

# HEINONLINE

Citation: 12 Minn. J. Global Trade 337 2003



Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Wed Nov 11 18:47:39 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=1944-0294](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1944-0294)

## Commentary

### **Triptych: Three Meditations on How Law Rules After Globalization**

**David A. Westbrook\***

At some point now past, it became clear that the context in which we do politics – and so our situation before our law – had already changed. No longer did we need to talk about the historical processes that we still refer to as globalization as if such processes were news. Without our noting precisely when, globalization has ceased to be a possibility, a development, or even a choice and has become an assumption. We have come to understand that the politics that structure our world are defined beyond the confines of the nation state and therefore, to suspect that our inherited intellectual apparatus, based upon the assumption that national institutions were the foundation of political life, is ill-fitted to our new situation. In particular, we do not understand whether or not we should be happy to obey.

Those of us who are lawyers may take some comfort in the fact that legalism ranges the new world. We see the war on terrorism, the construction of markets, and even our identities articulated in terms that are already legal, or terms so formal that the law may use them as need be. But while global politics are often articulated legalistically, the nagging suspicion arises that such expressions are not law, not really. It seems odd to speak of the Rule of Globalization in the same worshipful tones that

---

\* Associate Professor, State University of New York at Buffalo School of Law. This piece situates and extends thinking done for a book, *City of Gold: An Apology for Globalization in a Time of Discontent*. My deep thanks to Pierre d'Argent, Jim Chen, Sherman Clark, Michael Glennon, Marc Miller, Pierre Schlag, Jack Schlegel, Amy, Joseph and Viola Westbrook, and Frank Vogel. Charles Miller's research help and Barb Kennedy's clerical assistance are much appreciated. More specific acknowledgments are provided where appropriate in the text. I take full responsibility for whatever mistakes and foolishness mar this effort.

we traditionally use when discussing the Rule of Law. The formalities that comprise our globalization seem only superficially structured, strangely floating. Reverence does not seem to be the correct attitude to take to such formalities, even if they do in fact constrain us. But if reverence for our law is difficult to muster, then what is the correct attitude for those of us who are lawyers – mandarins who run bureaucracies – to take toward the law? What does it mean to be tending a vast conceptual structure whose authority is so distant as to be rumored?

## I. METHOD: LEGAL SCHOLARSHIP WITHOUT THE RULE OF LAW?

*How can such questions be pursued?*

I am hardly the first to argue that the ideal of the Rule of Law has run its course, and can no longer serve to organize our thinking about politics or our scholarship. A certain impatience with the Rule of Law is implicit in any critique of modernity and certainly has marked “critical” legal thought in the United States since at least the late 1970s.<sup>1</sup> This impatience notwithstanding, critical legal scholarship often seems lost in a great forest, discovering its own tracks, and understanding that it has stopped moving forward. Much of this disorientation is structured as follows: critical scholars analyze (and debunk) claims to legal authority by providing alternate accounts of the social phenomena in question, accounts that only superficially have to do with law. In the critical mode, legal scholarship turns on the ability to uncover some anterior, more authentic, content that masquerades as “law.” Law then is “really” the desire for political power, or a racial or sexual hierarchy, or the drive to acquire wealth (“economic efficiency”), or a moral authenticity, or in Pierre Schlag’s most recent outing, a psychologically sensible arrangement of things (an “aesthetic”).<sup>2</sup> But if we believe law is hollow, a vessel, then we may wish to talk about its content, about the “politics” or “power” or whatever it is that law is

---

1. The literature is large, but ritual citations include: MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (Harvard University Press 1977); ROBERTO MANGABEIRA UNGER, *KNOWLEDGE & POLITICS* (The Free Press 1975); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 *BUFF. L. REV.* 205 (1979). For a bit of perspective, see John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 *STAN. L. REV.* 391 (1984).

2. See generally Pierre Schlag, *The Aesthetics of American Law*, 115 *HARV. L. REV.* 1047 (2002).

“really” about.

Turning their attention to the substratum is difficult for legal scholars, in part because as they stray from the bounds of their discipline, the authority that the discipline can provide them decreases. Scholars outside their disciplines are in the wilderness, relying on their own intellectual and persuasive resources, which is a scary proposition. If we critically-minded legal thinkers nonetheless turn our attention to the anterior and authentic content that we deployed in order to suggest law’s hollow nature, we usually discover that what we had claimed was the real content of the law, for convenience “politics,” had been rather unspecified. When we begin to specify this content, a curious transformation takes place. Like the child in the fairytale, critical scholars cry that the law is less than it appears, that the emperor has no clothes. But while it is importantly true (and fun, terrifying, and so forth) that the emperor is naked (that we are all naked), awareness of these truths resolves none of the questions of standing and protocol that we used to answer by reference to clothing. How, after all, are naked people to live among one another? In answering that question, legal scholars, however critical, tend to deploy the intellectual tools of their training (drawing distinctions, constructing models or tests, making analogies, etc.), the same tools that, during the moment of critique, had just been unmasked as obfuscation and persiflage. Instead of resolving anything, critical analysis of claims to legal authority tends to displace such claims more or less logically intact onto another field of disputation. At least in the hands of law professors, discontent with the Rule of Law seems to lead to a new elaboration of the Rule of Law. Serious discontent with the Rule of Law is something lawyers have great difficulty expressing.

Part of this difficulty is social: Most of our legal scholarship is constrained by the author’s understandable unwillingness to lose the privileges conferred upon us by our discipline. Or, more kindly, we lawyers have difficulty thinking in terms other than legal simply because we are lawyers, victims of our graduate education. But part of the difficulty here is intellectual, substantive: In our ceaseless denial and then reaffirmation of the culture in which we have been trained, our formerly vaunted critical faculties seem to have less potential than they once did. While I have not conducted a poll, I think it is fair to say that U.S. legal scholars generally believe that valid critiques of whatever argument they may make are available, even cheap.

This begets the proposition that the analytic and critical capabilities of U.S. legal scholarship have outstripped the abilities of the discipline to rationalize. Under such circumstances, it is unclear what principled purpose argument could have, and hence it is unclear what legal scholars, as legal scholars, should do.<sup>3</sup>

The practical and institutional response to this situation is balkanization and repetition. While critique may make argument impossible as a whole, vehement yet principled argument is still quite possible within the confines of subdisciplines ranging from economics to radical feminism. Participation in such subdisciplines requires adoption of shared assumptions, discursive primitives that are beyond criticism, that make argument possible. But argument is only really possible within the subdiscipline. For example, economists argue among people who already agree that "the problem" needs to be analyzed in terms of rational individuals; feminists argue among people who already know that gendered hierarchy needs attention, now. Discourse within such disciplines where the rules are already known tends to be repetitive and hence somewhat tiresome. Outside the subdiscipline, however, there is only chaotic discussion of first principles, bad metaphysics, which is more quickly tiresome. In its preaching to the choir, balkanization's successes are modest, although perhaps sufficient for the purposes of institutional stability (participants in various subdisciplines need not talk to one another much). On the other hand, balkanization is not only unsatisfying for a host of reasons too obvious and painful to recount, it is an unsatisfying way to begin thinking about large-scale politics, about globalization.

Among U.S. legal scholars, nobody has more directly confronted this widespread sense that the legal academy is losing its faith in its own arguments than Pierre Schlag. In his recent *The Aesthetics of American Law*, Schlag depicts arguments as modes of expression, modes with typical sequences of moves, manipulable in characteristic ways, producing relatively predictable outcomes.<sup>4</sup> Argument, in short, is a matter of style, although perhaps we should understand "style" with the serious connotations of art, e.g. classicism, baroque, etc., rather than with the more frivolous connotations of fashion, e.g. acid wash, boot cut, bell bottom, etc. Law does matter, after all. But un-

---

3. At this level, critical legal studies, or postmodernism generally, may have been more successful than anyone dreamed possible.

4. See generally Schlag, *supra* note 2.

derstanding legal scholarship in terms of aesthetics, style, is problematic for legal scholars because “once a dispute becomes explicitly aesthetic, rational argument has reached a kind of terminus.”<sup>5</sup> And indeed it has.

How troubled should we be to find that even in the hands of law professors reason has limits, what Schlag calls a “terminus”? Perhaps we should be very troubled, even downright disturbed. The legal community frequently conflates law and reason, and Schlag himself sometimes seems to conflate reason and speech. For example, “[o]nce a dispute becomes explicitly a contest of aesthetics, there is not a whole lot more to say other than, ‘Well, that’s just the way I see things.’”<sup>6</sup> Schlag thus suggests certain decadence, and so it is perhaps unsurprising that he draws ire from his colleagues.<sup>7</sup> Consider this recent statement: “[f]inally[!], for those who experience law in terms of all the aesthetics, a great number of jurisprudential problems become at once clear, rationally insoluble, and no longer terribly interesting.”<sup>8</sup> The terminus of reason seems to signal the abandonment of thought as useless, and with it, law as uninteresting. Presumably force will abide, and so Schlag’s move to aesthetics might be seen as a loss of nerve, a dinner party in the spring of 1914, a refined prelude to violent chaos.

Well, no. While such dramatization is fun, it is also rather self-indulgent, even juvenile [sorry]. For rationalist law professors (often including Schlag), it is easy consciously or subconsciously to bifurcate the world into reason on the one hand and chaos or silence (both associated with death) on the other hand. Rationalists unsurprisingly give reason far too much credit and so conversely tend to assume that reason’s absence is terribly significant, probably horrible. Our lives, however, are lived in the insufficiency of reason. To say that “rational argument has reached a kind of terminus” is, if anything, too flattering to rational argument, because the statement implies that the train was running fine, but has simply reached the end of the line. Schlag suggests that reason’s progress has been arrested, broken, interrupted, that the world used to move on reason’s tracks

---

5. *Id.* at 1105.

6. *Id.*

7. A string citation to the vociferous critics would serve little purpose. I continue to be amazed at the hostility with which Schlag’s not unimportant and very clever ventures are received, as if our republic were threatened by godless witticisms.

8. Schlag, *supra* note 2, at 1102.

and now it does not. But there has not been a train wreck; we were never on a train.

Even much of intellectual life is led in circumstances in which we are acutely conscious of the limitations of rational argument. Consider the practice of criticism, paradigmatically art history or for that matter, any history. Facts cannot be perceived, much less deemed significant, without an intellectual frame in which to do so. But the construction of that frame, e.g. a perspective on a group of artists, or a theory, however inchoate, of historical change, is a painful, difficult, self-consciously problematic project. Consider also the practice of art. Schlag, a gifted writer, forgets himself in the statement: "This is why in law – as contrasted, say, with poetry or painting – rightness cannot be put so easily aside."<sup>9</sup> No poet thinks that rightness can be put aside, that any old word will do. To say that reason ends does not mean there is not much more to say, or to think, or even to argue. Even in law, our recognition of the limitations of our reason – and the awareness of the unfounded nature of our judgments – does *not* mean, "the less interesting and less pressing rightness questions become."<sup>10</sup> Our awareness of judgment, aesthetic qualities, at the root of our reasons means that the epistemological status of our thoughts and arguments are uncertain. We know that our own minds are strange to us. Such awareness, however, does not mean that thought is impossible for us or that we somehow have been excused.

If Schlag is right (and he is) that "law is itself an aesthetic enactment," then legal argument presumes the ability to reach agreement on the frame in which argument takes place; legal argument presumes a necessarily temporary resolution of the contest of aesthetics.<sup>11</sup> Indeed, a similar terminus was reached by no less a rationalist than Kant in the *Critique of Judgment*, in which Kant argued in part that neither conceptual nor normative reason could be conducted except upon the basis of another faculty of mind, judgment.<sup>12</sup> Although we experience judgment most purely in that limited context we call aesthetic appreciation, the faculty of judgment is by no means limited to aesthetics. Instead, judgment (naming) is a precondition to thinking at all. While recognition of the aesthetic aspect at the

---

9. *Id.* at 1108.

