

TRANSNATIONAL LAW: AN ESSAY IN DEFINITION WITH A POLEMIC ADDENDUM

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Introduction

What is transnational law? Various procedures and theories have emanated from this slippery signifier, but in general academics and legal practitioners who use the term have settled on certain common meanings for it. My purpose in this article is not to disrupt but to clarify these meanings by turning to literary theory and criticism that regularly address transnationality. Cultural and postcolonial studies are the particular strains of literary theory and criticism to which I will attend. According to John Fiske, “The term culture, as used in the phrase ‘cultural studies,’ is neither aesthetic nor humanist in emphasis, but political. Culture is not conceived of as the aesthetic ideals of form and beauty found in great art.”¹ An interdisciplinary field, cultural studies is highly theoretical and shot through with political and politicized discourses, most notably Marxism and neo-Marxism, which I strongly oppose. As a movement, cultural studies, especially the postcolonial variety, has had an enormous impact on global economies, politics, literatures, and scholarship. It has changed the way that disciplines like law conceive of institutions like government. It has interrogated the vexed relationship between literature and nationalism: how the former often serves the ideological functions of the latter. A representative text on this score is *Nationalism, Colonialism & Literature* (University of Minnesota Press, 1990), which includes contributions by Terry Eagleton, Fredric Jameson, and Edward Said. As much for their politics as for their literary theory – not that the two are mutually exclusive – contemporary literati such as Noam Chomsky, Eagleton, Said (deceased), Homi Bhabha, Gayatri Chakravorty Spivak (deceased), Slavoj Žižek, Jameson, and others have enjoyed a meteoric rise in global recognition. It is thus no surprise that Detlev F. Vagts, an expert in transnational law, begins his oft-cited article “The Multinational Challenge” with a quotation of Chomsky, or that legal pedagogy has turned increasingly theoretical over the last decade.

Literature is comprised of language, and language often distinguishes countries from other countries. Literature and literary tradition drive nationalism when they become the “specific and tangible form” of the “ambition to realize” nationalism.² Postcolonial studies have undertaken to explain literature’s role in the rise and solidification of the nation state and in the perpetuation of empire and power. Law is the structure that holds nation states together. Literature validates law. Therefore, the nation state is not just a fiction but a product of fictions; literature is a cultural touchstone. Many prominent postcolonial critiques of these touchstones are unfortunately and ironically (given their rhetorical attacks upon statecraft) embedded in Marxist discourse and strategy. I am quite unhappy with the

dependency of postcolonial studies upon outmoded or destructive dogmas emanating from Karl Marx and his disciples, but I will hide – or try to hide – my unhappiness until late in the essay.

To review “transnational law,” examining its literary inertia and significations, is the objective of this article, which does not purport to settle the matter of denotation. Rather, this article is an essay in definition, a quest for etymological precision. Its take on transnationalism will rely not so much on works of literature (novels, plays, poems, drama, and so forth) but on works of literary theory and criticism. It will reference literary critics as wide-ranging as George Orwell, Kenneth Burke, and Said. It will explore the “trans” prefix as a supplantation of the “post” prefix. We are in the post-post-modern and post-post-colonial era, which is to say that we have, in the wake of globalization, entered into the age of “trans.” The significance of this age is the collapse of nationalism as a discursive construct and the reconfiguring of group identities and politics along the rubric of local cultures and communities. At the heart of “trans” studies is a respect for pluralism, which differs markedly from multiculturalism because it is not a relativistic dogma treating all views as equally valid, but rather a noninterventionist practice that treats unprovoked initiation of force against “the other” as inherently illegitimate.

The discourse of law (and especially of transnational law) has influenced the production of so-called “transnational” knowledge in the current era. The first section of this article, “Nationalism,” will examine the concept of nationalism that transnationalism replaced. A proper understanding of transnational law is not possible without a look at its most prominent antecedent. The first section, then, will not explore what transnationalism is; it will explore what transnationalism is not. The second section, “Transnationalism,” will piece together the assemblages of thought comprising transnationalist studies. This section will then narrow the subject of transnationalism to transnational law. Here I will attempt to squeeze several broad themes and ideals into comprehensible explanations, hopefully without oversimplifying; here also I will tighten our understanding of transnational law into something of a definition. Having tentatively defined transnational law, I will, in section three, “Against the New Imperialism,” address some critiques of capitalism by those cultural critics who celebrate the transnational turn in global law and politics. Although I share these critics’ enthusiasm for transnational law, I see capitalism – another hazy construct that will require further clarification – as a good thing, not as a repressive ideology that serves the wants and needs of the hegemonic or elite. The institutionalizing of anti-capitalist

postcolonial studies has resulted in a disciplinary takeover by Western academics who purport to speak for the disenfranchised subaltern, but whose ideas often work at cross-purposes with the subaltern's. I hope to both explain and challenge such results in this article, for no one intellectual camp should monopolize the marketplace of ideas.

Nationalism

Nationalism paved the road towards transnationalism; or perhaps it is more precise to say that transnationalism unpaved the roads that nationalism paved. Nationalism erected those structures that decolonization was and is tasked with dismantling piece by piece, often violently. Any discussion of nationalism is necessarily curtailed because nationalism is a vexed and multifarious concept and because "there is no agreement among scholars about 'subjective' and 'objective' factors in the definition of nations, or about the relationship of nations and nationalism to ethnicity on the one hand, and statehood on the other."³ For this reason, this truncated account of nationalism, like any account of nationalism, will leave several loose ends. An exhaustive treatise on nationalism is not possible in one article, let alone one book or even one collection of books. There is a plethora of sources I could have borrowed from and cited in this piece, but for clarity and convenience, I have used only a few. I have chosen these few sources for two reasons: they incorporate many different takes on nationalism without explicitly advocating for one, and they are *en vogue*. Perhaps these are not the most rigorous or proper reasons, but they are the reasons I have chosen after some reflection. I do not purport to have chosen the "best" or most exhaustive texts, but these texts, if carefully attended to, will enlighten readers as to various strains of thinking about nationalism. We may – indeed *must* – settle on some sort of meaning for "nationalism" within the discursive framework of the literary and legal communities because those communities have shaped the sociopolitical landscape, and because we cannot speak of transnationalism without first understanding nationalism.

Nationalism has to do, of course, with nations, which have to do with "the power, even primacy, of national loyalties and identities over those of even class, gender, and race."⁴ Nationalism signals movements by which individuals come together to support a common cause couched in terms of country or citizenship. One dated treatise – quite informative because of its datedness – claims that the "most widely held view" of nationalism is "that nationalism means love of the nation or people, zeal for its true interests, loyalty to the State, [and] affection for the homeland";⁵ the treatise goes on to problematize this popular notion – which relies upon several generalization – by honing the definition until at last the author proclaims, as if exasperated, "the lack of a clear and stable terminology greatly contributes to the confusion of ideas."⁶ Hence the problem of discussing nationalism: it defies definition. Fortunately the literati have helped us to express what is meant by this term.

Writing even before the publication of the treatise that I have called "dated," George Orwell defined nationalism as

"the habit of assuming that human beings can be classified like insects and that whole blocks of millions or tens of millions of people can be labeled good or bad."⁷ Orwell clearly sees a problem with reducing people to categories to achieve a totalizing synthesis of self-serving ideas. Edward Said echoes Orwell and contextualizes nationalism within the American framework. He proposes that nationalism

...gives rise not only to the affirmative mischief of exceptionalism and the various paranoid doctrines of 'un-Americanism' by which our modern history is so unfortunately disfigured, but also to narratives of patriotic sovereignty and separateness that are inordinately bellicose about enemies, the clash of civilizations, manifest destiny, 'our' national superiority, and, inevitably (as now), to policies of arrogant interventionism in politics the world over so that alas in places like Iraq the United States today is synonymous with a very harsh inhumanity and with politics whose results are particularly and, I would say, even perniciously destructive.⁸

Said adds, in characteristically sardonic fashion, that this "sort of American nationalism would be comic if it were not actually so utterly devastating and even tragic in its consequences."⁹ What Said says about America could be said about most Western nations – if not now, then at least within the last century or so. His not-so-subtle point is that rigid commitments to vague ideas can lead to violence and cultural chauvinism. Narratives of exceptionalism valorize the indivisible and collective unit that is always absurd because any sampling of people is heterogeneous and diverse. Violence based on absurdities is doubly absurd, but that is precisely what nationalist discourse, claiming special insights into knowledge of right and wrong, precipitates.

