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# Transnational Law as Socio-Legal Theory and Critique: Prospects for “Law and Society” in a Divided World

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## Transnational Law as Socio-Legal Theory and Critique: Prospects for “Law and Society” in a Divided World

PEER ZUMBANSEN†

**Bobbi:** if you look at love as something other than an interpersonal phenomenon

**Bobbi:** and try to understand it as a social value system

**Bobbi:** it’s both antithetical to capitalism, in that it challenges the axiom of selfishness

**Bobbi:** which dictates the whole logic of inequality

**Bobbi:** and yet also it’s subservient and facilitatory

**Bobbi:** i.e. mothers selflessly raising children without any profit motive

**Bobbi:** which seems to contradict the demands of the market at one level

**Bobbi:** and yet actually functions to provide workers for free

**me:** yes

**me:** capitalism harnesses “love” for profit

**me:** love is the discursive practice and unpaid labor is the effect

**me:** but I mean, I get that, I’m anti love as such

**Bobbi:** that’s vapid Frances

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**Bobbi:** you have to do more than say you're anti things<sup>1</sup>

[M]odernization and globalization are powerful processes. We live in a period in which you easily get sushi in Denver, Colorado or Caracas, Venezuela (and it is popular in both cities); and you can find McDonald's in Tokyo as well. American movies are popular in most of the world. So is rock-and-roll. Today you can go on the Internet from Madison, Wisconsin and purchase a recording by Bartok with the Berlin Philharmonic, conducted by Zubin Mehta. Museums in New York display African art. The world is, of course, hardly a global village; but if culture and technology converge, at least relatively speaking, does this have an impact on legal systems? Does it have an impact on legal culture? On all of these global and transnational issues, surely there will be far more interest, and research, in years to come.<sup>2</sup>

The trick, of course, is neither to engage in some quest for the universal nor to approach each legal system as an exercise in butterfly collecting. Instead, it is to focus on connections, to keep turning the kaleidoscope so that as different legal and cultural systems appear we appreciate how differently they may arrange the connections among their parts.<sup>3</sup>

## I. DESPAIR

The present moment. The weight of it. And, yet, its elusiveness. How does one capture it? How does one grasp the multiple strands of thoughts, discourse, events as well as objects that make up this particular moment? If not (or, no longer<sup>4</sup>) reaching for stars, are we hoping to catch butterflies or missiles, or, are we merely clasp at straws? The feeling of inadequacy is prompted by repeated experiences of ignorance and unawareness. So much unseen, so many

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1. SALLY ROONEY, CONVERSATIONS WITH FRIENDS 172–73 (2017).

2. STEWART MACAULAY ET AL., LAW IN ACTION: A SOCIO-LEGAL READER 1018 (2007).

3. LAWRENCE ROSEN, LAW AS CULTURE: AN INVITATION 12 (2006).

4. See Roberto Foa & Yascha Mounk, *Across the Globe, a Growing Disillusionment with Democracy*, N.Y. TIMES, Sept. 15, 2015, <https://www.nytimes.com/2015/09/15/opinion/across-the-globe-a-growing-disillusionment-with-democracy.html>.

unheard.<sup>5</sup> How helpful, then, is it to try to identify precursors,<sup>6</sup> echoes<sup>7</sup> and trajectories<sup>8</sup> to connect the past with our day in order to draw lessons or insights? The approach to law and to a critique of its function in a changing and, structurally, deeply divided society,<sup>9</sup> is and has been at the core of the “law and society” movement<sup>10</sup> (LSM) and, with that, the question of what *is* and *how* to adequately capture the materiality and meaning of “context” has been both the elephant in the room and the elephant being felt by blind men. It is the unavoidable item which is present and the reason why everyone came, but it is something different for everyone. Aspirations abound, and so do law and society’s trials and tribulations.<sup>11</sup>

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5. See CARL C. ANTHONY, *THE EARTH, THE CITY AND THE HIDDEN NARRATIVE OF RACE* *passim* (2017); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* xii–xvii (2017); Priya Gupta, *The American Dream, Deferred: Contextualizing Property After the Foreclosure Crisis*, 73 MD. L. REV. 523 *passim* (2014).

6. Following the populist revival of the millennium’s second decade, a recurring theme in the anatomy of the present is “fascism.” See, e.g., WILLIAM E. CONNOLLY, *ASPIRATIONAL FASCISM: THE STRUGGLE FOR MULTIFACETED DEMOCRACY UNDER TRUMPISM* (2017).

7. ROGER EATWELL & MATTHEW GOODWIN, *NATIONAL POPULISM: THE REVOLT AGAINST LIBERAL DEMOCRACY* *passim* (2018).

8. RACISM IN THE MODERN WORLD: HISTORICAL PERSPECTIVES ON CULTURAL TRANSFER AND ADAPTATION *passim* (Manfred Berg & Simon Wendt eds., 2014). For a fascinating history of neoliberal economists’ and policy makers’ instrumentalization of the state in the promotion of property and investment rights, see QUINN SLOBODIAN, *THE GLOBALISTS* *passim* (2018). For an equally disconcerting account of the origins of the Global Financial Crisis (GFC) and the many inopportune attempts to learn from it, see ADAM TOOZE, *CRASHED: HOW A DECADE OF FINANCIAL CRISES CHANGED THE WORLD* *passim* (2018).