10. *Id.*

11. *Id.* at 1118.

12. See generally IMMANUEL KANT, *CRITIQUE OF JUDGMENT* (Hafner Pub. Co. 1951).

foundations of our thinking may be regarded as, in some sense, a terminus of reason, it should also be regarded as the beginning of thought.

To recapitulate: It is easy enough to overstate the importance of our loss of faith in our arguments, and therefore to overstate the significance of the confusion felt in many quarters of the U.S. legal academy. Academic problems are mostly problems for academics, rather than insurmountable difficulties to thought. Socially, our loss of faith in our discipline means only that our positions (education, background, moral rectitude, and so forth) do not suffice to make us worth listening to, or reading. Substantively, our loss of faith in arguments means only that we recognize how feeble a tool our reason is for making life sensible.<sup>13</sup> Politics and law have not ceased to be interesting objects of thought; much remains to be written. But we should be more humble. Law teachers cannot truthfully claim much authority for something we regularly train bright students to become facile at doing, namely making arguments. Our thinking and writing are just that, thinking and writing, rather than “law” or even its more polite form, “policy.”

But what is legal scholarship that does not claim to be law? How do we write if we abandon our professional tendency to understand our own thinking as rationally and hence politically authoritative? A preliminary answer is negative: such writing would have to come to grips with the fact that we are at best persuasive and not binding, to use traditional language. Our works must be worth reading and our arguments must be worth following on their own account.<sup>14</sup> And that standard is not easy to meet, as a few rhetorical questions should make painfully clear. How many law review articles do you recommend to your intellectual friends who are not professors of law? To professors

---

13. This is overstated slightly. Experience matters. But the great and the good rarely understand their authority to derive from the fact that they have witnessed and done; the human tendency is to believe one is great and good because so frequently right.

14. Due to the importance of law and the university in contemporary public life, simply because we are professors we may be worth listening to as a *political* matter, but not so worthwhile as street graffiti, campaign speeches, corporate enthusiasm, military euphemism . . . law professors are no doubt political actors, but that fact is hardly sufficient to justify the thoughtful attention of busy people. For the professor who understands her work to be justified by its practical political effects, the existential situation is even more desperate, for reasons Pierre Schlag makes uncomfortably clear. See generally the reactions to Schlag's work in *Symposium: Beyond Right and Reason: Pierre Schlag's The Enchantment of Reason*, 57 U. MIAMI L. REV. (forthcoming 2003).

of law in other subdisciplines? Not much legal scholarship can stand up to such questions, not even among people who spend much of their days thinking about law, because the vast majority of legal scholarship relies on the authority of the discipline, and secondarily, the coercive force of argument. Abandoning the claim to reasoned authority means abandoning the claim to be read by our peers, the claim that if one is to canvas the literature, we are owed a footnote. We must confront the possibility that our writing is not worth reading, our arguments not worth following much less rebutting, and in fact will not be read or considered . . . before we begin to write.

But that is merely a negative answer, a reminder of how we should not write. Can anything be said about how to write? If we assume both that professors will continue to write, and (improbably) that such writing will not continue to be purely formulaic, like the eight-legged essay with which the Chinese civil service used to test prospective bureaucrats, then what? For that genre of expression known as legal scholarship, what are the formal consequences of abandoning argument?

One place to start is by reconsidering the character of the rebellion and reconciliation that characterizes so much legal scholarship, and indeed so many professorial lives. As discussed above, contemporary frustration with legal rules, even the Rule of Law itself, often leads to critique, which oddly enough often results in the recapitulation of the legal tropes originally held to be offensive, although the recapitulation sometimes takes place in another intellectual field. In legal scholarship, as elsewhere, rebellion is repetitive, often painfully so. Repetition should not, however, obscure the fact that the law professor's law against which scholars rebel, and which they then recapitulate, is strikingly different from real law. The rules of law generated by contemporary scholars are quite literally fantastic: scholars propose rules that are fantasies of authority. Such fantasies are not restricted to scholars who write in a more or less utopian vein. Modest efforts at constitutional re(interpretation), or less modest efforts to assert property rights, or secure efficiency gains, are all efforts to impose the mind's order on a recalcitrant world, yet which claim the authority of law. Such claims, of course, are specious. As we are not kings, such "law" tends to be irrelevant. At best, such efforts are special pleading (the Constitution, our higher ideals, human rights, or simply the law requires the world I wish to see) and as special pleading, unbelievable. It is this wishful quality that leads to the formal conundrum that

confronts so many contemporary legal scholars, and that perhaps suggests a solution.

To state the conundrum: On the one hand, once we agree with Kafka that the law is something that we never yet know, it seems at best dishonest to write as if we were chancellors, empowered to set forth the king's writ. Once we lose the faith that even our own, no doubt very clever, legal argument should be understood as legally authoritative, binding, it becomes difficult to write legislatively to propose the one right rule.<sup>15</sup> On the other hand, considered as fiction, a sort of fairytale in which reason meets politics, politics sees the error of its ways, and we live happily ever after, the law review article is a terrible form: boring, inelegant, petty, implausible, ugly . . . . Once we understand that our thinking does not issue in something that can be justified as a statement ("review") of the law, but is instead an awkward fantasy that politics can be made to conform to our minds, orthodox legal scholarship becomes an almost unredeemed exercise of professional discipline.

Fortunately, the profession's emphasis on years of competitive achievement ensures that only very disciplined people become teachers. Many legal scholars are disciplined enough to work in an artistic form in which they do not believe. To be blunt, many legal scholars are quite capable of writing pulp fiction. Other scholars tell themselves (in an oligarchy, perhaps truthfully) that their voices are powerful. They believe that they are what international law calls "publicists," and their expressions are in fact a source of law. For whatever reason, however, the law review article remains the usual form of legal scholarship. This is unfortunate, because in their allegiance to the law review article, by failing to break form, professors restrict not just how they write but substantively limit what they can say.<sup>16</sup> For pertinent example, the law review article cannot

---

15. This is a reduction of my understanding of Pierre Schlag's critique of U.S. legal thought. I have engaged Schlag's work more extensively – and discussed the possibilities of the essay – in David A. Westbrook, *Pierre Schlag and the Temple of Boredom*, 57 U. MIAMI L. REV. (forthcoming 2003). And it is worth considering the extent to which Schlag stays within, barely, but within, the traditional form of the law review article. Many law professors write books, a form less susceptible to the problems discussed here.

16. Two important, but generally partial, exceptions to this generalization spring to mind. First, many scholars working in critical race theory, feminist theory, and other "outsider" perspectives often use narrative techniques – tell stories – to suggest the experiences that inform the perspectives of their arguments. Second, a great deal of critical theory done by folks who could not plausibly claim to be born outside (insider critical theory? straight white male critical theory?) focuses on the

articulate something as nuanced as a sensibility toward global modernity, as important as that is to contemporary legal consciousness.

Therefore, in order to ask what the Rule of Law can mean for our historical situation, I have not turned to the law review article, which would be an intellectually grotesque (if funny) exercise, but instead have used a rather literary form, the personal essay. As a form, the essay foregrounds the tentative and occasional character of thought, the story of a thought's development. In place of the article's logical necessity and hence political coercion, the essay, like the novel, turns on happenstance and fortuity. Where the article attempts to establish what must be thought, the essay tells how its author has come to think. Where the article denies the effort of always fallible minds, denies its fiction and grasping but simply claims to be true, the essay revels in the effort of mind, treats thought and even writing, with their inevitable failures, as a kind of heroism. Bluntly, *Triptych* is an effort to do law and literature, as opposed to deploying the scholarly apparatus of literary studies to make an academic argument about a legal topic.

Each essay in *Triptych* confronts an area of social life that currently seems problematic, and asks what our subterranean commitments, what the law we understand to be ours, really is. In its dealing with a specific aspect of globalization, each of these three essays articulates an attitude that might be appropriate for a custodian of our formalities (for a lawyer in a self-consciously global society) to take towards the law that now rules.<sup>17</sup> *Does This Really Change Everything?* maintains that law divides civilized from barbarian and legitimates our force-

---

oppressive experiences of legal education and the implausible writing of scholars, that is, on law *in the academy* as opposed to elsewhere in the world. But such variations reaffirm rather than disturb the genre. The professor, radical critique done, returns to the plow and resumes teaching, all the while understanding his or her thought to have been justified insofar as it challenged the status quo, at least for a little while.

17. Jim Chen has also confronted globalization in tripartite fashion, in a typically tough-minded (too tough minded for many of his colleagues) and erudite (ditto) series of articles that defend globalization from the most commonly heard political criticisms. See Jim Chen, *Epiphytic Economics and the Politics of Place*, 10 MINN. J. GLOBAL TRADE 1 (2001); Jim Chen, *Pax Mercatoria: Globalization as a Second Chance at 'Peace for Our Time,'* 24 FORDHAM INT'L L.J. 217 (2000); Jim Chen, *Globalization and Its Losers*, 9 MINN. J. GLOBAL TRADE 157 (2000). There is much to say at this juncture, but for present purposes it suffices to note that Chen's arguments are political, and therefore addressed to an adversary, an interlocutor. The essays that comprise *Triptych*, in contrast, are far more interior.

fulness against the barbarians. *Island on the Horizon of Desire* presents the private law of markets as the matrix through which desires are gratified and more obscurely, public law as a mechanism through which desires are deferred and thereby kept alive. Finally, *Kafka's Laughter* suggests that law – in the sense of formality – facilitates not only the sense of alienation that we recognize in globalization, but also the combinations, and hence the fecundity, that we must also acknowledge. In exploring these roles played by law in global modernity, each essay intimates an attitude that lawyers might adopt: a stoic recognition of necessity; a tragically inclined understanding of law as the frustration of desire; and a comic understanding of law and economics as the terrain of erotic life – the new corn that we may still hope will sprout even from these very old fields.<sup>18</sup> Taken together, the essays that comprise *Triptych* maintain my hope that in spite of our alienation, we may confront our law – our globalized situation – with a certain ironic affection. It is the collective purpose of these essays to begin articulating that stance.

## II. DOES THIS REALLY CHANGE EVERYTHING? THINKING ABOUT GLOBALIZATION AFTER SEPTEMBER 11TH<sup>19</sup>

“This changes everything,” we all said, as soon as we realized that the World Trade Center towers, almost as big as mountains, had nonetheless fallen, that the Pentagon, nerve center of the world’s most powerful military, had actually been attacked, and that there were still other attackers, dead in a field in Pennsylvania and lurking who knew where else?<sup>20</sup> Nor can one dispute that September 11th changed everything for

---

18. See EDWARD COKE, REPORTS OF SIR EDWARD COKE (preface to the reader) (London, John Streater 1672) (“out of the old Fields must spring and grow the new Corn”).

19. Much of the substance of this essay was presented as a talk at the Michigan Law School Legal Theory Workshop on October 15, 2001. Thanks are due to Sherman Clark for both the invitation and his enthusiasm for my efforts. Thanks are also due to Michael Glennon, an international lawyer in the U.S. pragmatic tradition, Pierre d’Argent, an international lawyer in the classical European tradition, and Joseph A. Westbrook, an old soldier and political philosopher – I have needed their responses.

20. *The Economist*, journal of our class, ran a cover story entitled just that: *The Day the World Changed*. THE ECONOMIST, Sept. 15-21, 2001, at 13. Time has moderated the newspaper’s views somewhat. See *How the World Has (and Hasn’t) Changed*, THE ECONOMIST, Oct. 27-Nov. 2, 2001, at 11.

those who died and those who cared about them, for the New York skyline, and perhaps for some sense of what it means to be safe in the United States, although that sense of safety from politics had been fraying in recent years. This was not the first encounter with terrorism on U.S. soil. The World Trade Center had been attacked before, in 1993, and in 1995, Timothy McVeigh killed what we then thought was an impossible number of Americans in Oklahoma City. But even so, the scale, coordination, and success of the attacks on September 11th dwarfed anything we had thought possible. "It is like a movie," people said over and over again, to indicate how impressed they were that something almost completely unimagined, unthought, could be made so real. Perhaps we did not understand, or perhaps the world that we had understood had been destroyed – and so "this changes everything."

