* 49 *J. Legal Pluralism* 1 (2004) (providing an excellent overview and critique of the legal scholarship on the subject) [hereinafter Twining, *Diffusion of Law*].

<sup>2</sup> I am a theorist of globalization, so this is quite a problem for me. In my own defense, in my book *City of Gold: An Apology for Global Capitalism in a Time of Discontent* (Routledge 2003) I generally eschew the word “globalization,” in order to focus on supranational capitalism, a topic quite broad enough, and surely a central aspect of the present transformation.

we might expect to find quite a lot of diffusion, both of law and other things.

The words “diffusion” and “globalization” share something important. In ordinary usage, “diffusion” means the spread of one liquid throughout a second liquid, thereby transforming the character of both. Imagine cream poured into coffee in one of those clear glass mugs that were so popular a few years back: where there had been two substances, there is a wonderful swirling and billowing, but soon there is one glass, full of a uniform liquid. The phrase “diffusion of law” suggests that laws similarly will lose their identities and be folded into an amorphous mass, just like the coffee and cream. Diffusion suggests the fear of, to use another milky word, homogenization; the fear that our legal system, and by implication our culture, will lose whatever it is that makes it special. Not too deeply buried within this anxiety are worries that ethnicity, race, power, home, and the seat of our beliefs will be obliterated by, or at least subordinated to, a modern global culture.<sup>3</sup>

Yet the words “diffusion” and “globalization” also connote world-views that are fundamentally at odds. As already noted, diffusion sounds in comparison, even if it engenders a lurking fear of homogenization. But if globalization is real, and is in fact bringing hitherto discrete peoples and their laws together into a single social and legal context, then this fear is actualized, and we must wonder to what extent it makes sense to speak of things that are in some important way different and worth studying for their difference.<sup>4</sup> Globalization threatens to make various intellectual enterprises superfluous. Consider the situation of contemporary cultural anthropology, trying to figure out what to do with ethnography after the islands get satellite TV,<sup>5</sup> or whether it makes sense to speak of international law in any sense other than the law of what many feel to be

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<sup>3</sup> Such losses, e.g., of our sense of ethnicity, may not be altogether bad. See Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* 105–07 (2006) (“If we want to preserve a wide range of human conditions because it allows free people the best chance to make their own lives, there is no place for the enforcement of diversity by trapping people within a kind of difference they long to escape.”). For present purposes, however, I will bracket such possibilities and treat the loss of cultural particularity in the usual if simplified way, as a bad thing.

<sup>4</sup> Niklas Luhmann made the point almost twenty-five years ago, declaring that once communication had created a global horizon of discourse, and in that sense society, then “a plurality of possible worlds has become impossible.” Niklas Luhmann, *World Society as a Social System*, in *Essays on Self-Reference* 175, 178 (1990), quoted in Haun Saussy, *Great Walls of Discourse, and Other Adventures in Cultural China* 15 (2001).

<sup>5</sup> See, e.g., Douglas R. Holmes & George E. Marcus, *Cultures of Expertise and the Management of Globalization: Towards the Refunctioning of Ethnography*, in *Global Assemblages: Technology, Politics, and Ethics as Anthropological Problems* 235 (Aihwa Ong & Stephen J. Collier eds., 2005); see also George Marcus, *Beyond Malinowski and After Writing Culture: On the Future of Cultural Anthropology and the Predicament of Ethnography*, 13 *Austl. J. Anthropology* 191, 191–99 (2002); David A. Westbrook, *Navi-*

a hegemonic global system. If the diffusion of law is basically a euphemism for the extension, refinement, and entrenchment of a global system, then comparative law might well be over.<sup>6</sup>

One response to such a totalizing idea of globalization is denial. Comparatists tend to be somewhat antagonistic to talk of globalization. Haun Saussy, a literary thinker, has observed that

“When [comparatists] get together to talk about globalization, you can expect to hear about difference, relation, confluence, and hybridity. If they recognize the existence of a global modern culture they are likely to want to accentuate the particular inflections taken on by that culture [...] for without particularity what is left to compare?”<sup>7</sup>

The problem with denial as a response to globalization is that it ends discussion before much understanding has been reached. Although much talk of globalization is overheated, and some skepticism is in order, social life worldwide does seem to be changing in some important ways, even transforming. In particular, at the present time, laws influence one another in many ways. Something more than denial, or its cousins, idiosyncratic typology and moral hygiene, is required for analysis.

On the other hand, and as has already been suggested, a vague conception of “globalization” does not, by itself, do much intellectual work. To say “the world is flat” or something similar won’t get us very far.<sup>8</sup> Locality still matters. (Trust me on this point, I teach at Buffalo.<sup>9</sup>) Indeed, culture, which globalization sometimes seems about to abolish, very obviously still matters. More interestingly still, while we often ob-

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gators of the Contemporary: *Ethnography as Enterprise and Adventure in the Cross Currents of Present Situations* (forthcoming 2008).

<sup>6</sup> While I think the text is correct at its level, Pierre Legrand has argued that, at a yet deeper level, the mainstream of comparative law scholarship is oriented toward sameness rather than difference. Thus we might see mainstream comparative law as, in its deepest desires, in cahoots with globalization. See Pierre Legrand, *The Same and the Different*, in *Comparative Legal Studies: Traditions and Transitions* 240 (Pierre Legrand & Roderick Munday eds., 2003). I simply do not feel myself enough of an insider to generalize about and comment on the proclivities of the discipline at this level of nuance.