Perhaps only religion rivals nationalism in its draw of zealous adherents – which is to say, the rhetoric of nationalism casts the state as a messianic savior. Dissenting from the cult of the nation is not allowed. Orwell notes that "if one harbors anywhere in one's mind a nationalistic loyalty or hatred, certain facts, although in a sense known to be true, are inadmissible."¹⁰ Orwell once again calls our attention to the utter absurdity of nationalism, whose adherents pretend to share an exceptional faculty or intuition to know what is good or true. Nationalism represents a blending of "ideology and movement," which "incorporate political and cultural dimensions."¹¹ It originates as "a doctrine of popular freedom and sovereignty"¹² and evolves into an animal that demands obedience to its absolute authority. It moves from rhetoric of liberation to rhetoric of domination. Hutchinson and Smith summarize the emotional and ideological trajectory of the movement in this way:

The people must be liberated – that is, free from any external constraint; they must determine their own destiny and be masters in their own house; they must control their own resources; they must obey only their own 'inner' voice. But that entailed fraternity. The people must be united; they must dissolve all internal

*divisions; they must be gathered together in a single historic territory, a homeland; and they must have legal equality and share a single public culture.*¹³

This careful summary demonstrates the contradictory impulses at the heart of nationalism. Indeed, it shows that nationalism is fraught with competing discourses and that it has as its *telos* certain irresolvable tensions: freedom and control, individualism and fraternity, liberty and consolidation of power. Maybe that is why “nationalism” is such a difficult signifier to talk about. Maybe that is why nationalism flows into what Hutchinson and Smith call the “dramatic transformation of absolutism into the mass national state.”¹⁴

Homi K. Bhabha troubles any stable or stabilized notion of “nationalism” as a discursive construct. He writes against the “historical certainty” and “settled nature” of the term.¹⁵ He attempts to “write of the Western nation as an obscure and ubiquitous form of living the *locality* of culture.”¹⁶ For him, the nation is fabricated by and shot through with discourse; moreover, it is symbolic: a complex network of signs and syntax that achieve in their participants some sense, however illusory, of cultural unity. Bhabha’s idea of nationhood joins social and literary narratives and underscores the temporal – that is, the process and moments of inscription.¹⁷ To understand nationhood, one must work inductively from specific, quotidian operations of everyday life to grand narratives of cohesion that emanate from small pockets of people. Bhabha notes that the “narrative and psychological force that nationness brings to bear on the cultural production and political projection is the effect of the ambivalence of the ‘nation’ as a narrative strategy.”¹⁸ The nation icon is therefore an “apparatus of symbolic power.”¹⁹ It is a technique based in language. Perhaps it is best not to call the nation an icon but a rhetorical tool. Permit me the following generalization based on Bhabha’s claims about this tool: people who band together under the rubric of some fiction called “the nation” do so by metaphor and mimesis. I think that this is a fair abridgement of Bhabha’s argument: one that at least explains why literary theory and criticism make sense of how nations form and function – and why nations cannot exist outside of language. (*Nothing* can exist outside of language.) If nationhood is the product of rhetoric and narrative and metanarrative, then the study of rhetoric and narrative and metanarrative helps us understand the grammar and logic of nationhood.

We still have not attained a workable definition of nationalism. Would that we could attain a perfect one, but we cannot. The best we can do is to craft an almost-workable definition that will allow us to move on to that even more elusive signifier: transnationalism. To get at this almost-workable definition, I return to Orwell, whose notes on nationalists lead to stark insights about nationalism. “As nearly as possible,” Orwell proclaims, “no nationalist ever thinks, talks, or writes about anything except the superiority of his own power unit.”²⁰ Accordingly, the nationalist is a sort of supremacist; therefore, nationalism is a sort of supremacism. Nationalism activates dogma that demands allegiance and prosecutes dissent. The intensity with

which nationalists hold onto loyalties does not, Orwell claims, “prevent nationalist loyalties from being transferable.”²¹ Actually, the putative clarity and community of nationalist ideology attract converts. The issue with the nationalist emphasis on community is that the evaluative criteria for moral or ethical action pivot on whether one is a member of the particular group of nationalists. Orwell refers to these criteria as powers “of not seeing resemblances between similar sets of facts.”²² He qualifies that, for the nationalist, “[a]ctions are held to be good or bad, not on their own merits, but according to who does them, and there is almost no kind of outrage—torture, the use of hostages, forced labour, mass deportations, imprisonment without trial, forgery, assassination, the bombing of civilians—which does not change its moral colour when it is committed by ‘our’ side.”²³ By way of analogy, George W. Bush justified certain acts – a good example being waterboarding – that his administration would have considered illegal if done to U.S. citizens. In the common vernacular, we call this a double-standard. Indeed, nationalism is like a double-standard writ large: the “nationalist not only does not disapprove of atrocities committed by his own side, but he has a remarkable capacity for not even hearing about them.”²⁴ Willful blindness is not prosecutable under a nationalist system because it is necessary for the system to exist at all.

To translate Orwell’s claims about nationalists into claims about nationalism, all we do is flip the signifiers: “nationalists” becomes “nationalism.” Thus, nationalism is not a phenomenon limited to discrete territories and boundaries; it extends to any group that pretends or fashions cultural commonalities. It does not admit disagreement or internal conflict. The commonalities it constructs are bound up with narratives: about supremacy, about heritage, about literature, about law. These commonalities are so celebrated that the celebrants themselves cannot or do not recognize similar constructions of the commonalities of other groups. Self-righteously sure of the superiority of their particular unit, these celebrants will go to great lengths to preserve their supposed commonality and to stamp out the commonalities of others. Law is a legitimizing force turning these constructions into coercive policy. Law is what makes fictions obtain to the *polis*. This is the essence of nationalism: validating mass coercion and imagined boundaries using the instrument of law and control. Nationalism is that which creates narratives that produce and maintain political spaces and borders; its fictions generate other fictions like boundaries and regions. Nationalism, then, is the process by which communities and cultures synthesize divergent economies, politics, ideas, and languages into a unified corpus to divest the marginalized politics, ideas, and languages of their force and legitimacy. Nationalism fuses diverging politics and languages into something coherent and unified, discarding whatever thought and theory seem to impede the congelation of the state. Because nationalism treats individuals and communities as interpenetrated, interfused, and therefore as monolithic, it depicts the nation itself as an individual with a definite and complete purpose. On a planetary scale, nationalisms come into conflict with one another, and these conflicts are resolved by “public law,” or law be-

tween states. Traditional ways of thinking about international law reflect nationalism. Yet state-based jurisdictions fail to fully provide for incidents or conflicts that do not belong in the province of state laws because they do not implicate nations, except proximately. The globalized world has made such incidents and conflicts more common at the same time that postmodernism and other intellectual currencies have altered our thinking about essentialized constructs like nations. Transnationalism unsettles nationalism and calls into question the narratives of unity and harmony on which nationalism depends. Transnational law is divorced from the generally accepted absurdity of statehood.

Transnationalism

In 1957, reviewing Philip Jessup's *Transnational Law*, James N. Hyde wrote that "[t]ransnational law is not likely to become a term of art for a new body of law."²⁵ Mr Hyde was wrong. There has been a proliferation of relatively new law journals bearing "transnational law" in their titles: *Transnational Law & Contemporary Problems: A Journal of the University of Iowa College of Law*, *Ashburn Institute Transnational Law Journal*, *Journal of Transnational Law & Policy*, *Vanderbilt Journal of Transnational Law*, *Transnational Law Review*, and *Columbia Journal of Transnational Law*. There are LL.M. programs in transnational law (such as the one I am in), and there are even institutes and think-tanks devoted to the study and development of transnational law. Transnational law has in fact become the term of art for a new body of law, and here we will consider the nature and meaning of this term as well as the corpus of law it has created. It is perhaps not coincidental that the emergence of transnational law coincided with transnational poetics²⁶ and other transnational trends in literary criticism because the legal and literary fields always seem responsive to one another.

One of the earliest references, if not *the* earliest reference, to the concept of transnationalism comes from the pragmatist philosopher and student of John Dewey: Randolph Bourne. Bourne's use of the term "transnational" recalls William James's notion of religious pluralism as non-absolute and non-monist.²⁷ Bourne appears to have revised and extended James's pragmatism to fit the political instead of the religious or philosophical context, although James himself came close to addressing the former context in "A Pluralistic Universe." Bourne's essay "Trans-National America" regarded transnationalism as a cousin of cultural pluralism, the notion that differences in belief across cultures and communities may not be equally valid but can be at least equally practical. Against essentialism, monism, and absolutism, Bourne posits a consequentialist system of polycentrism that regards multiplicity as positive and collectivism as dangerous. Society can and should be multiple and heterogeneous, not single and homogeneous, for a one-size-fits-all *polis* can only materialize through the stamping out of minority views and through the erasing of distinct, regional cultures. Put another way, Bourne transforms James's varieties of religious experience²⁸ into varieties of political experience.

Kenneth Burke, a literary critic, sometime student of pragmatism, and Marxist converted into a non-"ism" altogether, argued later in his life that ideology and fanaticism – by which he meant "the effort to impose one doctrine of motives abruptly upon a world composed of many different motivational situations"²⁹ – were destructive missions incompatible with pluralism or democracy. Burke, who remained naively critical of the free market, nevertheless refused ideologies as simplifying what cannot be simplified: human behavior. What Burke did not realize is that free market theories, especially those of the Austrian variety, are not deterministic: they refuse to pigeonhole people or to reduce them to economic calculations; they treat humans as unpredictable and spontaneous and celebrate the sheer variety of human behavior. My point in referencing Burke is not to systematically demolish his economic preferences but to suggest that his wide-ranging theories have positive implications for our understanding of transnationalism. One could argue that Bourne and Burke were the earliest expositors of transnationalist theories tied to the practical world and that Jessup and others merely repackaged Bourne and Burke's dicta. Regardless of whether Jessup either read or credited Bourne and Burke, the theories emanating from these two literary critics would have been in circulation at Jessup's moment in history. Jessup, widely read as he was, probably would have encountered Bourne and Burke's transnationalism directly or indirectly.