These horrors – especially the falling of the towers – bulked so enormous in our imaginations that it seemed obvious to almost everyone that this was a break point in our history, that there was a "before" and an "after" September 11th. People immediately drew parallels to Pearl Harbor, and World War II truly did change everything – the world looked and functioned very differently after that war. Understanding the events of September 11th in terms of Pearl Harbor was to raise the question of whether world history somehow had changed direction again. In this view, the years 1989-2001 were like the Jazz Age, an almost willful denial, not incidentally facilitated by a bull market for equity securities, of the basic ugliness of political life. In those giddy days now past, we talked about One World, the end of history, no bombing among countries with McDonald's, *Perpetual Peace*, and much other nonsense.<sup>21</sup> We talked, in short, about globalization. We worried about the inequality between rich and poor. We considered the nation state obsolete. In this view, September 11, 2001, like October 29, 1929, pierced our bubble, brought us to earth. Politics, we were violently reminded, is in the end a Hobbesian enterprise of grim conflict among enemies. Politics matter. And, the nation matters because it is the form through which political life, and especially the collective traffic in death, warfare, is organized. In this view, among the victims of September 11th lie the grand histori-

---

21. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999) (arguing no country with a McDonald's has bombed another country with a McDonald's); IMMANUEL KANT, *PERPETUAL PEACE* 155 (M. Campbell Smith trans., George Allen & Unwin Ltd. 1st ed. 1903) (1795).

cal narratives we call globalization, destroyed by the pre-modern, presumably authentic force embodied by bin Laden and al Qaeda. If this view were right, then September 11th really did change everything, including our new vision of human history - globalization.

But is this view right? Perhaps this latest conflict is better understood as an expression of globalization, rather than its repudiation. Certainly the governments of the civilized world responded in ways that we have come to expect since 1989, and whose roots go back in important ways to the settlement of World War II, but no further. More interestingly perhaps, however, even bin Laden should be understood in part as an expression of global society, not just as violence reacting to modernity. While perhaps also symbolic of the primitive and archaic past, unutterably different and foreign, terrorists attack from within, turning our society – its schools, its mails, its transportation – against us. Like a cancer, bin Laden depended on the world he tried to destroy. Our civilization responded to al Qaeda in the only ways it knew how: with military force, political conversion, and economic integration, that is, by forcibly reasserting its understanding of civilization in the face of barbarism.<sup>22</sup> September 11th did not change our vision of human history, but left us in the grips of those processes we regard as globalization. Indeed, if we stop to consider dual aspects of how the war on terrorism has been waged, we can see the present conflict as globalization militant.

Immediately after September 11th, U.S. President George W. Bush and British Prime Minister Tony Blair, and indeed most of the leaders of the world's powerful nations, characterized the attacks of September 11th as attacks on civilization.<sup>23</sup> Other characterizations were possible, but were explicitly denied.<sup>24</sup> The war on terrorism was thus announced in post-national terms. The civilized world did not define this conflict as that of one nation against another, i.e. the United States vs. Afghanistan; or of one civilization against another, i.e. the West vs. Islam; or even of individuals against one another, i.e. bin

---

22. For an exploration of how this distinction structures contemporary thought about the international order, see generally David A. Westbrook, *Law Through War*, 48 BUFFALO L. REV. 299 (2000).

23. See Derek McGinty, *Pres. Bush, Tony Blair and Donald Rumsfeld Give Reasons for Striking at Afghanistan*, ABC NEWS: WORLD NEWS NOW, Oct. 8, 2001, available at 2001 WL 22699990; Robert Siegal, *Profile: Presidential Press Conference*, NPR: ALL THINGS CONSIDERED, Oct. 11, 2001, available at 2001 WL 9436794.

24. McGinty, *supra* note 23; Siegal, *supra* note 23.

Laden and al Qaeda vs. their victims.<sup>25</sup> Instead, world leaders defined the conflict in terms of civilization vs. terrorism, or barbarism.

This is not to gainsay the fact that there was a lot of flag waving, and we continue to hope that God blesses America. Such displays of patriotism were to be expected for the simple reason that Americans were the targets on September 11th, and so we needed cheerful flags and divine blessings. But even these displays of patriotism were not expressions of a nationalistic understanding of the conflict. The “war on terrorism,” or “America’s new war,” was not defined in national terms. As a matter of government policy and what appears to have been the vast weight of popular opinion, we defined the war as a conflict against an activity - terrorism - rather than against a people or a nation. We said that those individuals who engage in that activity are barbaric. We thus understood this war to be between one state of being, civilized, and another state of being, barbaric. In our understanding of the war on terrorism as a conflict between ways of being, the war functions as an engine of history – like globalization.

How do civilized governments fight barbarism? First, as an institutional matter they form a coalition. Wars fought on behalf of civilization must be waged multilaterally, lest they be understood as old-fashioned expressions of the particular interests of national governments.<sup>26</sup> In the sort of war that has become paradigmatic since the end of the Cold War, violence is not legitimated as a territorial expression of the particular interests of a government. In the war against terrorism (Afghanistan), as in the wars against genocide (Bosnia, Rwanda, Kosovo, East Timor) and the war against starvation caused by chaos (Somalia), military intervention was distinguished from conquest. As an institutional matter, however, war remains organized by the nation state. The Yugoslavian debacle rather convincingly demonstrated that the United States government remains the political institution best able to conduct military operations over long distances. There is thus a conflict between ends – defined supranationally, and means - defined nationally. Modern supra-

---

25. Understanding September 11<sup>th</sup> in terms of individuals would have rendered the attacks mere crimes, a characterization that would have made it difficult to understand the conflict as a war.

26. CARL VON CLAUSEWITZ, *ON WAR* 87 (Michael Howard & Peter Paret trans., Princeton Univ. Press 1976) (1832) (“[W]ar is . . . a continuation of political intercourse, carried on with other means.”).

national wars, fought on behalf of civilization, are forever at risk of being perceived as old fashioned wars of national interest. It is therefore essential that other countries and supranational organizations, especially the United Nations, support the efforts that are, as a practical matter, made by the military personnel of some national governments, most often the United States.<sup>27</sup>

The bifurcation between civilized and barbarian that organizes modern warfare leads the civilized world to emphasize highly targeted military intervention. The civilized world plays to its strengths or at least to its perception of its strengths. In particular, while the U.S. predilection for bombing may be debatable on military grounds, it is difficult to argue with the proposition that nothing so symbolizes our military aspirations as air superiority.<sup>28</sup> But we cosmopolites are a bit uneasy with such aspirations. Surely, an advanced civilization that almost effortlessly achieves air superiority, carries with it moral obligations, and conversely, we have defined barbarism as those who express their political preferences violently. The idea of civilized violence thus presents substantial contradiction. Technology, smart bombs and the like, are one way to manage such tension, allowing us to express ourselves violently without giving up our claim to historical superiority. As a result, the U.S. military worries about relatively minuscule losses of life. Stressing the difficulty of their missions and overall professionalism, the Air Force apologized for the killing of civilians in Afghanistan.<sup>29</sup> What, exactly, did anybody think was going to happen once bin Laden began the war?

In defining the war as a conflict between civilization and barbarism, we effectively abandoned the old distinction between friend and enemy in favor of a distinction between regimes who obstruct the interests of civilization and everybody else. So Afghans were not the enemy.<sup>30</sup> Muslims were not the enemy.

---

27. The current debate over whether to use military force to overthrow the government of Iraq's Saddam Hussein may be understood in terms of this asymmetry, i.e., the unwillingness of a number of other leading countries to legitimize decisions made by the United States.

28. There are, of course, other reasons to emphasize bombing. For obvious example, bombing is quite safe for the military personnel actually involved, relative to other forms of combat, and we should expect a degree of prudence from our military leaders.

29. "The United States has repeatedly said it is not targeting civilians and regrets any loss of life." *US Admits Second Bombing Error*, BBC, Oct. 27, 2001, at <http://news.bbc.co.uk>.

30. See, e.g., President George W. Bush, Address to a Joint Session of Congress and the American People, Freedom at War with Fear (Sept. 20, 2001), available at

There was no enemy, just people whose regimes were not yet civilized. This was quite a change. The traditional view had been that being a citizen of a bad government was risky; nobody considered a citizen in Hitler's Germany to be safe. Now, however, if a few civilians are killed during an attack the United States Air Force can be expected to apologize. Once we understand national governments ("the regime") to be an administrative unit of the world order, rather than the political and moral representative of a people, then the regime's culpability says nothing about the culpability of the people. We are free to destroy the regime while helping the people. As United Nations Secretary General Kofi Annan put it, while bombs were falling, "[t]he people of Afghanistan, who cannot be held responsible for the acts of the Taliban regime, are now in desperate need of aid."<sup>31</sup> The Air Force dropped aid packages on the people even as it dropped bombs on the regime. Governments and the people they represent are understood to be entirely distinct. Intentional violence is permissible only against the former.

The globalization of our politics has transformed the way we end wars. Indeed, globalization in its modern form began with the peace following World War II.<sup>32</sup> Contrast the vindictive peace of Versailles with the generosity of the Marshall Plan: The difference reflects the Allies' realization that it is not enough to win the war, the peace also must be won.<sup>33</sup> And so in Afghanistan, as expected, we have seen enormous amounts of humanitarian aid. Indeed, the humanitarian aid started not with the end of the conflict but with its beginning. And, when the Taliban were overthrown, we saw the initiation of massive programs aimed at integrating the Afghan economy into the West. As with the Germans, as with all defeated nations, in Afghanistan it is important to make starting the next war bad business. Afghanistan is the latest example of what has become

---

<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>

31. Press Release, Secretary-General of the United Nations Kofi Annan, to the Organization of Islamic Conference Extraordinary Foreign Minister Conference in Doha, Organization of Islamic Conference Has Central Role in Devising Effective Strategy to Combat Terrorism, Secretary-General Says (Oct. 10, 2001), available at [www.un.org/News/Press/docs/2001/sgsm7989.doc.htm](http://www.un.org/News/Press/docs/2001/sgsm7989.doc.htm).

32. As used in this piece, "globalization" refers to a set of political and cultural processes quite different from the "globalization" of trade and colonialism that ended with the World War I.

33. "Victory in this war is the first and greatest goal before us. Victory in the peace is the next." FRANKLIN D. ROOSEVELT, *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 32 (Samuel I. Rosenman, ed., Harper & Brothers 1950) (1943).

the typical response of the civilized world to the barbarian world: pacify and integrate.

Osama bin Laden acts like he is opposed to all that is Western and presumably opposed to globalization. Bin Laden said that the events of September 11th divided the world into two, that of belief and disbelief.<sup>34</sup> One might also say that of the dar al Islam, the domain of peace, and the dar al Harb, the domain of war.<sup>35</sup> And it is true that, as suggested above, we defined bin Laden and other terrorists as barbarians, and so in some sense beyond the pale of our civilization. Those things said, on closer scrutiny a different picture of the terrorists emerges.

1. Consider the weapons: The attacks of September 11th were carried out with Boeing 757 and 767 aircraft. These are not just products of globalization but current fly by wire (computer controlled) passenger planes. Perhaps the Internet is a better symbol of globalization, but the modern jetliner, paid for largely by business travel, must come close.<sup>36</sup>
2. Al Qaeda was a technically sophisticated operation that communicated electronically.<sup>37</sup>
3. Bin Laden skillfully used mass media, especially videos.
4. Al Qaeda was financed by money made in the Saudi construction boom. This money flowed, of course, from the Saudi participation in the world oil market. Al Qaeda subsequently branched out into other international markets, such as the international drug market.<sup>38</sup>

---

34. "These incidents divided the entire world into two regions - one of faith where there is no hypocrisy and another of infidelity - from which we hope God will protect us." Videotape: Osama Bin Laden, *cited in Bin Laden's Warning: Full Text*, BBC News, Oct. 7, 2001, available at [www.news.bbc.co.uk/1/hi/world/south\\_asia/1585636.stm](http://www.news.bbc.co.uk/1/hi/world/south_asia/1585636.stm).