<sup>7</sup> Haun Saussy, *In the Workshop of Equivalences: Seventeenth-Century Globalism and the Comparative Pursuit* (May 22, 1999), <http://www.stanford.edu/dept/HPS/RethinkingSciCiv/etexts/Saussy/Workshop.html> (preliminary draft, cited with permission of author).

<sup>8</sup> Thomas L. Friedman, *The World is Flat: A Brief History of the Twenty-First Century* (2005). This dismissal may be a bit unfair on my part, and is certainly hasty. Simplification is part of speech; it is difficult to be a journalist; and Friedman often has something to say. At the same time, it is clear that the tropes of journalism have done much to “flatten” the public discourses that they simultaneously enable.

<sup>9</sup> As US readers are no doubt aware, the fortunes of Buffalo, New York, where my university is located, have been in steep decline for decades. Recent census data indicates that Buffalo is the second poorest major U.S. city.

serve homogenization these days, and it would be foolish to claim otherwise, or to minimize the force of such process, at the same time and almost as obviously, we may observe the emergence of new and important differences among people, and the emergence of such differences runs counter to anxieties, now clichéd, about homogenization.

### 3. LOCAL AND GLOBAL PERSPECTIVES – REACHING THE MIDDLE GROUND

So how to begin thinking about such contradictions, about this tangled thicket that has sprung up in the social garden that we thought we understood? Such thinking was a delusion, no doubt, but there has been a palpable sense of intellectual dislocation over the last long decade or so, a sense of losing rather than gaining understanding. What does comparison have to offer here?

In response, let me suggest that the challenge for contemporary theorists of the diffusion of law is to pursue their inquiries from a middle vantage point. The intellectual challenge is to embrace neither an insistently local perspective that denies globalization altogether, nor a “globalist” perspective from which the local is dismissed as irrelevant or vanishing. Of course, this is easier said than done. How is this middle ground to be achieved? How, as a matter of intellectual practice, do we theorists go about adopting a stance from which opposites—the local and the global—can both be understood? As the annoying bumper sticker “think globally, act locally” unintentionally suggests, it is difficult for people to think on two levels at once.<sup>10</sup> And, of course, even two levels is an oversimplification. There are more than two levels, as William Twining correctly argues.<sup>11</sup> The regional, national, provincial and even individual still matter, and one could say things about categories of the social, such as the ethnic, the racial, the tribal, the corporate ... This ship may not leave port.

If our paralysis is conceptual – it is hard to know where to start thinking – then perhaps analysis can clear away some of the underbrush. The phrase “diffusion of law” evokes an essentially spatial imagination of social process—the term tacitly imports a geography, in which law is somehow transported from one place to another. Again, I have no wish to enter the comparative law tournament; for my purposes here, it suffices to

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<sup>10</sup> Which is not to say the bumper sticker is inaccurate: its righteous thoughtlessness immediately reminds one of a great deal of local politics played out before town boards, in faculty meetings, or for that matter, on bumper stickers.

<sup>11</sup> William Twining, *Diffusion and Globalization Discourse*, 47 *Harv. Int'l. L.J.* 507, 508 (2006).

note that the arguments for transplants, and the arguments against, on the basis of local culture, are intensely geographical. And globalization, another essentially spatial image, is usually understood to be the negation of geography. In suggesting the importance and irrelevance of geography, our very language presents substantial conceptual obstacles.<sup>12</sup>

If language, rhetoric, is the problem, then a different rhetoric might produce more fruitful lines of thought; greater care with our imagery may aid our imagination. So what I am going to sketch in this talk is not a descriptive analytic of how legal change extends through the world, but, instead, a more phenomenological account of how we might go about thinking of such changes. Specifically, what I intend to sketch, and what I hope the panels will continue to explore, is what happens if we understand instances of what we term the “diffusion of law” as instances of the modernization of authority. If we do so, I believe that many of the comparative law problems with “globalization” will fall away, and we even may begin to think through aspects of the current situation that the language of diffusion and globalization obscures completely.

#### 4. DIFFUSION AND MODERNIZATION

Let us start with the proposition that diffusion is a modernizing process. Any instance of the “diffusion of law” is a change in the law.<sup>13</sup> Let me be clear: I am here using the word “modern” in a very simple sense, to mean the experience of the new. Modern can mean many other things, and some of them are relevant to this talk, such as a system of

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<sup>12</sup> The idea that a contradiction (geography is/is not important) is problematic presumes, along with most scholarship, that it is important to be consistent. This presumption is put under some pressure by this talk, i.e., this talk is in some sense an effort to imagine a scholarship less bound to the virtue of consistency.

<sup>13</sup> For the purposes of presentation, especially oral, I have chosen not to spell out the cuts and biases of approaching diffusion through a relatively temporal and subjective description of authority, as opposed to traditional imagery of comparative law, with its relatively spatial description of social phenomena objectively understood, i.e., as things that can be shipped, transplanted, or otherwise moved. My shift of focus from a reified notion of law, usually expressed in legal texts, to the subject of the law mirrors a movement in law and society discourse, from questions about “the effect” of “the law” on “society” to questions about the legal consciousness of actors within the society. See Susan S. Silbey, *After Legal Consciousness*, 1 *Ann. Rev. L. & Soc. Sci.* 323, 327 (2005). And the move to the subject invites the sort of constructed “space” that Doug Holmes and George Marcus are attempting to delineate with their highly situated ethnographies, in which the “culture” that traditional ethnography could presume is conceptualized through the ethnographic encounter, worlds constructed on the “y by interlocutors moving through ill-articulated contemporary spaces. See Holmes & Marcus, *supra* note 5; see also Douglas R. Holmes, George E. Marcus & David A. Westbrook, *Intellectual Vocations in the City of Gold*, 29 *Pol. & Legal Anthropology Rev.* 154 (2006).

ideas, a historical period, or a political or cultural sensibility, but the focus here is on the simple idea of replacing an old way of doing things with a new way of doing things. In this sense of the word, “the modern” can be experienced in almost any time or place. Any time in which we can speak, in the passive voice, of law being diffused, we may also say, conversely and more actively, the people adopted new laws. We may not be able to specify precisely when the law was adopted; we might not even be sure exactly what counts as “law.” Exactly where the law stops is a mystery, as anyone familiar with securities regulation or Kafka’s parable of gatekeepers guarding gatekeepers would concede. However, the fact that law is such a slippery idea, impossible to specify or bound satisfactorily, does not preclude our knowing that people have changed their law.