The proximate basis for Jessup's turn to transnational law is the belief that "international law" is too vacuous a signifier. Jessup opens *Transnational Law* by declaring that the term "international law" is misleading because "it suggests that one is concerned only with the relations of one nation (or state) to other nations (or states)."³⁰ Acknowledging that much anxiety about planetary rules and regulations stems from the "lack of an appropriate word or term" for those rules and regulations,³¹ Jessup employs the term "transnational law" to "include all law which regulates actions or events that transcend national frontiers."³² That word "frontiers" should strike literary critics as particularly resonate in light of the many constellations of frontier studies springing up since the publication of Gloria Anzaldúa's *Borderlands*.

Jessup's terminology incorporates both private and public law³³ and addresses disputes between "individuals, corporations, states, organizations of states, or other groups."³⁴ For him, transnational law is a multi-hemispheric interaction of economies, politics, people, and communication that regards the state as merely one player among corporate bodies and individuals (even stateless individuals).³⁵ Understanding transnational law requires us to "avoid thinking solely in terms of any particular forum, since it is quite possible [...] to have a tribunal which does not have as its own law either a body of national law or the corpus of international law."³⁶ In the present era of globalization, Atlantic studies, indigenous studies, pan-Africanism, post-colonialism, terrorism, and the Internet, Jessup's take on transnational law seems far less revolutionary than it did in 1956. "Both the demise of the Cold War and the revolution of communications technology," Samuel P. Baumgartner suggests, "have heightened our awareness of

the limits of national borders and of the concomitant importance for our own law-making enterprises of social, economic, and legal developments elsewhere.”³⁷ We have grown accustomed to thinking about disputes involving multinational corporations, citizens, and groups. Insofar as lawyers “today cannot restrict themselves to studying black letter law, because globalization has created an abundance of other norm systems that also regulate human behavior,”³⁸ we have also grown accustomed to thinking of legal pluralisms as commonplace. We are only lately growing accustomed to thinking of transnationalism in terms of hybridity, ethnicity, multirootedness, and other literary fashions that, like Bourne and Burke’s pluralism, are gaining purchase and will continue to gain purchase.

In 2007, Harvard Law School held a conference called “Teaching from the Left” that revealed just how out-of-touch the so-called academic left has become with conservative thought and theory. Indeed, many of the presenters, including David Kennedy, parroted lines that conservative and libertarian activists have been trumpeting for years. Justin Raimondo’s *Antiwar.com* has been a consistent voice in this conservative/libertarian activism. The website operates under the aegis of the Randolph Bourne Institute, a fact that should have some resonance in light of my comments about Bourne and pluralism.

The Harvard conference testified to the belief held by many traditionalists and paleoconservatives that neoconservative intellectuals (ranging from Leo Strauss to Irving Kristol and his son William Kristol, editor of *The Weekly Standard*) hijacked the conservative movement and rewrote the conservative narrative to fit the aims of disaffected socialists and leftists, and therefore that contemporary leftist objections to the diplomatic policies of George W. Bush and other conservatives should be directed at the legacy of liberalism instead. On the other hand, the conference revealed that the left and traditional right could form an alliance to disrupt state power if thinkers from both camps were not so insulated and woefully ignorant of the commonalities they share. One such commonality is the attention to “the fragmentation, disaggregation, and multiplicity of the international regime.”³⁹ This attention invariably leads to legal pluralism, “the experience that things don’t add up, that coherence fails, that incommensurability must be acknowledged.”⁴⁰ Legal pluralism, in short, undoes the idea that “there is national law and international law, public law and private law, and that the legal order is a tidy sum of the four.”⁴¹ Legal pluralism occupies that liminal space between law and “not law.” It is a product of a postmodernist era that acknowledges the fragmentation and confusion of human experience. The Western left takes to pluralism because of its seeming commitment to diversity; the Western right takes to pluralism because of its protection and conservation of unique regional traditions and customs (to put it bluntly: the idea that Western cultures have every right to preserve their heritages and histories as does “the other”).

Transnational law participates with postmodernism, “a periodizing concept whose function is to correlate the emergence of new formal features in culture with the

emergence of a new type of social life and a new economic order – what is often euphemistically called modernization, post-industrial or consumer society.”⁴² A Marxist literary critic might say that transnational law is a product of the “belated theorization of the new forms of mass culture as so many manifestations of ‘postmodernism’ now seems to complete these new positions at the same time that it profoundly problematizes them.”⁴³ A free market economist might say that transnational law is “the role of freely competitive judiciaries” brought about by “privately competitive judges, who were sought out by litigants for their expertise in understanding the legal areas involved,” which areas include, *inter alia*, the “law merchant, admiralty law, and much of the common law.”⁴⁴ Both the Marxist literary critic and the free market economist are right to some extent.

Legal scholars as a class seem to be less theoretical about their references to the transnational. Indeed, some legal scholars appear to use the term “transnational law” in its most literal sense: with the “trans” prefix meaning something like “across” or “beyond” and the “national” referring to countries and their respective laws and constitutions. Although this usage reflects the idea that transnational law “represents a hybrid of domestic and international law that has assumed increasing significance in our lives,”⁴⁵ it does not go so far as to address transnational law as “the law of global democracy, the law of global governance, the law of transnational crime, the law of transnational injury and redress, the law of regulation of transnational markets, and the law of transnational dispute resolution.”⁴⁶ Transnational law is much more than comparative law or an investigation of, say, how the United States Constitution differs from the Constitution of Japan. It is a jurisprudence that accommodates the latest phenomena of globalization and the shrinking world and that “is itself the result of individual and group preferences – within and outside of the government – exerted either directly through participation in the legislative, administrative, and litigation processes, or indirectly by engaging in transactional or litigation strategies designed to take advantage of, or frustrate, substantive or procedural policy.”⁴⁷ Moreover, transnational law “concerns much more than interstate relationships or matters of personal status”; “includes reciprocal influences of legal regimes and general tendencies in the evolution of law”; “encompasses law that is created outside the realm of state control”; and is “all about an open, legal pluralist, conception of law in which formal legal processes give way to the examination and theorization of concrete normative reality.”⁴⁸ Transnational law dismantles the homogeneity and coerciveness of nationalist rules and regulations; it is “a metaphor for the means through which law is transformed by more general movements of internationalization or globalization.”⁴⁹ Those who use the term “transnational law” to refer to a so-called universal system do so quite sloppily because the “transnational” signifier is all about shattering universalisms, which are always fictions in the legal world because no legal system has proven universal in application or foundation. Indeed, transnationalism suggests that there are no supercommunities or superstructures with which individuals have to identify.

Transnational law constrains the power of the state over matters of litigation and even strikes at the already hemorrhaging notion of sovereignty.⁵⁰ It results in disputation brought before non-state-sponsored legal bodies whose decisions have the force of law despite a lack of military or like police mechanisms to enforce law.⁵¹ For example, transnational alternative dispute resolution, or transnational ADR, is becoming increasingly important in our globalized economy because it gives clients more say about who will decide cases, empowers clients to choose procedural rules that guide the application of laws (also chosen by clients), and allows clients to have cases decided more quickly and efficiently than the cases would be if lodged in bureaucratic layers of government courts. Organizations such as the American Arbitration Association offer “clients the opportunity to file cases under specific sets of rules, which allow clients to choose where a dispute will be arbitrated as well as provide a mechanism to select a skilled arbitrator or mediator with the appropriate language skills.”⁵² These organizations are ultimately backed with the power of government because clients can choose which government (which nation or state within a nation) they want to administer sanctions if a party violates the arbitrated decision. But it is not far-fetched to imagine other, nongovernmental enforcement mechanisms such as those used for centuries under maritime law. These laws obtained to people despite their approval by governments. The laws of war, moreover, were around long before The Hague Convention (1907) or the Geneva Convention (1949); therefore, formal codification of these rules by states was not necessary for general law to exist.

The landscape of law in today’s atmosphere of declining nation states could mean a return to legal habits and commonplaces before the rise and solidification of nation states, or it could mean, on the contrary, the rise of new supragovernmental legal systems: mega-states wherein centralized authorities promulgate rules to communities with less negotiating leverage. Such a system may not seem bad if it applied only preemptory norms: prohibitions against genocide, for instance, or slavery. But if this system implicated trade or finance, as the WTO does, and if it favored the interests of multinational corporations and more powerful nations, leaving poorer nations with little influence, then it would become an oppressive system. Transnational law, as manifest in ADR and similar mechanisms, goes a long way towards establishing agency for developing or disenfranchised communities.

Domestic law still plays a role in transnationalist systems,⁵³ but its role is highly mediated and always contingent. Transnational law is a “web of transnational interdependence”⁵⁴ that makes up a network “from which the law originates and where it sometimes operates [...] on a supra-jurisdictional level.”⁵⁵ Transnational law has allowed for the circulation of ideas in a way that no nation state model has before. It is gradually establishing a system that accommodates multiple beliefs and practices and that accepts as valid the regulatory mechanisms of marginalized and disenfranchised groups. It is the closest we have come in several centuries to a system of voluntary institutions that “emerge to effectively and peacefully resolve the dis-

putes arising in everyday life”—a system of market law that is both “more *efficient*” and “more *equitable* than the government alternative.”⁵⁶ Previously, suits were mostly settled in accordance with treaties or laws of particular nations; today, suits are frequently settled by international organizations such as the American Arbitration Association that incorporate into their procedures any number of foreign laws.