35. See generally David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VIRGINIA J. INT'L LAW 819 (1993) (discussing the bifurcation between belief and disbelief).

36. The Boeings, however, were apparently seized with very primitive weapons, box cutters. So the destruction of the World Trade Center Towers were accomplished with a peculiar mixture of ultramodern and most primitive technologies, computers and knives.

37. In another mixture of the ultramodern and the primitive, however, the disks themselves are often encrypted and then physically transported, making electronic interception of their communications impossible.

38. See, e.g., Douglas Farah, *Al Qaeda's Road Paved With Gold; Secret Shipments Traced Through a Lax System in United Arab Emirates*, WASH. POST, Feb. 17, 2002, at A1; Mark Galeotti, *Drugs Fund War*, WORLD TODAY, Dec. 12, 2001, at 12 ("The global narcotics trade is central to the 'war against terrorism' and military operations against Osama Bin Laden's Al Qaeda organization. It funds all sides in the

5. Al Qaeda appears to have taken short positions on various international equity markets in order to profit from their foreknowledge of the losses of September 11th.<sup>39</sup> Short selling is hardly the action of folks who are not comfortable with the heart of globalization, the financial markets.<sup>40</sup>
6. Bin Laden himself traveled widely, showing no particular tie to a geographical location. The Sudan and Afghanistan are thousands of miles apart and bin Laden himself was Saudi. He was a terrorist analogue of the modern high tech worker with only a notional home.
7. Finally, the scope of al Qaeda's operations was nearly global. The organization was linked to terrorist attacks in countries including Indonesia, Kenya, Tanzania, the Philippines, the United States, and Yemen. In addition, al Qaeda operated out of many countries, including Afghanistan, Canada, Germany, Sudan, and Saudi Arabia.<sup>41</sup>

As cosmopolitan as al Qaeda is in some ways, it is not the cosmopolitan character of the network that prevents us from understanding their terrorism as a protest against globalization and interpreting September 11th as a conflict between some pre-modern perspective and our modernity. Nor does the impropriety of understanding killing as argument inhibit the U.S.

Afghan civil war, as well as a substantial proportion of Al Qaeda's operations."); Roula Khalaf, *US Seeks More Saudi Assistance on Terrorism*, FIN. TIMES, Jan. 29, 2002, (noting Saudi displeasure at the listing of several Saudi nationals and charities on the U.S. Treasury list of groups whose assets must be frozen); Syed Saleem Shahzad, *How Osama bin Laden Really Builds His Fortune*, ASIAN TIMES ONLINE, Sept. 20, 2001, at [www.atimes.com/ind-pak/CI20DF03.html](http://www.atimes.com/ind-pak/CI20DF03.html); Department of Defense, *Background Briefing on the Al Qaeda Terrorist Network*, Feb. 19, 2002, available at [www.defenselink.mil](http://www.defenselink.mil) ("[T]he way al Qaeda financed itself was multifaceted.").

39. Adam Cohen, *How Bin Laden Funds His Network*, Oct. 1, 2001, at [www.time.com](http://www.time.com). See also Press Release, Securities and Exchange Commission, *Request Relating to Information Pertaining to the Terrorist Attacks* (Oct. 18, 2001), at <http://www.sec.gov/news/press/2001-115.txt>.

40. Interpretations vary, but in general, the Islamic tradition constrains the charging of interest (*riba*), in ways akin to Christian injunctions against usury. Short selling, generally through derivative instruments, indicates a comfort with financial arrangements far more complex – and so morally opaque – than mere interest, however exorbitant.

41. As of March 6, 2002, Defense Secretary Rumsfeld reported that Al Qaeda was operating in between thirty and sixty countries. Editorial, *Daschle and Gardez*, WALL ST. J., Mar. 6, 2002, at A16. See also U.S. INFO. OFFICE, MAP OF COUNTRIES WHERE AL QAEDA HAS OPERATED, available at <http://usinfo.state.gov/products/pubs/terrornet/12.htm> (last visited Mar. 2, 2002) (including appended list of forty-five countries).

chattering class from seeing September 11th as a serious antithesis to the historical trends we call globalization. We perforce understand September 11th in terms of globalization and other familiar political tropes because insignificant numbers of us have intellectual equipment that would allow us to do much otherwise.

To understand a foreign culture, or even to understand one's own culture in the highly conscious terms required for serious comparison, is exceedingly difficult work. It takes time and insight. Consequently, in the wake of September 11th we saw intellectual concern shift to questions that, while not irrelevant, were more notable for their availability. We immediately worried about issues such as U.S. adherence to the U.N. Charter (as if the Charter governed conflict in today's world); whether the investigations into terrorism would usher in an era of McCarthyism; racial injustice; rules of evidence for criminals; and treatment of prisoners. Europeans worried about U.S. power and our relationship with Israel. How *easy*. Evidently, for policy discourse, September 11th changed almost nothing, and we were left to confront the world with tried and tested arguments drawn from popular history. The war on terrorism has thus been rendered more politics, internal to modern conceptions of the world including globalization, rather than some form of argument through deeds against modernity. September 11th has become a symbol of our anxiety – as if we needed another – but no more. In terms of our large scale politics, the course of history and suchlike, the events of September 11th did not change everything, and that which was fundamental to a worldview has remained so.

That is not to say that there was nothing new in the world after September 11th. For example, the war on terrorism has presented many problems for established ideas of international law, which remains largely defined in terms of autonomous nation states even though law professors have pointed out *ad nauseum* that the international legal environment is not comprised solely by such actors. The classical theory of international law is dead, but it rules us from the grave.<sup>42</sup> And so we have had problems saying what “the law” is with regard to al Qaeda, in large part for the simple reason that al Qaeda is not a state. But never in the modern era had it been necessary to

---

42. FREDERIC WILLIAM MAITLAND, *EQUITY AND THE FORMS OF ACTION* 296 (1st ed. 1909) (“The forms of action we have buried, but they still rule us from their graves.”).

deal with a non-governmental organization capable of inflicting losses on the same scale as a national military.

More generally, we still require a new grammar through which to think about the violent acts we commit. It is clear that neither the classical formulation of the law in war nor the text of the UN Charter adequately articulates the felt necessities of the armed interventions that have become increasingly common since the end of the Cold War. For familiar example, how are prisoners in the war against terror like those accused by the criminal justice system (how does war relate to crime)? Both warfare and criminal law are forceful expressions of the state, but we still need to think about the formalization of our violence. For now it suffices to say that on September 11th the international community did not have, and does not yet have, a firm and formal, and in that sense, legal, articulation of the rules governing the kinds of politically organized violence we now routinely conduct. With regard to this aspect of our lives among one another, we are not yet as lawful as we might like to be.<sup>43</sup>

We are working out solutions to such difficulties. We are entering a time of law-making, a jurisgenerative phase. Particularly at first, we can expect the efforts of the international community (and especially the United States) in this regard to be somewhat ad hoc, improvisational, and therefore less than perfectly consistent. Moreover, the United States and other nations will resist any notion of law that purports to constrain or even rationalize their ability to defend themselves, or, more broadly, to protect vital interests.<sup>44</sup> But that the hyperpower will resist efforts to get it to promise to recognize the authority of congeries of foreign bureaucrats is hardly surprising and does not change the inevitability of rationalistic formal articulation (and by "law" I mean little else) of the issues raised by September 11th. Terrorist attacks of this magnitude and the international cooperation required to punish the perpetrators and prevent similar acts must give rise to new international law. Consider cash flows, airports, data privacy, ethnic profiling, uni-

---

43. I do not say reflexively (as an international legalist should) that we need further legal articulation. To claim that law is the answer at this point in the argument would require an implicit position vis-à-vis law and modernity that I am not at present prepared to make. Indeed, the difficulty lawyers have with a surfeit of law is at the heart of this piece, and is addressed directly at the conclusion of the next essay, *Island on the Horizon of Desire*.

44. The obvious examples at present are the U.S. refusal to participate in the International Criminal Court and unilateral U.S. action in Iraq and elsewhere.

university study – such matters almost inevitably will be objects of legalization, and such legalization will most likely be international in character. Not only will such new laws reflect a time of globalization, they will in fact be engines of globalization.

September 11th also raised classic problems of international law, and here too we have already seen the first stirrings of new law. In a speech on the evening of September 17, 2001, President Bush announced what some have called the “Bush doctrine.”<sup>45</sup> The Bush doctrine is the idea that no distinction will be made between terrorists and states that harbor terrorists.<sup>46</sup> States that harbor terrorists will be considered to be responsible for the terrorist’s acts. So what had been a “terrorist act,” i.e., a crime, is thereby converted into an “armed attack.” As that term is used in international law, an armed attack triggers rights to self-defense, rights that we saw exercised when the U.S. and British forces attacked the Taliban.<sup>47</sup>

The Bush doctrine almost immediately accomplished a number of things on behalf of the civilized order. First, on its face, it helped to punish the guilty. At domestic law, helping murderers is a crime. A state that has others do its killing is certainly culpable and ought to be punished. Second, the civilized world, and the United States in particular, could not absorb al Qaeda’s attacks indefinitely without responding. But al Qaeda is not a government. It represents no territory and therefore presents no stationary, well-defined military objectives. The Bush doctrine, to be blunt, gave the U.S. military a target, namely the Taliban.

The real importance of the Bush doctrine, however, lay in its secondary and higher order effects. The doctrine compels regimes to police their populations, lest they be deemed to harbor

---

45. President Bush said: “Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.” Bush, *supra* note 30. For discussion of this as the Bush doctrine, see Michael J. Glennon, *Forging a Third Way to Fight: “Bush doctrine” for Combating Terrorism Straddles Divide Between Crime and War*, LEGAL TIMES, Sept. 24, 2001, at 68, available at <http://www5.law.com/lawcom/displayid.cfm?statename=DC&docnum=87562&table=news&flag=f>ull.

46. Glennon, *supra* note 45, at 68.

47. Under classical international law, harboring terrorists could be considered an act of war. In order to declare war, however, the aggrieved state had to demand that the state allegedly harboring the terrorists surrender them. In announcing the Bush doctrine, the President did not acknowledge an obligation to make a formal demand on a foreign government. In fact, however, the Bush administration made demand on the Taliban for bin Laden and was refused.

terrorists, and treated as terrorists themselves, i.e., killed or at least removed from their positions of power and otherwise punished. In order to avoid such treatment, the Bush doctrine requires regimes to realize the traditional understanding of what a state is – the institutions of society that collectively possess a monopoly of force. The Bush doctrine thus forces putative states to become in fact what they already are conceived to be. Conceived, that is, in the conventional modern (once Western, now nearly universal) view; effective policemen, not just domestically, but for the world order. The Bush doctrine thus uses war, or the threat of war, to establish lawful political order.

In order to be so compelled, it is not necessary that a regime actually harbor a terrorist and that the terrorist actually commit an act of violence. The Bush doctrine forces states into alliances. Every nation, said President Bush, has a choice regarding which side it wishes to be on in the war against terrorism.<sup>48</sup> There is no neutrality. The state, which may only barely be a state, is forced to participate (act like a state) in the organization of an international civil order that can police the globe. In so doing, the state becomes a modern – or perhaps post-modern – political entity, defined by its participation rather than its autonomy or independence from outside interference.