Moreover, if “diffusion” is to mean anything, the new law must be felt to be somehow from elsewhere. There need be no formal “reception,” but if we are speaking of the diffusion of law, the new law cannot be considered purely indigenous or familiar. (Indeed, our reader of Kafka may wonder if “familiar law” is not impossibility.) A sense of foreign origins is also central to the experience of the modern. In societies whose members regard themselves as at the forefront of historical change, specifically “modern” experiences are generally understood to be foreign, alienating, strange, and unfamiliar. And for developing countries, the modern is explicitly not only next in time, but already occurring somewhere else, in a more developed country. So while the diffusion of law evokes a spatial conception, albeit one involving change and therefore time, modernization is primarily a temporal concept, albeit one with weak spatial associations. *Diffusion and modernization can thus be understood as reciprocal descriptions of the same phenomena.*

Why should this matter to comparative law? Because its spatial associations are relatively weak, the word “modern” implies no specific geography, either local or global. A social development described as modern might be global in scope, or it might take place on one or more smaller stages. The idea of the modern thus allows us to think further, while bracketing geographical questions; we may discuss legal change without being forced, by the terms we use, to decide *ex ante* how “big” the change we are discussing is. “Modern” promises to facilitate our thinking, precisely because it is vague enough to get us past a conceptual obstacle.

Delivering on that promise, of course, requires us to specify “modern” at some point. Otherwise, we have simply asserted that both the diffusion of law and globalization involve newness, and so they are in that regard alike, or overlapping, or something. If that is all we do, we have not moved the ball much beyond the “world is flat” stage. But this is much less of a problem than it might first appear to be. There is no need

for comparative law scholars to attempt to consider “the modern” in the abstract, or in its totality (in fact, I would counsel against the attempt). Comparative law scholars consider the modernization of actual laws, for example, of corporate governance, that is, we tend to confront “the modern” in quite particular situations. Therefore, the instantiation of “the modern” with which we are concerned, in doing comparative law, is usually already quite specified.

In keeping with the shift in emphasis from the objective (the law was diffused) to the subjective (we adopted new law) that I suggested above, I would like to use the concept of authority to organize our thinking about the modernization of law. From this perspective, the legal theorist should imagine authority either by conceptualizing the law binding upon herself, the “felt necessities” of an era, or through an act of sympathy, by imagining herself in the position of one obedient to the law in question.<sup>14</sup> So, to restate the challenge confronting comparative law scholars as they seek to establish a middle ground between the local and the global: the question of the diffusion of law, understood from the position of the subject of the new law as a modernizing and vaguely alien process, can be rephrased as an inquiry into what gives the new and foreign established and local authority. Why were the old ways not good enough? Why were the new ways, despite their foreign and perhaps even global character, adopted?

Acknowledging the fact of modernization thus shades into the normative act of reevaluating authority; the modern is a normative concept. Adopting a law entails a claim that the new law is right for a collectivity as it moves forward in history. The old ways will not do precisely because the modern claims to be required for progress; dramatically phrased, the modern claims the authority of history itself. The authority of the modern is thus specified, not just as a matter of intellectual propriety, but subjectively, ethnographically or even psychologically. Anytime a legal subject acknowledges a new and heretofore somewhat foreign law as her law, she adopts a perspective toward the modern. To acknowledge authority, to establish a relationship of obedience, requires a conception of what one is obeying.

This is uncomfortable. If we understand that the citizen changes her understanding of what authority is binding upon her, and thus her laws, then she has simultaneously, if imperceptibly, redefined what it means for her to be a citizen. The normative thus shades into the politi-

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<sup>14</sup> In what I suppose is my sole publication that might be described as an exercise in comparative law, I criticized what is pejoratively called the “Orientalist” tradition of Islamic law scholarship done in the West for precisely this lack of imaginative sympathy. See David A. Westbrook, *Islamic International Law and Public International Law*, 33 *Va. J. Int’l L.* 819, 892–93 (1993).

cally existential. If our ways were inadequate and must be changed, who were we? What are we, as a polity and so as citizens, becoming? These are especially tough questions for Americans these days.

In the American legal academy, it is common enough to answer questions about what legislatures and other lawgivers do, at least when acting in good faith, by reference to policy. Let us put cynicism aside, and presume that, at their best, people do what they think best, under the circumstances. But the deeper question remains: what informs the understandings of circumstances held by legal actors, understandings that make some things required by law, new and foreign law, but law nonetheless, even though that has not been the way it is done, here? “Policy” is just an effort to return the question of legal authority to the objective (often bureaucratic) realm. But the questions of authority, indeed power (the subjectivities of agency and obedience) are only postponed or suppressed, not denied.