What, then, is transnational law? In short, it is the pluralistic order of various principles and rules from divergent customs, cultures, and communities that draws its lexicon from competing philosophical discourses and not from top-down, coercive commands of states or sovereigns. It is a rejection of the power and modes of statism and a reversal of state-formation. It is an unsettling of borders and boundaries and a turn toward compromise and competition as means by which to settle disputes. The beauty of transnational law is that it serves the putatively “liberal” interest of pluralism while serving the putatively “conservative” interest of minimizing and circumventing government bureaucracy.

Polemical Addendum: Against the New Imperialism

I have titled this section “Against the New Imperialism” because I wish to emphasize that I am not advocating *for* any one solution to pressing global issues, legal or otherwise. Instead, I am arguing *against* the too-common Western assumption that Western ideas and models (such as any I could come up with) are answers to Third-World problems. In that sense, I am arguing against any presumption of universal resolution. Without conflating the terms “Western” and “Marxist,” I am arguing that Western theorists relying on Marxism reinforce Western power structures that exploit the Third World, and I am suggesting that transnational law, as defined above, explodes or at least undercuts these power structures that are more in keeping with traditional notions of international law than with transnational law. In that respect, I am extending the spirit of pluralism, engendered by transnationalism, to the realm of literary-political theory. Transnational law subverts Western dominance (especially among progressives, Marxists, leftists, neoconservatives, and other brands of contemporary imperialists) and carves out a space for Third World agency.

À la William James, the eminent American pragmatist, I throw my hands in the air and declare that any insistence upon universalism or absolutism or essentialism is an “expression of impulses that would control by making uniform the variegated world of autonomous individuals, that would destroy individuality, personal and national, by trimming, fitting, and normalizing autonomous individuality, making the world safe for structure (mine, not yours, ours, not theirs).”⁵⁷ That is not to say that I see the rhetoric of tolerance and inclusion as a panacea. Indeed, such rhetoric misses the mark because it sidesteps two pivotal questions: who is being included or tolerated and why? Supposedly universal cosmopolitanism and liberalism are not proper ends in themselves; for as Fredric Jameson

writes, “Americans always find it shocking when foreigners suggest that human rights, feminist values, and even parliamentary democracy are not necessarily to be seen as universals, but rather merely local American cultural characteristics that have been exported as practices valid for all peoples in the world.”⁵⁸ Indeed, the entire international law movement (as opposed to the transnational law movement) seems to endeavor towards monism or universal law while ignoring the complete incompatibility between Western liberalism and many Third-World discourses and values. For instance, the Universal Declaration of Human Rights, when its terms are not so vague as to be meaningless, presumptuously valorizes several ideals as universal while ignoring the fact that some cultures and communities do not recognize or ascribe to those ideals. In fact, the very purpose of enacting the Cairo Declaration of Human Rights in Islam (CDHRI), as well as its precursor the Universal Islamic Declaration of Human Rights, was to respond to and undermine the Universal Declaration of Human Rights – a document that, in the words of Said Rajaie-Khorassani, the Iranian representative to the U.N. at that time, was “a secular understanding of the Judeo-Christian tradition” that could not apply to Muslims.⁵⁹

Most Western thinkers, including this author, would agree with the principles of the Universal Declaration of Human Rights, but applying these principles to real-world, workaday realities problematizes the principles that might not be universal but rather Western constructs participating in the reawakening of American and European colonization. Although noble-sounding, these principles are twisted by Western leftists to justify Western intervention into the affairs of sovereign nations. The discourse of Western liberalism is possibly the new imperialism seeking to transform the world to fit Western norms, which many cultures and communities consider to be abnormal.

Western theorists have insisted on Marxism and social democracy (two radically different things) as solutions to pressing global issues affecting the Third World. As a result, Third World theorists (some literary, some not) who have achieved the most planetary recognition are those like Franz Fanon who are willing to tow the Western “discursive” and “rhetorical” lines. Although theorists like Robert J. C. Young have tried to position Marxism as a non-Western or anti-Western discourse, their efforts seem forced and unconvincing. I suspect that, if left to their own devices and freed from the meddling of Western intellectuals and governments, Third World nations and peoples – and in particular Muslim nations and peoples – would turn to capitalism rather than socialism or Marxism: the favored ideologies at present because of their linkages to Western intellectuals who purport to know what is best for the world. At any rate, I believe that Third World nations would turn to capitalism – as China has (sort of) since realizing the benefits of (somewhat) free markets – because of capitalism’s proven track record of liberating people from the three great tyrannies: government, military, and monopoly. None of these tyrannies is wholly distinct from the other; all of them are products of statecraft.

I must define “capitalism” before I accuse others of misunderstanding the nature of capitalism. I consider anarcho-capitalists to have explicated the most accurate definition for this term. This definition generally holds that state-based capitalism does not constitute capitalism at all. Murray Rothbard, arguably the most famous anarcho-capitalist to date, explains,

In order to discuss the “future of capitalism,” we must first decide what the meaning of the term “capitalism” really is. Unfortunately, the term “capitalism” was coined by its greatest and most famous enemy, Karl Marx. We really can’t rely upon him for correct and subtle usage. And, in fact, what Marx and later writers have done is to lump together two extremely different and even contradictory concepts and actions under the same portmanteau term. These two contradictory concepts are what I would call “free-market capitalism” on the one hand, and “state capitalism” on the other.⁶⁰

Rothbard casts the difference between state-based capitalism and pure capitalism as the difference “between, on the one hand, peaceful, voluntary exchange, and on the other, violent expropriation.”⁶¹ Any government intervention – either the “prohibiting or partially prohibiting [of] an exchange between people”⁶² – removes an exchange from the realm of capitalism and into the realm of government. State-based capitalism is not capitalism. Capitalism is, in short, a system of voluntary economic exchanges between parties without government interest or intervention. In a capitalist system, resolving disputes that arise from such exchanges is left to non-governmental institutions.⁶³

After Antonio Gramsci, Fanon, an early postcolonialist, was perhaps the catalyst of the Marxist paradigms and practices that mark postcolonial studies. Assuming Marx as an apt model without challenging the underlying premises of Marx’s economic theories, Fanon writes, in approximately 1960, that race and wealth are inextricably tied and that therefore Marxist analysis “should always be slightly stretched every time we have to do [sic] with the colonial problem.”⁶⁴ In other words, Marxist practice, though right, does not go far enough because it is a color-blind philosophy and because poverty is bound up with race. Fanon may be right that at his historical moment (and probably today) race and wealth correlate, but why he supposes Marxism as an answer to the problems of either race or wealth remains unclear. Without beginning to explain why Marxist practices would better race relations or maximize wealth, Fanon calls for a reinventing of the Marxist framework along lines of race, since, after all, lines of race demarcate lines of class. Thus, for Fanon, “[e]verything up to and including the very nature of precapitalist society, so well explained by Marx, must [...] be thought out again.”⁶⁵ And so it has been, over and over, by countless critics, often with violent, bloody, or counterproductive results.

Part of Fanon’s mistake is that he seems to fundamentally misunderstand the nature of capitalism. He declares, for instance, that “[s]poilt children of yesterday’s colonialism

and of today's national governments [...] organize the loot of whatever national resources exist" and also "use today's national distress as a means of getting on through scheming and legal robbery, by import-export combines, limited liability companies, gambling on the stock exchange, or unfair promotion."⁶⁶ These same spoiled children, Fanon claims, are "insistent in their demands for the nationalization of commerce, that is to say the reservation of markets and advantageous bargains for nationals only."⁶⁷ Fanon is right about more than he is wrong here, but he is chiefly wrong about the signification of capitalism, which apparently is not his intended target, despite his claims to the contrary, because the economic framework he criticizes is more akin to mercantilism than any form of capitalism. Indeed, each of his references to nationalism proves a very different point than he probably intends. Fanon is right about government cronyism and about privileged children having privileged access to government jobs, corporate connections, and all sorts of corrupt and corrupting institutions. He is right, moreover, to criticize the intermingling of government and business, since the former is above and beyond regulation – meaning that, therefore, any business merger with government is also above and beyond regulation. What he criticizes is state-based capitalism, which, Rothbard points out, is not really capitalism. Fanon relies too heavily on Western thinkers who would have the Third-World conform to their utopian vision of an allegedly progressive, enlightened society anchored in Marxism.