The Bush doctrine would seem to have an obvious limitation. One can easily imagine a situation in which the “state” had no practical recourse against terrorists operating from within its borders.<sup>49</sup> Some governments are simply not in control of the people in their territory. If a state cannot control a terrorist organization located within its borders, then the international legal order may threaten or even harm the state without having any effect on the terrorists. From this perspective, it might be argued that the Bush doctrine is ineffectual where it is most needed. This perspective, however, misses the deeper function of the doctrine. To understand the ineffectiveness of a given state as a limitation on the civilized legal order is to miss the point that the state is defined, as a state, by its ability to participate in the world order. A state that will not or cannot

---

48. See Bush, *supra* note 30.

49. It would be interesting to know the course of bin Laden’s negotiations with the Taliban. The dramatist in me would like to believe that the Taliban, or many of them, were conned: bin Laden appears as a rich Islamic war hero, who wants to grace their country and will pay and fight as necessary. What is a gang of impoverished students not to like? In this drama, the students were unable to admit that they were gulled into giving up a great deal of effective control, and ultimately even their lives. But this is sheer speculation on my part.

control terrorists within its borders is *ipso facto* no longer entitled to the deference associated with sovereignty. An ineffective state is a failed state. Thus the Bush doctrine either forces states to act like states and police their territory, or admit that they have failed and therefore may be reconstituted. Far from saying the state is irrelevant, the Bush doctrine says about states what Voltaire did about God: If states didn't exist, we would have to invent them.<sup>50</sup>

This is a switch from classical international law, which tended to presume the state. Admittedly, within the classical view there were some difficulties in determining whether or not a state existed in cases involving civil wars, disputed territories, and so forth. The received solutions to such problems were called doctrines of recognition. Objective ("declaratory") doctrines of recognition attempted to set forth the indicia of a state's existence; subjective ("constitutive") doctrines argued that the state comes into existence when it is recognized by the community of states. Even with the aid of such doctrines, however, the problems remained difficult. A state, after all, has always been a rather metaphysical thing, and in some cases, it has been hard to tell whether or not one should say a state existed. Doctrinal disputes over the existence of a state were rather finely wrought, real angels on pinheads stuff, but the important point for present purposes is that such arguments were relatively factual: The question for classical international law was to determine whether a state actually existed in a given situation, so that other states might begin making treaties and establishing customs and otherwise doing international law.

The current situation is importantly different. The global polity cannot afford countries like the Afghanistan of 1980-2000. After September 11th, we felt both compelled and right – in some important if still inchoate way we felt it was legal – not only to revenge ourselves upon bin Laden and al Qaeda, but to topple the Taliban, and to (re)build the state, indeed the nation, to impose modernity. As the playwright Peter Handke put it, thinking about Yugoslavia, "[t]his is not a people, just a mere entity. This is no country, just a gray zone. And gray zones can no longer be tolerated geopolitically."<sup>51</sup> Contemporary public in-

---

50. FRANCOIS MARIE AROUT DE VOLTAIRE, EPI TRE A L'AUTEUR DU LIVRE DES TROIS IMPOSTEURS 2 (1770).

51. PETER HANDKE, DIE FAHRT IM EINBAUM, ODER, DAS STUECK ZUM FILM VOM KRIEG [TRAVELLING [sic] BY DUGOUT, OR THE PLAY ABOUT THE FILM ABOUT THE WAR] 93 (1999), quoted in Westbrook, *supra* note 22, at 329 n.34 (author's own

ternational law seeks to require that business be conducted through recognizable bureaucratic machinery, in most cases, through a state. We need states. This is why we have ended up in Yugoslavia, in East Timor, and elsewhere – replacing failed states and nation building.<sup>52</sup>

At least until recently, however, we waited until the state in question actually failed, and failed miserably. From both humanitarian and security perspectives, we waited far too long. The Bush doctrine is an expression of the idea that the global security order cannot tolerate large spaces outside the jurisdiction of a *responsible* state. Where public international law once asked whether a state existed as a matter of fact, or at least as a matter of common consensus, contemporary public international law asks whether a given regime can fulfill the international obligations of a state. Most importantly, can the putative state control its inhabitants? This is the new sovereignty – in which the nation is defined in terms of its ability to participate, as opposed to the traditional understanding of sovereignty as autonomy – with a vengeance.<sup>53</sup> The nation has not been abolished; it has been redefined as an administrative unit of the global polity. Governments that do not fulfill their critical obligations will be relabeled regimes, like the Taliban, and replaced at the option of the civilized world. From this perspective, the response to September 11th looks like the prelude to an extension of global society into a remote corner of the planet.

Attempting to articulate what I thought we had done in Kosovo and elsewhere, I wrote the following:

The civilized world, at its best, judges barbarians in the hope of converting them, of creating order so that human intercourse may flow through the channels of politics rather than down the sinews of war. All of our wars, even little adventures in oil rich regions, must therefore be wars to end all wars, must be justified in terms of an enlightened hope for human fruition, must be efforts to impose law. We moderns fight wars in order to prepare people for politics.<sup>54</sup>

---

translation).

52. Despite its early rhetoric, the Bush administration has been faulted for not working hard enough to ensure that the new Afghanistan is a political success. There is some sense that the administration has changed its priorities on this front. See Richard Holbrooke, *Letters to the Editor: Long-Term Dangers in Afghanistan*, WALL ST. J., Mar. 29, 2002, at A13.

53. See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (Harvard University Press 1995).

54. Westbrook, *supra* note 22, at 346.

The same holds true with regard to Afghanistan and in time the other havens of terrorism. None of which is to say that we will become one bourgeois world in fact. We may not succeed in integrating Afghanistan into the international order. We may be unwilling to discipline a barbaric regime that poses little threat beyond its borders and which is powerful enough to be a necessary participant in international affairs. But it seems clear that if such places cannot be quarantined or their sins ignored, as is the case with at least Afghanistan, then integration is the only thing we know how to do.

Integration is not merely political. Winning the peace means the establishment of a social order, a degree of economic integration, and consequently, a process of acculturation. So we must still talk about globalization, especially after the events of September 11th. At home, we are not about to stop markets, particularly now that shopping has become a patriotic obligation, and trade has been equated with civilization. (For our civilization, created by globalization, the equation is true enough.) More interestingly, we must talk about globalization in the heart of what appears, at first blush, to be old fashioned national power politics. Although serious questions remain concerning specific determinations, e.g., who counts as a barbarian on a given day, and how weapons may be deployed, these are mere lawyers' questions. Globalization has already gone much further than we are accustomed to acknowledging. Globalization has gone so far that we have difficulty recognizing how it has reshaped the ways in which we can think about international politics, and so law. The question before us is not what law defines a peace with an adversary. The question is how to make an international order that we recognize as peaceful enough, and in that very limited sense, just. Far from changing everything for us, September 11th has forced us to confess our commitments to a globalized vision of what it is to be modern.

### III. AN ISLAND ON THE HORIZON OF DESIRE

At the reflective end of summer, I found myself on Ocracoke Island, perched above Silver Lake Harbor, watching the sunset, eating Thai food, and contemplating a thing of power and beauty, an ocean-going catamaran. Rumor later claimed the boat to be more than 70 feet long, over 30 feet wide, and the number a man remembers, the tip of the mast to be 105 feet above the water. Perhaps these numbers were true; I have little

experience judging such things. What I can say is that each hull rose from the water like a white cliff, the cabin had the odd angles familiar from pictures of “stealthy” military aircraft, and I looked up from our third story deck to the light atop the mast, twinkling ever brighter as darkness fell. The boat was stunning. The men in a village reachable only by boat and small plane could be seen on docks, on the street, shamelessly staring. I wondered where she – the pronoun seemed necessary for such an object of desire – was from, where she was going, who controlled such a craft, and most of all, what it cost to be so regarded.

My wife and I have vacationed on Ocracoke over a number of years, but we had never seen a boat like that. For that matter, we never had been able to get Thai take-out either. Although we had not seen such things on the island before, we were not entirely surprised by their appearance. Shortly before our vacation, *The Wall Street Journal* published a lengthy survey of beaches, on which Ocracoke was included, and was far and away the most interesting beach discussed.<sup>55</sup> Perhaps there was some connection to the so New York statement by some travel writer I noticed somewhere – buzz is difficult to recall – that her favorite place for lunch was an obscure deli operated out of a backroad store owned by a family that had lived on the island for many generations. Plainly, Ocracoke had become fashionable, desirable to many when it had once been known only to a few. The signs were everywhere. Cars sported license plates from all over the country. The local paper had been bought by a woman with dot.com money. The service personnel, once exclusively local, had become exotic in more familiar ways: beautiful girls from Quebec served Seattle-style coffee and cavorted with boys whose lithe semi-nude bodies were decorated and pierced. Some of the staff were even from Mexico. Rent was higher than we remembered, and terms had become inflexible. Had I known these things before this last visit, I would almost have expected the excellent chicken with basil and red chilies, and that catamaran, the plaything of the superrich. Ocracoke had become someplace in the world of money.

This is a matter of importance to those of us who love the island for a certain set of attributes, for what we might, in a moment of weakness common among “sophisticated travelers” de-

---

55. Nancy Keates, *In Search of the Perfect Beach*, WALL ST. J., May 25, 2001, at W1.

scribe as the “authentic charm” of the place. But how long, I wondered over the next few days, sautéing scallops with butter and lime, or swimming in the Atlantic without benefit of life-guards, how long can such charm last, now that Ocracoke is so fashionable? The United States is a land of last great places, but few of them remain great. Most U.S. places become much like many other U.S. places, and hence somewhat boring. Not only the elegiac tone but also the number of the Ocracoke books for sale in the bookstores and galleries suggested that the island way of life was beautiful but perhaps already had past. (Fishermen require many coffee table books and weak paintings of the seaside?) The very presence of people like me, eating Thai food, might mean that the special character of Ocracoke was fading, or already lost. We have met globalization, to paraphrase Pogo, and it is us. We have reached the island we saw upon the horizon, only to find its beguilement gone.

Our beguilement depends, it seems, upon relative social location: We are enchanted by things we desire but do not yet possess, by the island we can see but have not yet reached. If the island is known to only a few, then it is exotic. Travelers can tell tales. Once an island becomes known to all, however, the enchantment fades. Familiarity breeds contempt, or more harshly still, we cherish that which is envied but not possessed by others. On the other hand, enchanting places cannot be totally unknown, because then they could not be desired. We cannot long for what we cannot imagine. To be beguiling, then, a place must be perceptible to, but not yet possessed by, society. It must be an island just visible upon the horizon of the world. We wish, at the end of summer, to return from an island that our neighbors have heard about but not yet visited.

For the first several centuries of its existence, indeed until living memory, Ocracoke was essentially unknown, and so beyond the horizon of mainland fashion. I have heard that the Ditch (the connection between Silver Lake Harbor and Pamlico Sound, and thence the ocean) was only four feet deep, and consequently the harbor was restricted to skiffs and other very shallow-drafted craft. Locals still call Silver Lake the “Creek,” because for several hundred years, that was all it was. In the late 1930’s, however, the federal government dredged the harbor, and even stationed naval forces there during World War II. Back then, the island had no real roads, although cars were occasionally brought over on private boats and driven down the sand packed hard by the receding tide. The island’s road was

not built until 1952, at which time the wild Ocracoke ponies ("Banker" ponies, thought to be descended from Spanish Mustangs) were penned. A man who remembered visiting the island as a boy in the 1950s told me it took all day to come over on the mail boat, a reconditioned trawler. At that time, only a few hundred outsiders visited the island in a given year. Shortly thereafter, however, the North Carolina Department of Transportation made the island more accessible by establishing a regular ferry service that now runs between Ocracoke and Hatteras Island, Cedar Island, and the mainland, at the remote hamlet of Swan Quarter.

Although geographically isolated, Ocracoke has a long if episodic recorded history, reaching back to Europe's early efforts in the New World. The island was visited by members of Raleigh's party in 1585. They decided to move a few islands to the North, to Roanoke, whence they would disappear into conjecture and legend. A small community of pilots established itself to guide ships through the shoals around Ocracoke Inlet. In 1718, the outside world asserted itself: British naval troops under the command of Lieutenant Robert Maynard killed Blackbeard the Pirate in a ferocious hand to hand battle in Pamlico Sound, just beyond the harbor. That remains the highpoint of island history. Although both the Revolutionary and Civil Wars were contested in the area, it is said that Ocracokers themselves tended to stand rather aloof from such outside affairs, and generally seemed willing to trade. A few generations on, during World War II, German U-Boats sank U.S. shipping offshore; a cross in the village is made from the wreckage of one of the torpedoed ships. English sailors' corpses washed ashore from the HMS Bedfordshire in 1942 and lay buried in a village cemetery.