The same answer is often presented procedurally, that is, at least in the US legal academy questions about legal authority are often answered by reference to legal process. So we may quite correctly say that a modern law is authoritative because the statute was passed by the legislature and signed into law, or that a judicial decision after due process is law, or that what parties agreed in their contract is law between them. While such essentially positivist answers are interesting in their way, by placing responsibility upon social institutions always somewhere “out there,” by refusing to engage in what I am calling sympathetic theory, such approaches beg deeper questions. I would like to cast the issue intellectually reflexively rather than procedurally: why would the legislature or judge or parties regard this, and not that, as the law that modern circumstances require?

Moreover, there is no reason to presume, as the positivist understanding of legal authority does, that the law is substantively modernized within essentially stable institutions that legitimate new texts and endow them with legality, like christening ships upon launch. Modernization means that the old ways, also meaning the old institutions and the old procedures, do not serve. Even old institutions change their characters over time; and sometimes there are new institutions. Process as well as substance may modernize. Rephrased, in a time of globalization, diffusion, and general confusion, which institutions are “making” substantive law is a very unclear question. In cases of diffusion, a simple positivism is hardly available to us. If one is willing to press the issue, then where the law comes from, and the question of what the polity is, become real problems. What is the actual site of lawmaking? Perhaps it is the nation, but perhaps the European Union, the international community, the profes-

sion of accountants or some other special interest, or some combination of these things.<sup>15</sup> Under the pressure of such questioning, the positivist identification of law with cohesive institutions falls apart, and the law again comes to be understood as somehow distinct from its geographical or even institutional context. This separation is theoretically awkward, of course, but it is not entirely new: we find it in the translations of law books in early modern Europe, or in the law of nations, or, for that matter, in any transcendent notion of justice that relies on an appeal to legal authority not limited to geographical or institutional instantiation. Hardly positivist, but hardly uncommon.

The notion of modernization helps us think about legal change during a time of great transformation, including globalization, by requiring us to understand the law to be found in places, but not defined by its location in a given society, or even by its origins in a discrete institution such as a legislature or court. Modernization thus helps us think about law, even in its most local manifestations, in ways that neither logically require nor exclude those vast contexts discussed in terms of globalization. It depends, and we are left, as scholars, to ask how, this time.

## 5. IMAGINATIONS OF MODERN AUTHORITY

I have been arguing that an experience of the diffusion of law (or even the sympathetic imagination of such an experience) implicitly requires a legal subject to take a stance vis-à-vis modern authority, and that this stance can help comparative legal scholars articulate, think through, what this or that diffusion signifies, without getting bogged down in rather sterile confusions and conflicts among conceptions of global and local.

Similarly, and more generally, talk of globalization requires us to locate ourselves vis-à-vis our imagination of how our historical situation is changing. For theorists of globalization, the question arises: do our imaginations of modern authority, in the context of legal change, resonate or replicate our imaginations of modernity discussed more grandly as “globalization” or “the current great transformation.” Obviously, I think that they must. To see why, I want to consider four ways in which modern authority is commonly imagined. There may be other ways, of course, and there are certainly other, less provocative, names, but I will discuss modern authority in terms of imperium, fashion, system, and tribe.

In brief, I maintain the following: each imagination of modern authority fulfills certain mental requirements, under Hume’s dictum that

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<sup>15</sup> See Twining, *Diffusion of Law*, supra note 1, at 15 (discussing various sources of the U.K. Human Rights Act of 1998).

reason—even theoretical reason—is the slave of the passions.<sup>16</sup> At the same time, each imagination has its shortcomings. The thinker who seeks to address these failings comes to understand authority in a new way. Therefore, our imaginings of modern authority—and hence our imaginations both of the diffusion of law, and of globalization more generally—are inherently unstable. Let me make this argument more concrete by describing each of these imaginations of modern authority in some detail.

### 5.1. Imperium

The most straightforward way to understand the diffusion of law is imperially. Law is the command of a sovereign. When a sovereign impresses itself upon people outside its established borders, expands, and creates new subjects, we may speak of imperialism. Such expansion is paradigmatically military, but it may also be commercial or cultural, indeed it is usually some blend of all three. In this view, the diffusion of law is accomplished by power. From this perspective, the nineteenth-century university discipline of comparative law is traditionally organized by the distinctions between common law and civil law treatment of private law questions, because those distinctions seemed to be the salient differences between British and French law in the expansive period of those nations' history.

Today, when globalization often seems indistinguishable from Americanization, it is difficult not to associate U.S. influence with the enormous build up of U.S. armed forces since the end of the Cold War.<sup>17</sup> Indeed, my government has made clear that it intends to spread democracy on the American model, and when necessary (or perhaps just convenient) to planetary management, is willing to use military power to do so. This sort of intention was called, in the some ways more honest nineteenth century, the obligation to spread civilization.

There are, of course, profound problems with understanding the United States (or globalization itself) on the model of empires. While the question is fascinating, it is, as they say, beyond the scope of this talk.<sup>18</sup>

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<sup>16</sup> David Hume, *A Treatise of Human Nature*, 415 (P. H. Nidditch ed., Oxford Univ. Press 1990) (1739).

<sup>17</sup> See Andrew J. Bacevich, *The New American Militarism: How Americans Are Seduced by War* 82–88 (2005) (discussing the apparent vindication of American might in the wake of the Cold War and the neoconservative movement to use military power to cement American primacy).

<sup>18</sup> I have long found myself both fascinated by and unsatisfied with imperial accounts of U.S. politics. As with sin, it is important to draw distinctions in politics, but it cannot be denied that there is a certain naughty thrill in offending our republican pieties. And as with dirty jokes, the flippancy of this note masks deep anxieties about our possibilities and limitations. Cf. David A. Westbrook, *City of Gold: An Apology for Global*

For present purposes, it suffices to acknowledge that modernization often comes through force, and that in light of current events, imperial imaginations fill many minds.