From Terry Eagleton to Fredric Jameson to Robert J. C. Young, literary theorists continue to alienate themselves and their profession by evaluating their work according to Marxist standards and by proselytizing with Marxist tactics. Although cautious to distinguish themselves from the legacy of political Marxism and Leninite socialism, they continue to rely on prefabricated categories of capitalism that reveal more about what these theorists do not know than about what they know. Or perhaps these literary theorists are aware of the proper signification of capitalism but realize that most people mistake the proper signification of capitalism. A recent article claims that there "is much to learn from the global justice movement, which has scrutinized economic institutions of global capitalism – the International Monetary Fund, World Bank, World Trade Organization and Free Trade of the Americas – and from the global mass movement against the war on Iraq, which has drawn attention to the material motivations for 'wars of liberation.'"⁶⁸ The institutions attacked in the article are so bound up with nations and nationalism that they cannot possibly constitute capitalism, at least as capitalism is envisioned by anarcho-capitalists. The article adds that "Marxist analyses of imperialism's centrality to capitalism remain invaluable for cutting through the ideological mystifications of capitalism's current forms."⁶⁹ If capitalism is taken to mean any kind of system justifying the institutions just mentioned, as well as war or imperialism, then capitalism no doubt is a bad thing. But capitalism as theorized by important free-market economists does not justify super-governmental architectures. Indeed, it undermines them. The author of these last remarks seems to associate "capitalism" with whatever she considers bad in the world

without much critical reflection about what makes these things bad. Her grumblings reveal how isolated literary theorists have become from those academics who propose capitalism as an emancipatory and humanitarian model. What the article treats as capitalism has more to do with government and corporate power than with any philosophical (as opposed to popular) capitalist theory I know of. It critiques the very state structures that Rothbard associates with anti-capitalism: "monopoly privilege, a complete meshing in what is now called the 'partnership of government and industry,' a pervasive system of militarism and war contracts, [and] a drive toward war and imperialism."⁷⁰ The article demonstrates that what Ludwig Von Mises said over half a century ago remains true – if not truer – today:

What is wrong with our age is precisely the widespread ignorance of the role which these policies of economic freedom played in the technical evolution of the last two hundred years. People fell prey to the fallacy that the improvement of the methods of production was contemporaneous with the policy of laissez-faire only by accident. Deluded by Marxian myths, they consider modern industrialism an outcome of the operation of mysterious 'productive forces' that do not depend in any way on ideological factors. Classical economics, they believe, was not a factor in the rise of capitalism, but rather its product, its 'ideological superstructure,' i.e., a doctrine designed to defend the unfair claims of the capitalist exploiters.⁷¹

It was the kind of thinking Mises addresses that led to the "age of destructive wars and social disintegration."⁷² In other words, capitalism is about eliminating war, which is "an offshoot of nationalism," the "necessary derivative of the policies of interventionism and central planning."⁷³ Capitalism, being anti-state, cannot support state-based warfare. The IMF, the WTO, the World Bank – these and other constructs represent interventionism and central planning on a planetary scale. They are quasi-government organisms, which purportedly facilitate free trade and migration and which counter nationalist protective measures, but which, in reality, function as centralization of power on a grand scale. They are tools for massive central planning, and they reenact colonial conceits and reanimate the spirit of conquest by ensuring Western dominance over global affairs.

Some confusion may lie in the fact that today's American war hawks, the neoconservatives, appropriate free-market vocabulary while promoting military projects and invasions around the globe. Yet neoconservatives' ideas owe more to American 20th century progressivism and socialism than to any stripe of free-market economics. Marxist literary critics would benefit from a sustained study of economic thinkers like Mises, Rothbard, and Hayek: Austrian economists who share many of the humanitarian goals of Marxist critics, but whose theories are more realistic and I dare say more profitable to those in need. Likewise, free market economists would benefit from studying literary theory that espouses Marxism, if only because they might see in that theory the reasons why literary critics so misunderstand capitalism and economics. Mises could not have

written *Human Action* without an abiding knowledge of those theories with which he disagreed. Today's literary theorists cannot write comprehensively about economics and global politics without an abiding knowledge of those theories that they critique.

Contrary to the clichés proliferating from today's Western academics, the Western world is not the great expositor of capitalism because capitalism is completely incompatible with the nation-state model, which the West seems to have imposed, or to have tried to impose, on most of the world. Capitalism is more in keeping with polycentric law and dominant Third World discourses than its statist or social-democratic or monistic alternatives. Western academics, rather than promoting capitalism, have decried capitalism while delighting in supposedly cosmopolitan, enlightened societies owing their luxuries not quite to capitalism, because pure capitalism could only exist in anarchic societies, but to something approaching capitalism; stranger still, these academics have done all this while denying agency to Third World communities. Western academics have become, by and large, orthodox liberals and statists and neo-conservatives consumed with a sort of German Romantic idealism. I essentialize of course – Western academics are not reducible to such harsh caricatures. Indeed, many if not most of these individuals are well-meaning and honest people. I am not hostile to the people but to their ideas. In fact, I have published in the same leftist venue as Fidel Castro, a darling of Western Marxists whose article “The Fight against Cholera” appeared two days after mine. My staunch opposition to Marxism did not stop me from contributing to critical conversations with those I disagree with.

My disenchantment has to do with the reinvesting of the “capitalism” signifier with new meaning. The result of this reinvestment has been a dull and rather misleading appropriation of the alphabet and logic of capitalism. This signifier – “capitalism” – stands for different concepts within different sociopolitical settings. Some hear *capitalism* and think “oppression” and “exploitation”; others hear *capitalism* and think “freedom” and “prosperity.” The meaning depends upon the complex web of associations that individuals bring to the word. We will continue to suffer from confusion and anger until literary Marxists and free market economists use the term in the same way. Worse, we will continue to insist upon illusory contrasts and to tie meanings into tangled rhetorical knots while the Third World remains poor and hungry. To the extent that I propose any prescription in this essay, I urge for semantic clarification before Western thinkers decide to pontificate to the Third World about what will alleviate its plight. I also urge more non-government institutions to carry out the methods and goals of transnational law.

Rather than liberating or aiding Third World peoples, Western academics and their political agents have paralyzed Third World peoples, enabling and perpetuating a dependency on Western thought and practice, especially Marxist, neoconservative, or leftist thought and practice, which should be, of course, distinguished from liberalism of the classical variety. By mistaking or misrepresenting

capitalism as corporatism, mercantilism, cronyism, state-based collusion, and so forth, Western academics have ensured the passivity and reliance of their subaltern subjects. By imposing the nation-state and supranational statist models on less powerful cultures and communities – e.g., by establishing certain criteria for membership in the United Nations, the European Union, the World Trade Organization, the International Monetary Fund, and other constructs – Western academics and their political agents have guaranteed that a sovereign (*the* sovereign?) will quash minority beliefs and practices. These academics and agents have crystallized the Western monopoly on the promulgation and enforcement of law on a planetary scale. For too long the West has treated foreign peoples and places as a laboratory for testing its philosophical hypotheses. That will not do. I celebrate the efforts of transnational law to divest the state of its all-encompassing powers. Insofar as it is a political movement, transnational law figures the trajectory of global relationships among peoples and communities. It is a step towards dismantling unchecked state power.

I can hear the objections already: “All of this nonsense about Western academics merely builds a straw man for you to knock down, doesn't it?” Yes and no. It builds a straw man, but instead of knocking down the straw man I hope to pull out his stuffing and then restuff him, as it were, with new – and better – straw. When we abstract from particulars, we always deal with straw men. What matters is whose straw man stands at the end of the day – whose straw man scares away crows from the crops. In writing about these issues, I acknowledge that I am a product of Western ideas and traditions, and although I reject theories of absolute determinism, I believe that my unique surroundings and experiences have influenced me. My audience, then, is Western. I have not presumed to know what is best for Third World cultures and peoples who fall outside the parameters of my experience – only to know what is not best: Marxism and other ideological currencies of the day. I have neither praised nor criticized nor even commented upon the quotidian politics and practices of Third World cultures and peoples, whose everyday realities occur outside of my ambit. To do so would have been to artificialize my perspective and to superimpose my experience onto situations I know little about. It is because I do not have an intimate connection with the prescriptive liberties, inherited moral orders, habits, or commonplaces of foreign peoples that I refuse to impress (or to try to impress) my convictions, or any practices that might emanate from my convictions, upon those peoples. I therefore have not discussed how foreign or Third World peoples could conserve and renew their laws and traditions because, *à la* Frederick Hayek, I believe that such solutions, if they have not already, will arise out of spontaneous order.⁷⁴

I also have not discussed how Third-World societies will or should function apart from Western models because that is not my business. The Third-World is free to decide for itself whether to adopt or discard Western ideas. I have merely criticized those Western thinkers who pontificate to the Third World about what courses of action are

best or right. The great vice of Western thinkers is to assume that non-Western peoples cannot achieve justice or order or efficiency without the aid of Western governments, that the poor and desperate women and children – whose images flash across Western television screens in commercial spin spots – will suffer fatally without intervention by far-away nation-states and far-away militaries. I am not so narcissistic as to think that my ideas matter much. What I say will not have global implications. I speak even if I speak in vain; for I wish to share my ideas – however delusional I may seem about them – and to relieve the non-Western world of their Western-made burdens.

The tendency of an article such as this is to abstract into the airiest of theories, forgetting the individuals whose interests the theories are meant to serve. I have tried to bear this tendency in mind while drafting this article. I also have tried not to foreclose the possibility that I am wrong about certain issues. People are entitled to change their minds, and I am not evermore or unconditionally committed to any theory espoused herein. At this writing, I sincerely believe that my arguments are, for lack of a better word, right. But I have proceeded cautiously, aware that the implications of any writing such as this are potentially vast and almost always subject to qualification and interrogation. Of one thing I am sure: my motives are to help, not hurt, as many people as possible, and to do so while seeking solutions that preserve the customs and mores of people who are different from me.

FURTHER READING AND ADDITIONAL COMMENTS

On Postcolonial Studies

For an essay in the definition of “postcolonial studies” similar to this essay in the definition of “transnational law,” see Ania Loomba, “Situating Colonial and Postcolonial Studies,” *Colonialism-Postcolonialism* 1-19 (New York: Routledge, 1998).