But these are dramatic highlights, relatively seldom moments when Ocracoke and the outside world paid attention to one another. For over three hundred years, the people of the island lived strikingly alone with the sea and the wind. Isolated in time and space, Ocracokers developed their own ways of doing things, told their own stories, and preserved and developed patterns of speech unheard elsewhere. In short, Ocracoke developed its own character. Despite being on the East Coast of the United States, the island remained a place apart, or from the perspective of the island, Ocracoke constituted a world. Perhaps it appears small to us, but the ocean, the marshes, the sound, and the community of the village at least once comprised a world quite large enough for living, or losing, a life.

There is no doubt that its separation from the United States is what first attracted my wife and me, then corporate lawyers practicing in Washington, D.C., to the island. Even today, Ocracoke is relatively inaccessible. The island can be reached only by private plane or water. There are no direct flights; indeed, no airports or major cities are very close. Nor is driving to the ferries easy. On reaching the island, one quickly realizes how far away it all is. Nags Head, the nearest town of any size whatsoever, is seventy-eight miles away, including a ferry ride that, with loading and unloading and assuming there is space, takes the burden of an hour. Though not as cut off as it was before the 1950's, even today Ocracoke is out there, poked into the Atlantic. A supermarket, movie theater, hospital, or car dealership are hours away. Most importantly, once on the island, one cannot even see the mainland. (Thoughts of hurricanes sulk about the corners of the mind.)

We go to Ocracoke, or to any other beach, to get away from it all. Scary cliché, that, but what does it mean? Few of us have Gauguin's talent, but many of us have some inkling of what he was up to in Tahiti. When we are at the beach, we eat and drink more. We expose ourselves and see the nakedness, or near nakedness, of others. We have sex more often. We live on a level of physicality that everyday life, at least among the upper middle class, does not allow, suppresses. To turn away from polite everyday society to the nearly nude culture of the beach – to get away from it all – is thus implicitly a rejection, however temporary, of modernity, an effort to strip away the clutter of a life, leaving only some essential core. We recreate ourselves (another scary thought, that we should need to be remade), selves that had somehow been obscured by life in civilization.

Ocracoke is an especially good beach for contemplating the horror of culture. The sense of isolation pervades the island itself, even the beaches during high season. The entire beachfront, and the vast majority of the island, is a national seashore. The town itself is tiny. It is possible to be on a beautiful beach in July and not see another person. The desire to go skinny dipping can be overwhelming. Ocracoke's beach itself has a stripped down feel. The elements are few, but all strong. The sun is intense, but not as fierce as the wind, which often blows abrasive sand down the beach. There are no trees visible from the beach, but there are bugs – the backside of the island, facing the Sound, is all marsh – and many of them bite. High waves and rip tides are commonplace. Bad storms are also common.

One does not go to the shore on Ocracoke; one stands on a sandbar and confronts the Atlantic. But somehow, these privations, the very aggressive qualities of the place, accentuate the fundamental point of going to the beach – to recover some essential things, and to wonder at what one has become.

To be venal, or perhaps just realistic, it must be acknowledged that we have become beachgoers, mere consumers. My wife and I are hardly alone in our desire to get away from it all on Ocracoke. What had been a few hundred annual visitors to the island in the 1950's has become a few hundred thousand. And one might reasonably ask in what sense vacationing on a fashionable island with several thousand like-minded folks is getting away from it all. In some enormous bait-and-switch, social fraud on a grand scale, an island vacation promises a respite from the real world, and instead again instantiates familiar markets, in real estate, dining, and so forth. But this should hardly be surprising. Not just the beach, not just Gauguin, but rebellion generally can be commodified. If people want rebellion, markets that provide experiences that seem to be rebellious will arise. Witness not only beaches, but rock music, which moved from rebellion to industry in less than a generation. Witness the host of products (ranging from tattoos to climbing gear) intended to express "individuality." While true rebellion may not be for sale, in the meantime we spend and spend, hoping somehow to become something other than consumers.

There is something almost tragic about this. The market – private law – enables us to satisfy our desires, to visit the islands on our horizons. In their very achievement, however, businesses accomplish their own undoing. The frontiersmen tamed the U.S. wilderness, but well-kept farms and prosperous towns do not need frontiersmen. The frontiersmen's successes made them obsolete. Something similar can be said for any people whose place and way of life become, for a while, an example of the authenticity for which cosmopolites hunger, that is, who serve a tourist trade. The people come; fashion shifts; resorts fade; devil take the hindmost. A long drive down U.S. Highway 1, the beach highway of yesteryear, should remind us how fickle our desires are, how fragile are our fulfillments.

And here we are close to the fears behind our worries over globalization. We will visit a place until it is no longer strange, until it has become banal and visiting it pointless. For a while, of course, a new object of desire will be substituted for the old. A new vacation island will appear upon the horizon. But we are

running out of islands. Intensely local worlds like Ocracoke seem to be vanishing, out of keeping with those far-flung historical processes we refer to as globalization. And what of we fashion seekers, who move restlessly from one place to the next, until the question "where are you from" appears quaint. At some point, we realize that there is no island where we can get away from it all, that the market for travel has not satisfied our need for perspective. We realize, instead, that we have lost the possibility of a sense of place. Through markets, we cosmopolites may achieve our own undoing, may unravel our pleasure in our worldliness, as surely as the frontiersmen committed suicide over the course of a long generation. The United States, now the planet, tends toward cosmopolitan boredom.

But it is not just the market that reduces enchantment to familiarity, and so threatens boredom. Anthropologists – a term I use loosely, to include even law professors – discuss why this or that place, moment, culture, is special. So we hear that the Ocracoker's brogue retains traces of Elizabethan English, long since lost to most other parts of the United States. But perhaps not all other places: the educated Southerner, growing up with Eliot Wigginton's *Foxfire* series, will recall similar claims for Southern Appalachia,<sup>56</sup> or, come to think of it, the Chesapeake region.<sup>57</sup> Perhaps there are other places that might support such claims, but these are enough to begin recognizing the proposition that someplace retains authentic traces of Elizabethan English as a Southern trope. Such tropes quite possibly are true, but that is not the point here. As tropes, ways in which Southerners remark the world and so recognize one another, such claims are kin to Jefferson's Virginia, Huck Finn, and all of Faulkner and Ransome and the rest of the Southern Agrarians and a passel of lesser lights. That is, "Elizabethan English" is a form of subtle protest against the hegemony of a society that understands the world as if it were a market.

Such protests are not without pathos, perhaps especially when they are true. To whom are such claims addressed? To the international society of social scientists? To the national universities that grant professional status? To Walker Percy's young Southerner, just back from Princeton?<sup>58</sup> Anthropologists

---

56. See, e.g., ROBERT MCCRUM ET AL., *THE STORY OF ENGLISH* (Faber & Faber 1986). See generally *THE FOXFIRE BOOKS* (Elliot Wigginton & Susan Coopers, eds. 1973-1985).

57. See generally MCCRUM, *supra* note 56.

58. See generally WALKER PERCY, *THE LAST GENTLEMAN* (Eyre & Spottiswoode

go so far as to claim that insular speech and folkways should be preserved, as we struggle to preserve biodiversity, because such exceptions from the homogeneity of the broader society constitute an opportunity for linguistic and cultural studies.<sup>59</sup> That is, particular and local lives are justified because they are necessary for the construction of a general and cosmopolitan, if merely academic, worldview. This hypocrisy is regrettable but to some extent unavoidable. Any argument I might make for a particular time and place is bound to be hypocritical, because I personally have so little time or place. My entire education has been an effort to abolish home, at least home understood with the intensity and particularity of a place like Ocracoke. More charitably, my education has been an effort to construct a larger world, a world in which it makes sense to look at a very rich man's catamaran, eat Thai food, and muse on the German U-Boat sinking of U.S. ships carrying arms to England besieged. Ocracoke has been recognized; Ocracoke is a place to be; Ocracoke has become part of the larger world. Now that Ocracoke is on the cosmopolite's map, the possibility of a local perspective and the possibility of a truly local character have been abolished, even if we still think we hear traces of the Virgin Queen's English.

It seems one cannot easily remain on the horizon, at the edge of the world. One cannot long talk of obscurity. Indeed, obscurity only makes sense in light of subsequent revelation. Travels are bothersome things, unless there is a traveler's tale to transform privation into adventure, perhaps even learning. Gauguin returned from Tahiti, which could not be Tahiti without Paris, before setting out for the Solomons to die. Robert Louis Stevenson also died on an island, but he never stopped publishing in London. The desire to rebel against modernity tends to subvert itself, not just because participation in a market entails complicity, but also because rebellion is itself political. Escapes, rebellions, critiques are reactions against society, but ultimately such matters must be validated by the very society that prompted the rebellion. And so, after getting away from it all, I find myself writing an open letter, this essay, to the culture that I time and again seek to escape. In so doing, I have done my bit to make Ocracoke part of the reader's world, and

---

1967).

59. See generally WALT WOLFRAM & NATALIE SCHILLING-ESTES, *HOI TOIDE ON THE OUTER BANKS: THE STORY OF OCRACOCKE BROGUE* (University of North Carolina Press 1997).

thereby made it less isolated, less of an escape, less of the place I love.

The threat of banality (if we understand participation in our society to be banal, and what beachgoer does not?) is thus a condition of our creating our world, is part and parcel of cosmopolitan existence, in which we relate particular times, places, experiences, and even people to the panoply of alternative times, places, experiences, and even people potentially available to a middle class life. In doing so, we make things familiar, until many people respond to much of life with some version of been there and done that. The banality of modern life for which the customary image is McDonald's is not merely the result of trade flows or some other process we casually recognize as globalization, but results from the market's success in providing choice, and even satisfying immediate desire.

The practical question, for the United States and now the world, is how can we remain interested in where we live? Can we keep the threat of banality from being fulfilled? Can anything be done to keep our islands, and indeed neighborhoods, somewhat unattainable, and hence desirable, worth striving for?

The obvious answer, in a market society, is to raise the price. Staying on the East Coast, places like South Beach, the Hamptons and Marblehead are hardly unknown, but are nonetheless wonderful places for lunch. The exclusivity of knowledge and the adventure of finding something new can be replaced with the exclusivity of a high price. To some extent, this is already happening on Ocracoke, that is, real estate prices are rising. As prices rise, those who can still afford to pay are entitled to congratulate themselves on their good fortune and, in particular, to enjoy being admired by their community. Being rich and exciting envy is mildly interesting, if not exactly beguiling.

Yet the exclusivity of price, while it may keep the island on the horizon and so desirable, is an imperfect substitute for character. Owning a great sailboat does not make one a great sailor. Buying a private island does not make that island a particularly interesting place. In fact, just the opposite: the countless planned communities that line the Atlantic Coast with their designer golf courses, manicured lawns, and stunning swimming pools are more than pleasant enough situations for fine bodies and decent food, but remain uninteresting. Constructed in order to please the market, such communities are as familiar as the next catalogue. Conversely, making Ocracoke terribly expensive might limit access, but it will limit access to the people

– fishermen, sailors, families – whose lives are the island’s history and who collectively have given the place its character. One could, with effort, imagine Ocracoke a beautiful resort. But that would be a very different island from what is still in part a working village – less than a thousand souls in the winter – built upon a spit of sand.