The imperial imagination, however, is rather ironically useful for republican politics. By emphasizing the power of government, the imperial imagination asserts that the government has a degree of freedom of action, and so may be criticized on moral grounds by political opponents. “The government made a mistake; we who would have done otherwise should be elected” is a political argument that sounds in a republican democracy. If we are worried about the diffusion of law, or more broadly, about cultural imperialism, we often assert that the influential power, oftentimes the United States, could have acted in some different, better way. Thus, while claiming that politics is authoritarian, the imperial imagination facilitates argument and, if not democracy, at least the hope of reasoned government.

Or maybe not. While claiming to be concerned for the people who endure power, the imperial imagination addresses itself to the emperor, not the people. Perhaps the emperor will be flattered by such speech, and impressed by the speaker. That is, the imperial imagination might be a conceit of bureaucratic elites, the sort of folks who used to be called courtiers. (Some of these coils should be familiar to law professors.)

However indispensable the imperial imagination may be for elite political discourse, republican or otherwise, imperial will is an insufficient way to understand the diffusion of law. First, imperialism simplifies the relations between law and the will of the sovereign beyond recognition. In discussing domestic law, we are unsure what law our legislatures and courts achieve—that is indeed the central problem confronted by law and society scholarship. But the relationship between political intention and law must be even more complicated outside the jurisdiction of the sovereign in question. What law do we think is actually achieved by U.S. government influence? Law simply is not some package of data that can be replicated here, there, and everywhere.

Even more critically, and as I have emphasized throughout this paper, questions of law are necessarily questions of the legal authority recognized by the subjects of the laws. The law that is diffused is adopted, recognized as law, locally. Once adopted, a law of imperial origins is no longer foreign. Thus “imperial” does not necessarily mean illegitimate.

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Capitalism in a Time of Discontent 97–99 (2003) (discussing why “city” and not “empire”); David A. Westbrook, *Law Through War*, 48 *Buff. L. Rev.* 299 (2000) (arguing that the imperial distinction between civilized and barbarian inheres in post-Cold War imaginations of international law and politics); David A. Westbrook, *Triptych: Three Meditations on How Law Rules after Globalization*, 12 *Minn. J. Global Trade* 337, 347–61 (2003) (arguing that 9/11 would require not only deployment of force, but forcible integration into global order).

The Romans—the Arabs, the British, the French, the Spanish, and, yes, the Americans—left law in the wake of their conquests, law that comparative law scholars study today, even when the conquerors have retired. More philosophically phrased, power—as distinct from force—requires the participation of the subject.<sup>19</sup> The hegemon sets standards to which subjects conform themselves, which leads to my second way to regard authority, fashionably.

## 5.2. Fashion

If a diffusion of law is an adoption of law, a modernization, then the law should not be imagined as a liquid, poured from one system into another. Instead, a legal system changes in accordance with what people believe to be modern, a belief often formed in view of the examples provided by other legal systems, models. Rather than diffuse, modern laws are literally re-presented by other jurisdictions.<sup>20</sup>

Understanding the modern in terms of fashion, or perhaps less pejoratively, in terms of learning from models, or even conversion, is not restricted to law. Individuals and entire societies model themselves. Consider Tolstoy's memoir *Childhood, Boyhood, and Youth*, in which he was trying to understand, like all young people, how he was supposed to act, but in French, *comme il faut*, rather than in Russian.<sup>21</sup> Some contemporary scientists maintain that a tendency to copy our fellows, oftentimes without reason, is characteristic of humans as a species.<sup>22</sup> So we should not be surprised when legal actors adopt laws first pronounced elsewhere.<sup>23</sup> That is, modernization may happen because people try to be modern.

To claim that modernization is essentially fashion constitutes a by-now orthodox response to charges of cultural imperialism. After all, the

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<sup>19</sup> Hannah Arendt, *The Human Condition* 201 (1958).

<sup>20</sup> Cf. Duncan Kennedy, *Two Globalizations of Law and Legal Thought, 1850–1968*, 36 *Suffolk U. L. Rev.* 631 (2003) (arguing that certain legal cultures have successively become models for “modern” legal science).

<sup>21</sup> Leo Tolstoy, *Childhood, Boyhood, and Youth* 261–64 (C. J. Hogarth trans., Everyman's Library 1991) (1857).

<sup>22</sup> See Carl Zimmer, *Children Learn by Monkey See, Monkey Do. Chimps Don't*, *N.Y. Times*, Dec. 13, 2005, at F2.

<sup>23</sup> For a well-known example, the transformation of Turkish law, Esin Özüçü maintains that “the difference between reception and imposition is related to the existence or absence of choice. On this criterion alone, the Turkish experience is a substantial and thorough experience in ‘reception.’” “Esin Özüçü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition*, 59 *Nederlandse Vereniging Voor Rechtsvergelijking* 1, 82 (1999).

argument goes, McDonalds commands no armies. Cultural artifacts, including law, are adopted because the people believe them to be better. In fact, to maintain the imperial imagination is to deny the agency of ordinary people, people in developing countries or marginal situations. Thus, if the imperial imagination tends to serve critique of, or negotiation with, great power, those who wish to valorize the marginalized (or sell something to them) are likely to approach modernity as fashion.