On Marxist Literary Criticism

Marxist literary criticism is not quite the same as political Marxism. Terry Eagleton claims that “Marxist criticism analyses literature in terms of the historical conditions which produce it; and it needs, similarly, to be aware of its own historical conditions.” *Marxism and Literary Criticism* vi (Berkeley & Los Angeles: University of California Press, 1976). He adds that “Marxism is a scientific theory of human societies and of the practice of transforming them; and what that means, rather more concretely, is that the narrative Marxism has to deliver is the story of the struggles of men and women to free themselves from certain forms of exploitation and oppression.” *Id.* at vii. Finally, Eagleton remarks that “Marxist criticism is part of a larger body of theoretical analysis which aims to understand *ideologies* – the ideas, values and feelings by which men experience their societies at various times.” *Id.* at viii. Francis Mulhera puts it this way: “[C]ontemporary Marxist criticism’ is not a stable entity, or even a phase in the history of

a settled lineage. It is a field of forces drawn and redrawn [...] [.] The decades ahead will be especially testing for Marxism in all its forms and areas of engagement, and not least in this one. Marxism has not ‘arrived’, nor has it ‘departed’. It persists, theoretically and practically, in a continuing history whose outcome is uncertain.” Francis Mulhern, *Contemporary Marxist Literary Criticism* 2 (London and New York: Longman Group UK Limited, 1992).

One cannot even begin to list all the Marxist paradigms that appear in postcolonial texts because most postcolonial critics – and I do not think that I am being hyperbolic here – couch their theories in Marxism. One can, however, suggest that this Marxism will not soon go away if this call is any indication: “We need from Marx a comprehensive framework in which forms of culture and consciousness of postcolonialisms are always grounded in material life processes.” Vijay Mishra and Bob Hodge, “What was Postcolonialism?” 36 *New Literary History* 375, 376 (2005).

Paul Cantor and Stephen Cox have edited a book that takes on Marxist monopolies on literary study and that “explores the possibility that forms of economic thinking sympathetic to capitalism may be able to illuminate our understanding of literature in new ways.” *Literature and the Economics of Liberty: Spontaneous Order in Culture* ix (Auburn, AL: Ludwig Von Mises Institute, 2009).

Theorists like Gayatri Spivak have spent a great deal of time and energy distinguishing their brand of Marxism and questioning the fundamental tenets of Marxism; but at the end of the day, these theorists are unwilling to let go of Marxist paradigms altogether. See, e.g., Gayatri Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge, Mass.: Harvard University Press, 1999).

On Postcolonial Studies, Literature and the Nation State

Homi K. Bhabha, “Signs Taken for Wonders: Questions of Ambivalence and Authority under a Tree Outside Delhi, May 1817,” 12 *Critical Inquiry* 144 (1985).

Slavoj Žižek on how literature can validate law: “The lesson to be drawn [...] concerning the social field is above all that belief, far from being an ‘intimate’, purely mental state, is always *materialized* in our effective social activity: belief supports the fantasy which regulates social reality. Let us take the case of Kafka: it is usually said that in the ‘irrational’ universe of his novels, Kafka has given and ‘exaggerated’, ‘fantastic’, ‘subjectively distorted’ expression to modern bureaucracy and the fate of the individual within it. In saying this we overlook the crucial fact that it is this very ‘exaggeration’ which articulates the fantasy regulating the libidinal functioning of the ‘effective’, ‘real’ bureaucracy itself.” Slavoj Žižek, *The Sublime Object of Ideology* 36 (London and New York: Verso, 1989). Žižek elaborates on the idea that law is a cultural touchstone: “‘External’ obedience to the Law is thus not submission to external pressure, to so-called non-ideological ‘brute force’, but obedience to the Command in so far as it is ‘incomprehensible’, not understood; in so far as it retains a

‘traumatic’, ‘irrational’ character: far from hiding its full authority, this traumatic, non-integrated character of the Law is a *positive condition of it*. This is the fundamental feature of the psychoanalytic concept of the *superego*: an injunction which is experienced as traumatic, ‘senseless’ – that is, which cannot be integrated into the symbolic universe of the subject. But for the Law to function ‘normally’, this traumatic fact that ‘custom is the whole of equity for the sole reason that it is accepted’ – the dependence of the Law on its process of enunciation or, to use a concept developed by Laclau and Mouffe, its radically *contingent* character – must be repressed into the unconscious, through the ideological, imaginary experience of the ‘meaning’ of the Law, of its foundation in Justice, Truth (or, in a more modern way, functionality).” *Id.* at 37-38.

On the Takeover of Postcolonial Studies by Western Academics

Donald R. Wehrs explains, “It has become commonplace within postcolonial studies to lament the colonizing propensities of postcolonial studies.” Donald R. Wehrs, “Sartre’s Legacy in Postcolonial Theory; or, Who’s Afraid of Non-Western Historiography and Cultural Studies?” 34 *New Literary History* 761 (2003). Wehrs adds, “Despite a guilty conscience about depending upon Western-derived analytical matrices, postcolonial theory continues to exhibit a lack of interest in non-Western cultures’ articulations of meanings and value.” *Id.*

The following passage both undermines and affirms Wehrs’s claim: “So postcolonialism, in our view, exists in an ambivalent belonging to the West. It speaks of the West and in a way comes from it. But postcolonialism is a disruption or fracturing of the West. It is not to be contained by the West. As such, it cannot be ‘part’ of the West. It must speak from beyond a West that, in a sense, originates it. All of which does not involve our occupying some position secured apart from the West. We do not even remotely presume to stand in a place of ‘the other,’ to speak for ‘the subaltern.’ Rather, we would say that postcolonialism does not lodge in any assured place.” Peter Fitzpatrick and Eve Darian-Smith, “An Insistent Introduction,” in *Laws of the Postcolonial* 2 (University of Michigan Press, 1999).

On International Law and Local and Non-Western Communities

Nathaniel Berman, “International Law of Nationalism: Group Identity and Legal History,” in *International Law and the Rise of Nations: The State System and the Challenge of Ethnic Groups* (R.J. Beck & T. Ambrosio, eds.) (Chatham House, 2001).

Ching-Chang Chen, “The absence of non-western IR theory in Asia Reconsidered,” *International Relations of the Asia-Pacific* (forthcoming 2010) [available for viewing at the journal’s website: <http://irap.oxfordjournals.org/>].

On Law and Nationalism

Ludwig von Mises suggests that aggressive nationalism results from legal mechanisms – or what he calls the politics of interventionism and national planning, which can only be implemented by way of law – and not vice versa: “There is a perfect agreement with regard to the fact that total war is an offshoot of aggressive nationalism. But this is merely circular reasoning. We call aggressive nationalism that ideology which makes for modern total war. Aggressive nationalism is the necessary derivative of the policies of interventionism and national planning. While *laissez faire* eliminates the causes of international conflict, government interference with business and socialism create conflicts for which no peaceful solution can be found. While under free trade and freedom of migration no individual is concerned about the territorial size of his country, under the protective measures of economic nationalism nearly every citizen has a substantial interest in these territorial issues.” Ludwig Von Mises, *Human Action* 819-20 (The Scholar’s Edition) (Auburn, AL: Ludwig Von Mises Institute, 1998). Mises’s comments also suggest that war is a result of nationalism and its attendant laws.

On Austrian Economics and Human Behavior

See Ludwig Von Mises on praxeology in “The Epistemological Problems of the Sciences of Human Action,” *Human Action*, at 30-69, and on economic calculation in “Valuation Without Calculation,” *Id.* at 201-212. See also Paul Cantor, “Preface,” *Literature and the Economics of Liberty*, at ix-xviii and “The Poetics of Spontaneous Order: Austrian Economics and Literary Criticism,” *Id.* at 1-97. Rothbard, likewise, claims that “the essence of human nature is that it cannot be considered as truly predictable; otherwise we should be dealing, not with free men, but with an ant heap. And if we could force men to march in unison according to a complete set of predictable norms, it is certainly not a foregone conclusion that we should all hail such an idea.” Murray Rothbard, *Man, Economy and State: A Treatise on Economic Principles with Power and Market: Government and the Economy* 1336 (2nd ed., The Scholar’s Edition) (Auburn, Alabama: Ludwig Von Mises Institute, 2009).

Two Caveats about Using the Transnational Signifier

With Craig Scott, I would like to adopt two caveats when talking about “transnational law” in this article: “First of all, the present paper tends to use the terms ‘phenomena’ and ‘situations’ interchangeably – as in transnational phenomena or transnational situations – to refer to the empirical contexts at play in theorizing about what ‘transnational law’ does, could or should mean”; and secondly, “quite apart from the normatized construction of ‘empirical’ contexts just noted, it is also important to note that Jessup’s passage at the very least needs to be read (as he almost certainly intended it to be read) as including contexts in which there are one or more actors with connections outside the jurisdiction in which all physical acts or events are taking place.” Craig Scott, “‘Transnational Law’ as Proto-

Concept: Three Conceptions,” 10 *German Law Journal* 859 (2009).