In fact, however, the island is unlikely to become the sort of resort threatened in the preceding paragraph. Ocracoke probably will remain something of a place apart, an island in the middle distance if no longer on the horizon, for three reasons: geography, water, and law. Even today, the island requires a hard day’s drive or chartered plane connections from any major city. From the East Coast it is easier to travel to most European capitals, and countless U.S. beaches, in less time than it takes to reach Ocracoke. Due to its location in the Atlantic, the weather is frequently brutal, which further diminishes the limited time the beach is available to most vacationers. In addition, the island has very little fresh water. It is unclear how much more building, if any, the island’s water supply can sustain. Finally, the island is not large, and most of it is part of the Cape Hatteras National Seashore. As a result of the National Seashore, very little land is available for development of any sort, and none is on the beach.

Taken together, these factors should help Ocracoke retain much of its character. My wife and I have been pleasantly surprised at how slowly the island’s real estate market has developed over the years. Upon reflection, however, perhaps this relative price stability should not be so surprising. While we love the place, Ocracoke simply cannot provide many of the amenities that have become standard among high wage earners. Those who go to the effort required to visit Ocracoke really want to be there and want to be there for the reasons that make Ocracoke what it is. Ocracoke certainly will change – all places do – but the island bids fair to remain a special place. And that, in the United States, is an accomplishment.

There is a lesson to be learned here, that may help those of us who live elsewhere to keep our homes interesting, too, and so to retain affection for our circumstances. While those who care about Ocracoke’s character are simply lucky that the island is remote and dry, the principal reason that Ocracoke is likely to remain interesting is very human: the federal government has declared most of the island to be national seashore, “the Park.” Without Cape Hatteras and Cape Lookout National Seashores,

the entire beachfront of the Outer Banks would be dominated by vacation houses, distance and water problems notwithstanding. Money and technology can overcome mere physical obstacles like distance and a lack of water. Without law in the form of the Park, the village might well become a town, or even towns, no doubt with strip malls and, in due course, fast food and mini-golf. Because of the Park, however, the beach will remain beautiful in perpetuity. And, what land is for sale will remain valuable. More importantly, Ocracoke will remain a place where one can get away, not from it all, but from enough of it to clear the head.

The broader lesson here is counterintuitive for those who believe in markets, as most Americans (and I) do. While optimism is a national trait and a useful thing for entrepreneurs, our optimism makes it difficult for us to understand how markets can be tragic contexts. But any open-eyed drive through the United States should make it clear how the very achievement of private interests so often has spelled the death of a market in which individuals tried to achieve their dreams. Like tragic heroes, businesses often contain the seeds of their own undoing. Assuming we wish to retain a given market for the long haul, as we might for markets in beautiful places, or even places where Americans build their houses and make their lives, then we may find it wise to restrict that market's scope. Ocracoke is a case in point: the federalization of so much of the land prevents the market from operating, and thereby destroying itself, that is, the Park prevents overdevelopment. And back of the proposition that markets are essentially tragic contexts, often best restrained, is an even darker lesson, blasphemy for a market society: Our happiness may require us to make some peace with our frustrations.

Private law has traditionally understood itself as the authoritative articulation of legitimate desires, desires whose fulfillment would command the respect of the state and, if necessary, call forth the state's forceful capabilities. Modernity, now globalization, raises the possibility that the desires that come to be uppermost in the public breast involve living in, or at least being able to visit, spaces which have not yet been fully articulated. We moderns often wish to get away from it all, believe that global civilization is a sort of virus. More deeply still, we cannot deny the nausea that modern life arouses, a feeling of surfeit. Too much has been thought and written and said and argued . . . and for even the successful among us, it is time to go

to the beach, perhaps engage in some (literally) mindless hedonism, do whatever it takes to shut the chattering down. Young men and other malcontents may choose more violent forms of rebellion.

Our longing for some space outside culture, for wilderness, leads us to ask for a law of wilderness, a fence that marks the edge of our modernity, beyond which lies a kind of freedom. Public law, we hope and I suggest above, can bound a civilization articulated through private law, and can thereby avert the tragedy of markets – the tragedy of desires pursued to their logical conclusions.

But public law, too, is engaged in a tragic project, tragic both in its ambition and its claustal impossibility. How are we to think the end of modern articulation, if not through further articulations of thinking (and writing, talking, arguing...)? More politically, how are we to realize our wishes to be free, if not through legal constraint? While we may succeed in building fences and in establishing parks, the desire for a law of wilderness is a contradiction of itself, as is the desire for an orderly chaos or a known unknown.

The tragedy of public law is particularly biting for lawyers, who revere the Rule of Law after they have lost faith in all else. Even lawyers, otherwise cynical, dream of the redemptive possibilities of a future law, that is, hope to be progressive. But here, vis-a-vis their own undeniable longings for the primitive, for the absence rather than the Rule of Law, lawyers are forced to confront essential limitations of their ideals. As lawyers, even our gods are finite.

#### IV. KAFKA'S LAUGHTER: MARKETS, ALIENATION, AND THE POSSIBILITY OF AFFECTION<sup>60</sup>

I am slightly embarrassed to admit that I do not take globalization seriously: I find myself snickering while cheerleaders and doomsayers shout it out. Instead of something more earnest, my response to supranational capitalism is a sense of alienation, far too often expressed as wry laughter. Such laughter is apt to cause social difficulties: Serious people intuit a politically incorrect stance on the part of the laugher, me. In re-

---

60. This was originally presented at the World Association of International Studies (WAIS) Conference, *Globalizations: Reflections on the State of the World and Its Discontents*, Stanford University (July 31, 2001), available at [www.law.buffalo.edu/dwestbro/kafkالاughter.htm](http://www.law.buffalo.edu/dwestbro/kafkالاughter.htm).

sponse to my unfashion, I have taken some intellectual comfort in Kafka, who also believed that laughter was the best medicine for alienation. I even think that Kafka, if he were alive today, would join me in arguing that an ironic view of supranational capitalism is both reasonable and comforting.

The place where I laugh at money most often is *The Wall Street Journal*. If you also read *The Journal* regularly, I am sure you will agree that it publishes some of the funniest writing in U.S. public life. For example, discussing Dubya's cabinet, specifically Defense Secretary Donald Rumsfeld, then Treasury Secretary Paul O'Neill, and Secretary of State Colin Powell, *The Journal* had this to say:

All three cabinet chiefs have mastered the earnest diction of business self-help. "The way to do well is to do well," Mr. Rumsfeld counsels. "Were you treated with dignity and respect today?" asks Mr. O'Neill. "Perpetual optimism is a force multiplier," declares Mr. Powell.<sup>61</sup>

To be clear; the Secretary of Defense, Secretary of the Treasury, and Secretary of State of the United States, the three bureaucrats perhaps most responsible for projecting U.S. power worldwide, really would prefer to write for in-flight magazines.

Or take the woman whose recovery from life-threatening breast cancer inspired her to plunge back into her deeply meaningful work as, you guessed it, a marketing executive.<sup>62</sup> Of course, not just any marketing executive, but one for an international pharmaceutical company.<sup>63</sup> Once back in the fray, our heroine calls for a new line of advertisements, exhorting women to think of themselves as warriors, to view their diseases as battles, and not incidentally, to buy drugs.<sup>64</sup> In this and countless other articles, *The Journal* gives us a sustained ironic voice, a catty take on money and the world as its playground. Through its reporting on market activity, *The Journal* provides a jaundiced view of what our now global society is coming to.

A recent favorite of mine was entitled *Prison as Profit Center*.<sup>65</sup> The good folks in the State of Oregon decided that prisoners ought to stop wasting tax dollars, and they should start

---

61. Carla Anne Robbins, *Rules-Happy Cabinet: Rumsfeld, Powell and O'Neill Weigh In*, WALL ST. J., Mar. 2, 2001, at A1.

62. Emily Nelson, *Battle Cry: How Women Warriors Replaced Gardeners in P&G Ad Campaign*, WALL ST. J., Feb. 21, 2001, at A1.

63. *Id.*

64. *Id.*

65. Joseph T. Hallinan, *Prison as Profit Center*, WALL ST. J., Mar. 15, 2001, at B1.

earning their keep.<sup>66</sup> Instead of being a liability, prisons should become an asset. So *The Journal* reported that the Oregon prisons were doing business as “Inside Oregon Enterprises.”<sup>67</sup> What is the business of Inside Oregon, you ask? Well, what do prisons have? That’s right, prisoners. Human capital. The State of Oregon is in the business of renting people out. As *The Journal* put it, “a convict version of Kelly Girls.”<sup>68</sup> Such dry humor (as if secretarial services were the obvious reason to rent people) almost distracts one from the elegance of the enterprises’ cost structure, namely, the 13th Amendment’s prohibition on involuntary servitude does not apply to those incarcerated by due legal process. And in this regard, it bears mentioning that – perhaps in deference to a certain historically rooted squeamishness – no persons of color appeared in the photographs accompanying “Prisons as Profit Center.” Good politics and low cost – good business – what more could one want from a justice system?

*The Journal’s* barrage of satire is more than just an accident of brilliant journalism.<sup>69</sup> Money breeds laughter – not always nice laughter, not necessarily we’re-laughing-with-you laughter, but laughter nonetheless – and so we should expect to find *The Journal* funny. More generally, we should approach capitalism with a sense of humor. Admittedly, capitalism is rarely viewed as a laughing matter. Economics has long been called the “dismal science” for a reason.<sup>70</sup> Moreover, the general attitude of most academics – apart from economists – towards capitalism is fairly distrustful, to say the least. And every time one of the Bretton Woods Institutions holds one of its meetings to plan world history, gangs of people show up to protest globalization. Such people believe that capitalism, especially global capitalism, is serious business indeed and not funny at all. They are wrong. Global capitalism is hilarious.

As at least most of its critics would argue, global capitalism is, to use an old fashioned word, alienating. Just because globalization is alienating, however, does not mean it cannot be funny. Instead, just the opposite. Globalization is funny for the same reasons it is alienating, and *The Journal* is funny because

66. *Id.*

67. *Id.*

68. *Id.*

69. Perhaps those of us who care about U.S. letters will come to regard the *Wall Street Journal* at century’s end as we did *Partisan Review* at mid-century.

70. Since Thomas Carlyle read Thomas Robert Malthus. See generally ROBERT HEILBRONER, *THE WORLDLY PHILOSOPHERS* (Simon & Schuster Inc. 7th ed. 1999) (1953).

it is a chronicle, or better yet, a daily anatomy, of our alienation.

But what does it mean to say that alienation is funny? Can we even specify what we mean by saying that the creation of a global polity based on trade, and especially the trade in tokens of value, finance, is alienating? What is alienation? As this essay's title suggests, a traditional and therefore obvious place to start with these questions is Franz Kafka.<sup>71</sup> Not that Kafka confronts our problem directly. As fiction generally should, Kafka shows rather than tells. Kafka's work tends to place the reader in a bizarre, and yet disturbingly familiar, exile. Reading Kafka, we recognize the place, and the old anxieties return, even though we have never been here before and have no clear idea why we feel threatened. This strange familiarity, the way in which Kafka's text still speaks, allows us to believe that Kafka is addressing an alienation somehow akin to our own. But how? What is the specific source of the discomfort we have in reading Kafka?

Once upon a time there was a Marxian canard that Kafka's work was a cry of bourgeois despair, that Kafka was writing about the alienation caused by life in markets.<sup>72</sup> This is too easy. Kafka himself, and many of his characters, are hardly shining examples of *Homo economicus*. More importantly, nothing about central aspects of Kafka's work – his mythical China,<sup>73</sup> his even more famous allegories of the law,<sup>74</sup> or even his discovery of himself as a dung beetle<sup>75</sup> – seems to require a market-place economy. Kafka's own milieu, a tottering empire, certainly had markets, but Prague remained in many respects a traditional society, organized along lines other than those required by markets, not yet entirely of the modern world that the Great War would usher in. Indeed, Kafka's understanding of alienation is sufficiently independent of markets to have made his writing critically pertinent to life under communism. And yet there must be some truth to the canard about Kafka's work as a critique of capitalism, if only because Kafka reads so well in

---

71. For a sampling of Kafka's work, see FRANZ KAFKA, *THE METAMORPHOSIS AND OTHER STORIES* (Barnes & Noble Books 1996).

72. See, e.g., Walter H. Sokel, *From Marx to Myth: The Structure and Function of Self-Alienation in Kafka's Metamorphosis*, 26 *LITERARY REVIEW* 485 (1983); Robin West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 *HARV. L. REV.* 384, 386-87 (1985).