Of course people's choices do matter, and so perhaps we all get the exotic we deserve. But such nuanced understandings of the complicitous character of modern authority can easily shade off into a rather vacuous correctness. To view change as essentially chosen is to miss much of the pathos of history. A sense of core and periphery, of leading and developing nations abides, even if it may be impolite to dwell on such hierarchical distinctions, and simply wrong to take much moral comfort in the happenstance of one's superior position. But those things said, upon reunification, East Germany adopted the laws of West Germany, not the other way around.

More generally, and following on the example of German reunification, one might be skeptical of claims of autonomous choice.<sup>24</sup> Autonomy is rare, and almost always compromised. Although we may, as an academic matter, point out the contingency of history, actually doing otherwise—political change—tends to be very difficult. The economic orthodoxy underlying the policies of the Bretton Woods institutions, the imaginations of government that structure the constitutions for failed states, the social structures through which large corporations operate—these things are not natural, but they are hardly up for grabs. History, once it becomes history, is not contingent. Which leads to my third imagination of modern authority, the systemic.

### 5.3. System

Perhaps those developments that we discuss under the rubric of globalization are not only modern in the sense we have been using it thus far, an experience of the new displacing the old, but also modern in the stronger sense of a new form of society, with its own distinct character.<sup>25</sup> And perhaps this as of yet vaguely named modern society is forcefully

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<sup>24</sup> See generally Dominic Boyer, *Spirit and System* (2005).

<sup>25</sup> It is worth remembering, however, that declarations of a new world order themselves have a long history, at least in the European West. See, e.g., Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983); Erwin Panofsky, *Renaissance and Renaissances in Western Art* (1960). And while the Greeks are generally understood to have a cyclical view of history (if a sometimes linear mythology), the decline of the city-state and the rise of empires (first Athens, then Macedonia) reconstituted the logic of politics, and so of political philosophy.

establishing itself, resulting in the destruction of traditional patterns of life. If this is correct, then a vitally important intellectual task (well, at least what I have been doing) is to try to conceptualize this new global society, which I have called the City of Gold.<sup>26</sup>

A pivotal aspect of this new society is law. Obviously, law in the narrow sense, the rules that allow for the landing of airplanes and the transfer of funds and the occasional regime change, is important. From a social perspective, if global society is to be considered a society, it must have structures, deep commitments that it will enforce. More deeply, the need for global society to organize relations among strangers would seem to require formalities that are legal in character. The sheer scale of global society requires the substitution of rights and obligations for actual personal relations. So the existence of global society entails the existence of global law, even if little by way of statute or judicial decision.

The emergence of a law for global society often suggests, as I have already remarked, the end of comparison. I think this is profoundly mistaken, though in the context of this talk I can only suggest the reasons why. Insofar as globalization is understood in terms of capitalism, it is a partial, even impoverished, discourse, for the simple reason that capitalism is an impoverished discourse. And capitalism is a partial discourse by design; its core institutions of money and property are simply not capable of conveying much that is central to being human. Thus much of what it means to be human happens, and must be articulated, *outside* of the logic of global capitalism. One might imagine other discourses with the spatial extension of finance— human rights, bureaucratic science, perhaps, or certain kinds of celebrity— but such discourses are even more obviously partial.

If globalization is vast but impoverished, then it is unsurprising that so many people oppose it. Indeed, globalization appears to be very difficult to think through, but quite easy to think up against. In popular and academic culture, globalization is often defined vaguely and negatively, the dark background against which meanings, legal and otherwise, are constructed among people. Which brings me to my fourth imagination of modern authority, the law that groups make among themselves, going forward.

#### 5.4. Tribe

We may imagine the modern in essentially tribal terms, a word whose nomadic associations I intend.<sup>27</sup> Law may be formed among per-

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<sup>26</sup> See Westbrook, *City of Gold*, *supra* note 19.

<sup>27</sup> To be explicit: I mean the word “tribe” as a provocation to thinking about contemporary society. I do not here use “tribe” as it is used in the sense of classical anthropol-

sons without regard to place. The most readily recognized example of this is perhaps law among the adherents of a religion.<sup>28</sup> Upon a moment's reflection, however, the creation of law more or less outside the institutions of the state is ubiquitous: consider not-for-profit networks, including many educational institutions, churches, medical institutions, and political organizations, but also corporations, and the notion of contract itself. When we speak of civil society, we often speak of legal relations that are not created by a state, that do not fulfill any particular purpose of the state, operate among people not defined as citizens, and are not bounded by the state's territory.<sup>29</sup>

And to take the argument a step further, in a world of regime changes, failed states, and especially ethnic separatism, it is the people (however they may be defined), that give the law to the state, not the other way around. From this perspective, the state is not the source of authority, that is, the state does not occupy the foundational position it occupies in positivist jurisprudence, international law, and modern political thought generally. Instead, people occupy this foundational position, and so the tribal perspective might less provocatively be called the democratic perspective, from *demos*, the people. But I love the smell of provocation in the morning, so I will continue to use "tribal."<sup>30</sup>

It is all too easy to see the tribal as a regression, and the reemergence of tribal claims to authority (one thinks immediately of ethnic violence) as archaic, the return of the repressed. I would like to suggest another view. In the nomadic state evoked by "tribal" we encounter the contemporary. In its emphasis on people rather than territory, the tribal imagination may be seen as a product, rather than a rejection, of globalization. In a world where geography and history are less meaningful, it is difficult to speak of meanings shared among people who live in a particular time and place. Simply put, it is difficult to speak of culture. Thus the turn to the tribal provides what culture once did, community solidarity. Tribal authority responds to the deficiencies of globalization, generally speaking, alienation.

Importantly for our purposes, the deterritorialization of globalization can be positively rearticulated as the move from a law of govern-

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ogy, as a social and political grouping found among some "premodern" peoples, e.g., the various tribes of Native Americans, or their descendants.