On Neoconservative Takeover of the Conservative Movement

See Paul Gottfried, *Conservatism in America: Making Sense of the American Right* (Palgrave-Macmillan, 2009); and Paul Gottfried, *Encounters: My Life with Nixon, Marcuse, and Other Friends and Teachers* (ISI Books, 2009). Sam Tanenhaus called the neoconservatives “the network of liberal and leftist intellectuals who were disillusioned by the convulsions of the 1960’s – or ‘mugged by reality,’ in the famous expression – and drifted steadily rightward, emerging in the 1980’s as an informal brain trust for the Reagan Administration.” Sam Tanenhaus, “When Left Turns Right, It Leaves the Middle Muddled,” *The New York Times*, Section B, Page 7, Column 1, September 16, 2001. See also Ralph Z. Hallow, “‘Neocons’ get boost in defeat of Saddam; the Movement boasts top proponents from the president down,” *The Washington Times*, Section One, Pg. A01, April 27, 2003. See also, Justin Vaïsse, “Was Irving Kristol a Neoconservative?” *Foreign Policy*, September 23, 2009: “[T]he original strand of neoconservatism didn’t pay any attention to foreign policy. Its earliest members were veterans of the anti-communist struggles who had reacted negatively to the leftward evolution of American liberalism in the 1960s. They were sociologists and political scientists who criticized the failures and unintended consequences of President Lyndon Johnson’s ‘Great Society’ programs, especially the war on poverty. They also bemoaned the excesses of what Lionel Trilling called the ‘adversary culture’ – in their view, individualistic, hedonistic, and relativistic – that had taken hold of the baby-boom generation on college campuses. Although these critics were not unconditional supporters of the free market and still belonged to the liberal camp, they did point out the limits of the welfare state and the naïveté of the boundless egalitarian dreams of the New Left.”

See also Murray Rothbard, *Betrayal of the American Right* (Edited with an Introduction by Thomas E. Woods, Jr.) (Auburn, Alabama: Ludwig Von Mises Institute, 2007).

On Postmodernism and Conservatism

Traditionalist and paleoconservative thinkers have ignored or dismissed any compatibility between their thought and postmodernism, even though postmodernism would seem to accommodate several strains of traditional conservatism. This disjuncture is probably the result of a willful ignorance on the part of those who call themselves conservatives. A notable exception is Gerald J. Russello, *The Postmodern Imagination of Russell Kirk* (Columbia, Mo.: University of Missouri Press, 2007).

Scholars Misusing the Term “Transnational”

See Mark Tushnet’s use of the term in Mark Tushnet, “Transnational/Domestic Constitutional Law,” 37 *Loyola of Los Angeles Law Review* 239 (2003) (classifying “transnational law” as an instance of one country deciding

a constitutional issue by referencing the constitution of another country); see also David Fontana, “The Next Generation of Transnational/Domestic Constitutional Law Scholarship: A Reply to Professor Tushnet,” 38 *Loyola of Los Angeles Law Review* 445 (2003); see also Philip D. Ras-cusin, “Looking at the Constitution through World-Colored Glasses: The Supreme Court’s use of Transnational Law in Constitutional Adjudication,” 28 *Houston Journal of International Law* 913 (2006).

See William J. Aceves, “Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation,” 41 *Harvard International Law Journal* 129 (2000).

Craig Scott leaves open the possibility that “transnationalism” entails “universalism,” but I entirely reject this position because there would be no point in employing the term transnational if it were simply to mean the same thing that old-school definitions of international law meant. See Scott on “Transnationalized Legal Traditionalism,” in “‘Transnational Law’ as Proto-Concept: Three Conceptions.” Craig Scott, “‘Transnational Law’ as Proto-Concept: Three Conceptions,” 10 *German Law Journal* 859 (2009). This universalizing impulse seems to fly in the face of the “trans” signifier, which in other contexts – in the sense of the word “transsexual,” say – disrupts claims and notions of universality. Scott’s third treatment of transnational law as “Transnational Socio-Legal Pluralism” is most apt and also the model I adopt in this essay.

George Orwell’s “Notes on Nationalism”

Essay available at http://orwell.ru/libraryessays/nationalism/english/e_nat. Orwell’s article, first published in *Polemic*, a London publication, is oft-quoted, but its original source remains hard-to-come-by. The essay appears, however, in 1 *The Collected Essays, Journalism, and Letters of George Orwell: An Age Like This, 1920-1940* (Sonia Orwell & Ian Angus, eds.) (David R. Godine, 2000). Assuming Orwell is right about the nationalist tendency to categorize individuals into groups, I could be deemed guilty of nationalistic rhetoric (despite of myself) insofar as I have lumped groups (Western academics, Marxists, and so on) into categories that I have designated good or bad. My purpose, however, is not to confer moral value onto national membership but to altogether upset categories of national membership or nationhood. I find problematic any turn to the fiction of nationhood to solve pressing global issues of poverty, war, diaspora, and so on.

On Maritime Law

American Jurisprudence, 2nd ed., describes maritime law as follows: “Courts of the United States and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law, not from the extraterritorial reach of national laws, nor from the abdication of its sovereign powers by any nation, but from the acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial rela-

tions. In some matters, international or maritime law does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. Rather it aims at stability and order through usages which considerations of comity, reciprocity, and long-range interest have developed to define the domain which each nation will claim as its own.” John Bourdeau, John Dvorske, Eleanor L. Grossman, Sonja Larson, William Lindsley, Jeffrey L. Shampo. “Maritime Law.” *American Jurisprudence Shipping* § 13 2nd ed.

Maritime law obtained to populations despite its acceptance or rejection by governments. During roughly the eighteenth century in England, where “[a]nything continental or international in origin met their [English common-law judges] determined resistance,” much time passed “before the English courts were willing even to admit that the law and custom of merchants, to which England owes its greatness of to-day, was a part of English law; or that it was more than a special custom, necessary to be proved in each case.” Robert Morton Hughes. *Handbook of Admiralty Law* 3-4 (St. Paul, Minnesota: West Publishing Co., 1901).

Murray Rothbard on Law

Rothbard provides an illustration that demonstrates how domestic laws function in a transnational system (bear in mind that he delivered these words in the 1960s): “[T]he world has lived quite well throughout its existence without a single, ultimate decision-maker over its whole inhabited surface. The Argentinian, for example, lives in a state of ‘anarchy,’ of nongovernment, in relation to the citizen of Uruguay – or of Ceylon. And yet the private citizens of these and other countries live and trade together without getting into insoluble legal conflicts, despite the absence of a common governmental ruler. The Argentinian who believes he has been aggressed upon by a Ceylonese, for example, takes his grievance to an Argentinian court, and its decision is recognized by the Ceylonese courts – and vice versa if the Ceylonese is the aggrieved party. Although it is true that separate nation-States have warred interminably against each other, the private citizens of various countries, despite widely differing legal systems, have managed to live together in harmony without having a single government attack on them. If the citizens of northern Montana and of Saskatchewan across the border can live and trade together in harmony without a common government, so can the citizens of northern and of southern Montana. In short, the present-day boundaries of nations are purely historical and arbitrary, and there is no more need for a monopoly government over the citizens of one country than there is for one between the citizens of two different nations.” Rothbard, *Man, Economy and State* at 1050.

On Universalism, Universal Declaration of Human Rights, and the United Nations

The very title of the Universal Declaration of Human Rights suggests that everything falling within the declaration is universal.

The *Charter of the United Nations* gave states sovereignty over their own affairs in Article 2, No. 7: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters within the domestic jurisdiction of any State.” UN Charter 1945. Article 2, No. 7. Nevertheless, the Universal Declaration of Human Rights, issued three years later, was enforceable regardless of the nation state to which a victim or violator belonged. See Universal Declaration of Human Rights, 1945, Preamble. This message effectively undercut the UN Charter’s declaration of sovereignty and laid the foundation for Western military or police intervention into foreign nations. As new nation states arose in the 20th century, their treatment by leading Western nations was not equal. See generally, e.g., Noam Chomsky, *Deterring Democracy* (London: Verso, 1991). For more on this tension between sovereignty and universal rights, consider this paragraph by Anne Bayefsky: “In 1946, the UN Charter proclaimed an international legal order, which at one and the same time promised to protect the integrity of states and promote respect for the human rights of every individual. Left unresolved was the tension between the sovereignty of states and the inviolability of human dignity. The Charter was used to support state sovereignty, territorial integrity, non-interference in domestic jurisdiction and peace as the tension between sovereignty of states and security on the one hand and respect for human rights and fundamental freedoms on the other hand. In this environment, sovereignty was the excuse for human rights abuses, whose legal message was ‘keep out.’” Anne Bayefsky. “The UN and the International Protection of Human Rights,” in Gallifan and Sampford, eds., *Rethinking Human Rights* (New South Wales, 1997). Bayefsky’s commentary points out the problems behind my argument of recognizing cultural and social legal distinctions across various states. Recognizing these distinctions could lead to violations of rights that many in the West consider universal. However, addressing rights violations with military intervention, foreign occupation, and cultural hegemony violates the very rights that Westerners consider universal. It will not do to violate rights in order to better secure those same rights.

On Western Progressivism as a Source of Colonialism

See Melanie Butler, “Canadian Women and the (re) production of Women in Afghanistan” 22 *Cambridge Review of International Affairs* 217 (2009) (arguing that Canadian women’s fight for women’s rights in Afghanistan has resulted in justifications for military intervention and occupation in Afghanistan). Similar arguments were made about women’s schools that British women established in colonial India. These schools justified the rhetoric of the Raj maintaining that the Indian people were backward and therefore in need of British occupation to bring them out of their backwardness.

On China and So-Called Capitalism

China remains more fascistic than communist in the Maoist sense. It has realized the benefits of free trade and liberalized economic systems. For more on this topic, see generally Yasheng Huang, *Capitalism with Chinese Characteristics*

tics: Entrepreneurship and the State (Cambridge University Press, 2008).