73. KAFKA, *supra* note 71.

74. *Id.*

75. *Id.*

the context of our discontent with today's global market society. We can speak of much of today's world as "Kafkaesque," and mean no compliment thereby. But what explains Kafka's current relevance? Why does Kafka, writing at the end of the Austro-Hungarian Empire, nonetheless seem so contemporary?

Kafka was trained as a lawyer and images of the law pervade his work. In the law, as in Kafka, formality is substituted for reality. The law concerns itself with legal roles, i.e., people formally defined as social and political functions, rather than with individuals themselves. One's name is accidental to becoming plaintiff or defendant, buyer or seller, employer or employee, lender or debtor. (Very few of Kafka's protagonists have full names; their own identities are largely dispensable.) Similarly, the law does not contemplate things themselves, but rights to things – entitlements – not the tissue and substance of what we eat, drink, control, but legally defined rights to exclude, alienate, devise, and : To take the facts of a situation and make a case out of it. Law replaces life's particulars with society's general and authoritative categories.

As the expression of authority, the law could judge a person's life, and thereby relieve the wretch of his terrible uncertainty as to whether he has lived well, or more generally, whether his life has meant anything at all. Kafka's characters are supplicants before the law. Although they may fear the moment, they desire judgment. The yearning for law reflects the human desire to locate our individuality within a broader framework of meaning. But in Kafka, the law withholds judgment. The law does not actually recognize the man, does not tell him what he means, thereby giving him status in the community. The law waits, or at most, recognizes the man's social role – petitioner, messenger, accused, clerk, and even son – always somebody whose existence is derived from others, from a function. The wretch never musters the courage to force the law to acknowledge him for what he is, and so he dies begging or waiting for recognition. The wretch dies as a set of claims, rather less than successful, without ever having been recognized – and so having lived – as a man who meant something in and to his community. The wretch dies a foreigner in his own land, alienated and nameless.

One must ask whether Kafka's discontent with the law's formality is reasonable. Could the law, as distinguished from the love of a father and certain versions of God, do otherwise? The law, as we have seen, turns on formality, on entitlements.

The law has no equipment with which to deal with people as such; it can only see plaintiffs and defendants, buyers and sellers, and the like. Law that operated with something other than legal categories would not be law. But legal formality is not reality, and so, to turn to the law for legitimization, as Kafka's characters do, is simultaneously to abandon the possibility of being recognized for oneself. Kafka's characters are thus caught in a terrible double bind: On their own, they have no assurance of their worth, but if they turn to social authority, law, in an attempt to legitimate themselves, they find that they can do no more than make formal, empty, claims. Law is thus both irresistibly attractive and necessarily unsatisfying.

As Walter Benjamin put it, paraphrasing Berthold Brecht, Kafka "had only one problem, that of organization. What seized him was fear of the ant-colony state: how people become estranged from themselves by the forms of their communal life."<sup>76</sup> The translation of the human situation – the man or woman in community – into our legal functionalities is the mechanism of our alienation. In a market society like our own, the forms of communal life that estrange us from ourselves are the property entitlements and the embodiments of value called money that together comprise the price mechanism. This is not to say that markets are the only mechanisms of alienation, other forms of communal life will do nicely. One might also be alienated by the forms of social life in early 20th century Prague, or by the offices of the Communist Party. But for us, who live in a world so largely constructed by markets, it is markets that alienate. To repeat the thought; Kafka reads well today and we are alienated because capitalism requires us to understand life in terms of prices. At a deeper level, we understand our situation within a market in terms of the interrelationships between those claims we understand to be money and those claims we understand to be property. Our true selves, however, cannot be recognized behind our entitlements. In short, the hoary arguments about the dehumanization of life in the marketplace are fundamentally correct.

So, taking the criticism of globalization very seriously indeed, the question is, what do we do? On good days, we laugh. How can we laugh? Well, laughter comes naturally, or does not, but if we find ourselves in fact laughing when we read *The Jour-*

---

76. WALTER BENJAMIN, REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 205 (Peter Demetz ed., Edmund Jephcott trans., Harcourt Brace Jovanovich 1978).

*Journal*, we can reflect on what our laughter might mean. One way to think about humor is as the unexpected juxtaposition of incongruities.<sup>77</sup> That is, we laugh at seeing combinations of things that do not belong together, and that might therefore be thought of as ridiculous or absurd. With this idea of humor in mind, if we turn our attention to markets, we see something quite marvelous. Markets, in which we sell what we have in order to buy what we do not, operate to bring things that are fundamentally unlike one another into conjunction with one another. Money makes properties commensurable. Money and property, the very formalizations that are the mechanisms of our alienation, juxtapose things that are entirely different from one another. Markets therefore tend to create humorous situations, the juxtaposition of unlikes. And this is why *The Journal* is so often funny, and life in capitalism is deeply absurd. Returning to our earlier examples, we have seen, in this monetary society over the last few months; the spectacle of real political power spoken in the grammar of business self-help, the existential horror of breast cancer inspiring the petty banality of advertising; and a slight confusion between punishment and profit, with the frisson of chattel slavery.<sup>78</sup>

Such things are humorous in fundamentally the same way. We know the truth is other than what the markets suggest. Shortly after we learned that Rumsfeld and Powell thought of themselves in language we associate with slightly sweaty businessmen in airports, hoping to read the paperback that will make it all come together, Rumsfeld and Powell coordinated the overthrow of Afghanistan's government. We are quite sure that breast cancer is not about shopping, and we have our suspicions about prison, whatever we might say in a polite marketplace. Our confrontation with the markets – our realization that the truth is not what appears on the economic stage – is ironic in character.

Like *The Journal*, Kafka understood that the same processes of formality that we are likely to find alienating may also be the occasion for ironic laughter. The formality that is so central to the sense of dread, even horror, that Kafka evokes also

---

77. Diligent search has not turned up a citation for the not unfamiliar quotation. Generally speaking, incongruity theories are associated with Kant and Schopenhauer and have become the dominant philosophical mode of thinking about humor. See generally THE PHILOSOPHY OF LAUGHTER AND HUMOR (John Morreall ed., 1987).

78. See *supra* notes 61-68 and accompanying text.

makes his stories very funny. As Kafka's friend and biographer Max Brod recalled:

When Kafka read aloud himself, this humor became particularly clear. Thus, for example, we friends of his laughed quite immoderately when he first let us hear the first chapter of *The Trial*. And he himself laughed so much that there were moments when he couldn't read any further. <sup>79</sup> Astonishing enough, when you think of the fearful earnestness . . .

Formality – in our society money and property – simultaneously alienates us and affords us humorous juxtapositions. Money is alienating, as we long suspected, but in creating the floating world of financial relations, money presents endless opportunities for jokes.

There is something more than a little unsettling about this, about realizing that existential horror and modern humor are so compatible. Discussing Kafka's laughter, Brod concedes that laughing at *The Trial* is "not entirely good, comfortable laughter."<sup>80</sup> The book, after all, is not merely a comedy of middle European manners, in which social forms are juxtaposed in amusing and surprising ways. *The Trial* is also about wretchedness, torture, and quasi-judicial killing, topics that might seem to have the same humorous potential as our earlier examples of power politics, breast cancer, and prison slavery. It might seem that the only laughter that we could imagine in such circumstances would be cold, probably cruel. Brod does not deny this outright – much of laughter is an assertion of strength, as Aristotle insisted,<sup>81</sup> and in laughing at wretchedness, Kafka reminds his readers of their complicity.

But cruelty is far from the whole story. Brod also insists that "the ingredients of a good laugh were also there."<sup>82</sup> What is meant by "a good laugh"? Brod tells us that what is "easily forgotten in studies of Kafka" is "the streak of joy in the world and in life."<sup>83</sup> The juxtaposition of incongruities is not enough; not even joy at our relative strength is enough. Kafka's laughter at *The Trial*, and our laughter at the exuberances of capitalism, depends on taking joy in the world. Thomas Mann explained: "But when you consider that laughter of such a sort, with such

---

79. MAX BROD, *FRANZ KAFKA: A BIOGRAPHY* 178 (G. Humphreys Roberts trans., Schocken Books 2d ed. 1960) (1937).

80. *Id.*

81. See *THE PHILOSOPHY OF LAUGHTER AND HUMOR*, *supra* note 77.

82. Brod, *supra* note 79.

83. *Id.*

deep and lofty sources, is probably the best thing that remains to us, then you will be inclined, with me, to place Kafka's warm-hearted fantasies among the best worth reading in the world's treasury of literature."<sup>84</sup> And so our ability to laugh, even the cold and ironic laughter with which we may greet *The Journal's* account of the absurdities that global capital markets will regularly produce, depends on our ability to love.

Speaking of love suggests a grander and more charitable way of thinking about laughter, drawing on the idea that comedy is the erotic counterpart to tragedy, and it is in this vein that I will close. Recall young Nicholas Leeson, the "rogue trader" who, by placing leveraged bets on the movement of the Nikkei, caused the collapse of Barings Bank, the bank that had financed among other things the Louisiana Purchase.<sup>85</sup> There was a brief period, after the damage was done, when young Nicky and his pretty wife were on the run across the tropical Pacific.<sup>86</sup> Now I want you to be honest with yourself – didn't you hope they would get away? I know I did. The bank was finished, there was nothing to be done – Nick had taken the big chance and was on the lam. He had succumbed to terrible temptation (made worse by the bank's lack of internal risk management), eaten at the apple and saw, by God, that he was naked, and so was she . . . and their very nakedness had certain possibilities.

Although money is alienating, as we long suspected, in creating the false world of financial relations, money creates endless opportunities for jokes. But money is not only alienating and therefore funny. Money is also an embodiment of permission, an invitation to take liberties, and so a temptation. It is precisely by taking liberties, by succumbing to temptation, that the human comedy proceeds, and that we gain the strength to laugh at our lies.

#### Conclusion

In going about its task, each of these three essays has taken an attitude that might be appropriate for a custodian of our formalities (for a lawyer in a self-consciously global society) to take towards the law that now rules.

The first attitude is necessity. Our understanding of what

84. Thomas Mann, *Homage* xvii (1940), *Foreward to* FRANZ KAFKA, *THE CASTLE* (Shocken Books 2nd ed. 1974).

85. See generally NICK LEESON ET AL., *ROGUE TRADER: HOW I BROUGHT DOWN BARINGS BANK AND SHOOK THE FINANCIAL WORLD* (1996).

86. *Id.*

the social order might require (our idea of justice) is already global. We understand war, and more importantly still, the making of peace (nation building), in terms defined by the global polity, indeed, as the extension of global civilization. Second, we need not be content with our admission of complicity and constraint in the global order. While we may revel in the material goods brought to us by the markets, we may look to law as the limitation of such desires. Law, then, becomes the field on which we ceaselessly fail to resolve our contradictions. Third, and stepping back yet farther, there is something deeply human about such efforts. The fact that we do not love our politics does not mean we do not love the people among whom we live, and do not intuit how hope, including love, may drive more than theory.

Taken together, these essays suggest that our reverence for the Rule of Law, simply understood, is gone, but also that we may still have – should still have – an erotic fondness for our human, especially because all too human, efforts to ameliorate our condition. The contemporary lawyer should be able to temper mockery with affection, or even grant a chuckling respect, for the artifacts of our markets and the bureaucracies that struggle to save them – for the human efforts to think our lives together and to achieve a modicum of happiness among our limitations and fears. And in the absence of alternatives, is it surprising that we are willing to back up such mocking respect with the fantasies, and at least some of the weapons, of our day? Cultural imperialism, indeed.