<sup>28</sup> The Peace of Westphalia simultaneously symbolizes territorial law, and provides the conditions for a law among believers who may not be territorially organized.

<sup>29</sup> Since the American Legal Realists, or even the progressive movement, it has been commonplace to point out that the state provides the mechanisms for enforcement, and so there is no truly "private" law, and, therefore (the point of the argument), the state may regulate economic arrangements without undue regard for the freedom of contract. Yes, but that is hardly the whole story.

<sup>30</sup> Apologies to Robert Duvall, *Apocalypse Now* (United Artists 1979).

ments, defined by institutions upon a territory, to a law of persons. The private/public distinction is reborn as the creation of association, community, in a context of vast scope, personal mobility, and hence alienation.<sup>31</sup> By way of examples consider the multinational corporation, or Olivier Roy's understanding of globalized, post-modern, and indeed post-cultural Islam and other religions—the product of no one place, no shared history, few institutions—but a shared belief.<sup>32</sup> The law of and among corporations, the law of shari'a among Muslim communities in Europe or in the United States, are in important ways laws of people, and quite if not absolutely independent of states.

By focusing on the creation of special relations among people, the tribal imagination emphasizes how people are differentiated one from another: corporate insiders and outsiders, believers and nonbelievers. The tribal perspective, like the imperial perspective, stresses the creation of social status, the classification of people as members or non-members of the tribe, as inside or outside the bounds of the empire, as Greek or barbarian. The tribal and the imperial perspectives provide, even during the creation of what is widely feared to be a homogenous and alienating world system, or widely touted as the proliferation of equality under the banner of human rights, the possibility of deeply felt political divisions, in Carl Schmitt's strong sense of the word "politics," of a social life structured by alliances strong enough to be used to organize people to kill other people.<sup>33</sup>

Understanding modern authority in such ugly terms is nonetheless an intellectual advance, not just because violence remains a problem, but because a focus on differentiation is required to counter the homogenizing connotations of the words globalization and indeed diffusion of law. Contemporary history is not merely the swirling and obliteration of human differences and therefore political passion suggested by my earlier image of a coffee and cream. The forces of homogenization are not the only forces at work; we also observe forces of differentiation.

In the Enlightenment tradition, modernizing developments have been understood as the unfolding of individual autonomy, phrased in terms of legal doctrine, as the expansion of the realm of contract. As Henry Sumner Maine famously put it, "the movement of the progressive societies has hitherto been a movement from status to contract."<sup>34</sup> And in any number of areas of law—certainly in commercial law, but also in areas of family law, personal expression, and the like—one can hear con-

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<sup>31</sup> Westbrook, *City of Gold*, supra note 19, at 158.

<sup>32</sup> See generally Olivier Roy, *Globalized Islam: The Search for a New Ummah* (2004).

<sup>33</sup> See Carl Schmitt, *The Concept of the Political* 35 (1996).

<sup>34</sup> Henry J. S. Maine, *Ancient Law* 96 (Gaunt 1999) (1861).

tract glorified. It would be wrong, however, to agree wholeheartedly with Maine and simply understand the glorification of contract to require the overthrow of status, although certain kinds of status (one thinks immediately of race) are no longer regarded as legitimate social markers. But the disappearance of some categories hardly precludes the emergence of others. Our time is also witnessing massive reassertions of status; indeed, our economy turns just as deeply on notions of status and property as it does on ideas of autonomy and contract.<sup>35</sup>

Thus, if the liberal narrative of history is the unfolding of contract (which I have called the fashionable imagination), if perhaps bounded (the systemic imagination), then the tribal and imperial imaginations present counternarratives, which turn on the reinvention of status.

## 6. RETHINKING OF MODERN AUTHORITY

This talk has come full circle. Conceptual difficulties with objective and spatial imaginations have occasioned more subjective and temporal lines of thought. But working through the legal subject's temporal imaginations of the diffusion of law as the authority of the modern has suggested how social spaces are reconstituted, even if physical geography is relatively insignificant.<sup>36</sup> Thus comparison is reinvented in a new key. This paper has gone on quite long enough, but before concluding, let me sketch a few of the possibilities, and of course difficulties, presented by the rethinking of modern authority not necessarily geographically defined suggested here.

### 6.1. Despatializing (some) politics and reimagining international law

Among the possibilities, such thinking can help us get past the Westphalian paradigm, with its dependence on territory, physical space, for conceptual and thus for juridical purposes. While difficult for us, who have thought of the power to speak law, jurisdiction, in territorial terms for several hundred years, this may be less radical than it sounds. In the masterly introduction to his arresting *Beowulf*, Seamus Heaney speaks of an emotional geography with “no very clear map-sense of the world, more an apprehension of menaced borders, of danger gathering beyond

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<sup>35</sup> See, e.g., *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171–72 (2d Cir. 1968) (holding that an employer should expect certain risks to arise in the course of employment, even if traditional agency requirements are not met); *Kidd v. Thomas Edison, Inc.*, 239 F. 405, 407 (D.C.N.Y. 1917) (suggesting that, in tort, a master's responsibility for a servant is based not on consent but a historical idea of status).

<sup>36</sup> See Holmes, Marcus & Westbrook, *supra* note 12 (describing the process of reconstructing such an imagination).

the mere and the marshes. [...]”<sup>37</sup> He is also speaking of our world, in which space is relevant to, but hardly definitively organizes, our politics or its dangers.