Murray Rothbard on Capitalism

I adopt Murray Rothbard's definition(s) of capitalism. Rothbard claims that "we believe that capitalism is the fullest expression of anarchism, and anarchism is the fullest expression of capitalism. Not only are they compatible, but you can't really have one without the other. True anarchism will be capitalism, and true capitalism will be anarchism." Murray Rothbard, "Exclusive Interview with Murray Rothbard," *The New Banner: A Fortnightly Libertarian Journal* (25th February 1972) [reprinted on LewRockwell.com: <http://www.lewrockwell.com/rothbard/rothbard103.html>].

On Polycentric Law

Polycentric law is a system of "overlapping private jurisdictions in free and open competition." Tom W. Bell, "Polycentric Law," 7 *Humane Studies Review* (1991-92) [full article available at <http://osf1.gmu.edu/~ihs/w9issues.html>]. Other articles addressing this topic include: Tom W. Bell, *Privately Produced Law*, Libertarian Alliance Legal Notes No. 16 (1991) [available at <http://www.libertarian.co.uk/lapubs/legan/legan016.pdf>]; George H. Smith, "Justice Entrepreneurship in a Free Market," *Journal of Libertarian Studies* 405 (1978) [available at http://mises.org/journals/jls/3_4/3_4_4.pdf]; and Karl T. Fielding, "The Role of Personal Justice in Anarcho-Capitalism," 2 *Journal of Libertarian Studies* 239 (1978) [available at http://mises.org/journals/jls/2_3/2_3_5.pdf].

For more on polycentric law, see Surya Prakash Sinha, *Legal Polycentricity and International Law* (Carolina Academic Press, 1996). For an insightful review of this book, see James Thuo Gathii, "International Law and Eurocentricity," 9 *European Journal of International Law* 184 (1998).

NOTES

(1) *Channels of Discourse, Reassembled: Television and Contemporary Criticism* 254 (Robert C. Allen, ed.) (Chapel Hill, N.C.: University of North Carolina Press, 1992). Fisk adds, "Cultural studies is concerned with the generation and circulation of meanings in industrial societies." *Id.* I am not a partisan of Fiske's variety of cultural studies. I merely cite his definition to clarify the way I use the term in this essay.

(2) Seamus Deane, "Introduction," in *Nationalism, Colonialism and Literature* 8 (University of Minnesota Press, 1990). Deane adds, "Although the problems created by such an ambition are sufficiently intractable in themselves, they are intensified to the point of absurdity when a nationalist self-conception imagines itself to be the ideal model to which all others should conform. That is a characteristic of colonial and imperial nations. Because they universalize themselves, they regard any insurgency against them as necessarily provincial. In response, insurgent nationalisms attempt to create a version of history for themselves in

which their intrinsic essence has always manifested itself, thereby producing readings of the past that are as monolithic as that which they are trying to supplant." *Id.* at 8-9.

(3) John Hutchinson and Anthony D. Smith, *Nationalism* 15 (Oxford and New York: Oxford University Press, 1994).

(4) *Id.* at 4.

(5) Frederick Hertz, *Nationality in History and Politics* 3 (New York: The Humanities Press, 1996).

(6) *Id.* at 4.

(7) George Orwell, "Notes on Nationalism" (October 1945).

(8) Edward W. Said, *Humanism and Democratic Criticism* 50 (New York: Columbia University Press, 2003).

(9) *Id.* at 51-52.

(10) Orwell, "Notes on Nationalism."

(11) Hutchinson and Smith at 4.

(12) *Id.*

(13) *Id.*

(14) *Id.* at 7.

(15) Homi K. Bhabha, *The Location of Culture* 200 (London and New York: Routledge, 1994).

(16) *Id.*

(17) *Id.* at 201.

(18) *Id.*

(19) *Id.*

(20) Orwell, "Notes on Nationalism."

(21) *Id.*

(22) *Id.*

(23) *Id.*

(24) *Id.*

(25) James H. Hyde, "Review of Transnational Law," 66 *Yale Law Journal* 813 (1957).

(26) C.f., Jahan Ramazani, *A Transnational Poetics* (Chicago, London: University of Chicago Press, 2009).

(27) See William James, *A Pluralistic Universe* (New York, London, Bombay, and Calcutta: Longmans, Green, and Co., 1909).

(28) See William James, *The Varieties of Religious Experience: A Study in Human Nature* (New York, NY: The Modern Library, 1902).

(29) Kenneth Burke, *A Grammar Of Motives* 318 (Berkeley and Los Angeles: University of California Press, 1969).

(30) Philip Jessup, *Transnational Law* 1 (New Haven, CT: Yale University Press, 1956).

(31) *Id.*

(32) *Id.* at 2.

(33) *Id.*

(34) *Id.* at 3.

(35) *Id.* at 3.

(36) *Id.* at 6.

(37) Samuel P. Baumgartner, "Is Transnational Litigation Different?" 25 *University of Pennsylvania Journal of International Economic Law* 1297, 1300 (2004).

(38) Wibo M. van Rossum, "Resolving Multicultural Legal Cases: A Bottom Up Perspective on the Internationalization of Law," in 2 *The Internationalization of Law and Legal Education* 113 (Jan Klabbers and Mortimer Sellers, eds.) (Springer, 2008).

(39) David Kennedy, "One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream," 31 *New York University Review of Law and Social Change* 641

- (2007).
- (40) *Id.* at 641.
- (41) *Id.* at 643.
- (42) Frederic Jameson, *The Cultural Turn: Selected Writings on the Postmodern, 1983-1998* 3 (London and New York: Verso, 1998).
- (43) Frederic Jameson, *Late Marxism* 142 (London and New York: Verso, 1990).
- (44) Murray Rothbard, *Man, Economy and State: A Treatise on Economic Principles with Power and Market: Government and the Economy* 1051 (2nd ed., The Scholar's Edition) (Auburn, Alabama: Ludwig Von Mises Institute, 2009).
- (45) Harold Hongju Koh, "Why Transnational Law Matters," 24 *Penn State International Law Review*. 745 (2006).
- (46) *Id.* at 751. "Not only does transnational law already represent a growing part of the Supreme Court's docket, but in a new millennium, the study of transnational law will soon affect and be reflected in all aspects of our legal education." *Id.* at 753.
- (47) Baumgartner, "Is Transnational Litigation Different?" at 1361.
- (48) Sébastien Lebel-Grenier, "What is a Transnational Legal Education?" 56 *Journal of Legal Education* 190, 191 (2006).
- (49) *Id.* at 192.
- (50) "This process runs several ways. Frequently, more than one country attempts to regulate particular patterns of behavior with the result that state action needs to account for the preferences of other governments in the international system. Moreover, affected transnational actors have more than one government to address their grievances. Thus, the policy decisions of one state may result in responsive governmental action both at home and abroad." Baumgartner at 1361.
- (51) "Nation states may truly fashion the law of transnational litigation as they deem fit, although their efforts are superseded by a growing patchwork of rules and standards of international law and are increasingly controlled by the jurisprudence of supranational tribunals." *Id.* at 1379.
- (52) American Arbitration Association website: <http://www.adr.org/icdr>.
- (53) Christopher A. Whytock, "Domestic Courts and Global Governance," 84 *Tulane Law Review*. 67 (2009).
- (54) Baumgartner at 1380.
- (55) Lebel-Grenier at 191.
- (56) Robert P Murphy, *Chaos Theory* 11 (New York: RJ Communications, 2002).
- (57) Frank Lentricchia, "Philosophers of Modernism at Harvard, circa 1900," 89 *South Atlantic Quarterly* 802 (1966).
- (58) Frederic Jameson, "Globalization as Philosophical Issue," in *The Cultures of Globalization* 64 (Frederic Jameson and Masao Miyoshi, eds.) (Durham and London: Duke University Press, 1998).
- (59) David G. Littman. "Universal Human Rights and 'Human Rights in Islam.'" *Midstream*. February/March (1999). See also David G. Littman. "Human Rights and Human Wrongs." *National Review Online*. 19th January 2003 [available at <http://www.nationalreview.com/articles/205577/human-rights-and-human-wrongs/david-g-littman>].
- (60) Murray Rothbard, "A Future of Peace and Capitalism," in James W. Weaver, ed., *Modern Political Economy* 419 (Boston: Allyn and Bacon, 1973). The article is available online at <http://mises.org/daily/1559>.
- (61) *Id.*
- (62) *Id.*
- (63) See Bruce L. Benson, "Customary Law with Private Means of Resolving Disputes and Dispensing Justice: A Description of a Modern System of Law and Order without State Coercion." 14 *Journal of Libertarian Studies* 25 (1990).
- (64) Franz Fanon, *The Wretched of The Earth* 40 (New York: Grove Press, 1963).
- (65) *Id.* at 40.
- (66) *Id.* at 48.
- (67) *Id.*
- (68) Helen Scott, "Reading the Text in its Worldly Situation: Marx, Imperialism, and Contemporary Caribbean Women's Literature," 2 *Postcolonial Text* (2006) [available at http://postcolonial.org/index.php/pct/article/viewArticle/491/851#_edn1].
- (69) *Id.*
- (70) Rothbard, "A Future of Peace and War."
- (71) Ludwig Von Mises, *Human Action* 9 (The Scholar's Edition) (Auburn, AL: Ludwig Von Mises Institute, 1998)
- (72) *Id.*
- (73) *Id.* at 819.
- (74) C.f., A. I. Orgus, "Law and Spontaneous Order: Hayek's Contribution to Legal Theory," 16 *Journal of Law & Society* (1989).