As a corollary, we are in a position to see that the Westphalian imagination of politics, on which the fields of both public international law and comparative law were founded, is quite a special and even strange imagination. In the nineteenth and twentieth centuries, in Europe and some places influenced by Europe, it was possible to imagine the global space in terms of discrete cultures represented by autonomous sovereigns, whose pronouncements were law, and so whose contractual obligations with like sovereigns, treaties, were also law. As Saussy puts it, we grew used to experiencing and recounting history through the device of the state as protagonist,<sup>38</sup> in the collective yet personal terms entailed in the old word, sovereignty. Those days are hastening on, if not already past.<sup>39</sup>

But a truly despatialized politics, in which political power does not take responsibility for establishing a humane order over a given territory, is radically insufficient. The present administration’s lame response to Hurricane Katrina was outrageous precisely because the government avoided its responsibility for its territory, and the people, insignificant thought they may have been in the calculus of partisan politics, who nonetheless lived there.

## 6.2. Thinking through globalization

Subjective and temporal approaches also may encourage more nuanced interpretations of globalization. We may begin to move away from understanding globalization as a totalizing modernity, and modernity as

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<sup>37</sup> Seamus Heaney, *Introduction to Beowulf: A New Verse Translation*, at xv (Seamus Heaney trans., Norton 2000).

<sup>38</sup> Saussy, *supra* note 7, at 5.

<sup>39</sup> The high positivism of Bentham (who coined the phrase “international law” as a replacement for the rather mystical “law of nations”) was never a good description of international politics and hence law. If we look at the Mediterranean worlds throughout history, medieval Europe, the cultural hegemony of ancient China, and “the civilized nations” of the 19th century, we rarely see positive law organized among autonomous sovereigns. Influence and adoption, armies and *comme il faut* and civilizations and peoples rising are far more usual. Even at Münster and Osnabrück, if we take a few minutes to read the treaties, we see that supranational law was also understood in terms of God, nature, and the law of all nations, that is, the actual Peace of Westphalia required imaginations quite different from the classical (19th and 20th) century model of public international law that roots itself in, among other things, Bentham’s sloganeering for national sovereignty and a mythologized Westphalia. More generally, regnant theory should not be confused with actual history nor even the whole of the law. More generally still, much of the current “great transformation” is a transformation of how we think rather than history or the human condition, a metamorphosis of our worlds, not the world. Cf. Kennedy, *supra* note 21.

the unfolding of liberty, but instead come to understand our globalization as the formation of new contexts, new social spaces, and indeed, new hierarchies.

### 6.3. Reimagining comparative law

Taking the two last points together: if we no longer understand political space in essentially geographical terms, and we no longer understand the processes of globalization as essentially totalizing or even global, then the tension between particular and general, local and global, which has structured much recent comparative discourse, can be reconfigured. Comparative law scholars, too, may think globally.

### 6.4. Acknowledging the instability of theory

While our thinking is increasingly structured by social spaces with peculiar, if any, relations to geography, exactly what constitutes such spaces is unclear, not just practically, but in principle. Each of the four imaginations of modern authority suggested here (the imperial, the fashionable, the systemic, and the tribal), are interrelated, responsive to the blind spots of the others. Because each imagination has its functions, its appeal, and its weaknesses, it is unlikely that any one imagination will banish another from discourse, indeed from an individual mind, altogether. So, for dramatic if obvious example, it is easy enough to characterize recent legal diffusion in Iraq in terms of imperialism, the desire of the Iraqis to have a proper modern state, the systemic needs of a capitalist world order, or as the forceful expression of whichever group of people comes to dominate. And, like the committee of blind men, each of whom grabs a different part of an elephant and tries to describe the beast, each perspective has evidence, good evidence, to support it. Each perspective can be used to articulate important truths about the world. Our thinking is unstable.

### 6.5. Losing our hold on modernity

The modern is in important ways never achieved. The modern experience is not only alienating; it is an experience of losing moorings, of being liberated. But, as already discussed, if we look, we see the reestablishment of moorings, of particularities. Status and so hierarchy are recreated even while they are being destroyed; the progressive dream recedes like the horizon. Once the new law is adopted, it is no longer foreign, and soon enough, it is no longer new. The sense of being newly liberated cannot last; the modern is itself a passing sensation.

## 7. CONCLUSION

At least in the American legal academy, most papers (and all presentations) end on a normative note. It is slightly odd, perhaps, for a bit of theorizing to end with an exhortation—so, now that we know what the diffusion of law is all about, go out and vote!—but in order to discharge my obligations in responsible fashion, I am professionally required to have a gently normative conclusion. So here goes.

If we turn the tribal imagination of authority on ourselves, as scholars, then I hope we consider how much of our work is maintaining the social order of our fields. It is worthwhile to ask how theory can be used to construct a social space, otherwise known as a field or discipline, and how a society so informed constrains the possibilities for theory itself.

But this is too downbeat, so let me try again. I have been trying to suggest that coming to grips with the diffusion of law in an age of globalization requires multiple, rather incommensurate, imaginations of authority. As the example of Iraq makes painfully obvious, in trying to understand present situations, and heroically presuming the adequacy of raw knowledge, the legal theorist must think from more than one stance, must adopt multiple imaginations. So most of us shift from one imagination to another, trying to make sense of the matter at hand. If we were to take the admittedly risky step of acknowledging that our thinking is polyphonic (a nicer word than schizophrenic), that we dance among our incommensurate imaginations of the diffusion of law, and of globalization more generally, then the criterion of approval for social theory would not be descriptive completeness or even impeccable demonstration. Instead we should strive for a certain human gracefulness of response to the world in which we find ourselves. So think gracefully, and enjoy the day.