9. Devon W. Carbado & L. Song Richardson, *The Black Police: Policing Our Own*, 131 Harv. L. Rev. 1979 *passim* (2018) (reviewing JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017)). For a different context of a divided society, see Marie Fox & John Morison, *Lawyers in a Divided Society: Legal Culture and Legal Services in Northern Ireland*, 19 J.L. & SOC’Y 124 *passim* (1992).

10. Lynn Mather, *Law and Society*, in *THE OXFORD HANDBOOK OF POLITICAL SCIENCE* 289 *passim* (Robert Goodin ed., 2011).

11. Jonathan Simon, *Law after Society*, 24 L. & Soc. Inquiry 143, 144 (1999) (reviewing STEWART MACAULAY ET AL., *LAW AND SOCIETY: READINGS ON THE SOCIAL*

To both capture and acknowledge the significance of the LSM today is an important task not only in light of the movement's complex trajectories over time, but because its greatest value, admittedly, might be seen in the critical interventions that have been made through its networks and members across different political eras—themselves often drawn upon as historical frames for the positioning and elaboration of the movement's central concerns. Underneath its focus on the relationship between “law” and “society”, its protagonists scrutinize the actual conditions of democratic representation, the substantive and procedural guarantees—and, their effectiveness—of “access to justice” and the role of courts in either advancing or stalling and resisting progressive claims for “social justice.” It is here, where LSM's genealogies and manifold inheritances as well as variations and innovations since the anti-formalist and legal realist writing of the Nineteenth/Twentieth century turn, through the Critical Legal Studies movement, Critical Race Theory and on to post-colonial legal studies, “TMAIL” and LGTBQ critiques become visible. In many ways, then, LSM has been and continues to be both a crucial time-keeper of critical legal and socio-legal thought and a platform for collaboration and collective agency towards law reform and policy intervention.

Meanwhile, such an ambitious understanding of law comes at a price. Viewing law as entangled not only in struggles for political and socio-economic rights, but as an important tool in the development of diverse initiatives of social critique and protest continues to expose the movement to challenging questions of method and epistemology. How, in other words, is “poverty” to be measured in a world before and *after* the welfare state, and since the financial crisis with its ambiguous fall out and post-crisis “normalization”? What does “equality” mean when studied in a context associated

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STUDY OF LAW (1995)) (“Yet as the twentieth century ends, this venerable project of working the intersection between law and the social finds itself not only incomplete but also increasingly uncertain about its identity . . .”).

with austerity and neoliberalism but also with identity politics and religious pluralism? And, where are the reference points for a "political" critique of social "conditions" when "the state" has undergone and continues to be shaped by fundamental transformations in the relationship between public and private? If the LSM, arguably, focuses on the civil-political and socio-economic circumstances of contemporary society, that very society has become ever more elusive to grasp—conceptually, empirically, and normatively. What does that mean for the movement's concept of law? And, what role can be imagined for law in a neo-liberal, allegedly "post-racial" and "post-feminist" world?

The here offered reflections are inspired by the crucial interventions that the LSM and its tireless and fearless protagonists have and continue to make to precisely that larger question. Recognizing the impossibility to even remotely do justice to the variety of LSM scholarship, its members' activism and engagement for the achievement of actual social and political change, their lobbying for law reform and advocacy of policy changes as well as their rebellious role in educational, governmental and other institutional contexts, my task here is a very specific one. In acknowledging the need to retrace, engage and adapt the analytical, conceptual and empirical toolkits of such bold law-based projects of social and political critique over time, I wish to draw attention to the time/place dimension in much of the LSM's work by building on what is already an important concern within the movement: the question how to adequately think of law (and society) in an interdisciplinary fashion. The here proposed intervention, however, seeks to—momentarily—decenter the ordinary focus in much of the LSM's scholarship on the "here and now" by critically challenging, first, *what* exactly is encapsulated in the "here", second, whether we should assume that there is a shared experience of everyone's journey to "now", namely this present moment, and, third, *who* really is meant by and included in our constant recurrences to a "we". In other

words, the three-fold question aims at interrogating our (!) existing frameworks with which we (!) a) identify problems as “problems,” b) explain these problems against a particular, yet potentially very one-dimensional and as such exclusionary and violent historical narrative and c) assume to be speaking in a universally acceptable and valid manner as representatives of an in fact much, much larger and infinitely more diverse group. Yes, we (!) are in trouble.

There is, of course, nothing in these questions which speak to the epistemological crisis in post-but-not-yet-dead-neoliberalism socio-legal studies that we (!) wouldn't all come up with answers to—at some point. The immensely innovative and inter-disciplinary quality of LSM work up until the present day is nothing but a great harbinger of hope. So, if there was any need or, rather, justification at all for the here offered comments, then it might be found in relation to the LSM's still dominant focus on the local. Ironically, the local context, a city, a segment of society, a region, a family or a corporation and its surrounding community, is its natural habitat and must be so, especially if we recognize the continued need to boldly challenge overly abstract and philosophical engagements with “law” through relentless offerings from the socio-legal scholar's grab bag of messy detail, fuzzy boundaries and incongruent narratives. As those are regularly borne out of concrete examples, “fieldwork” and sometimes long-term “shadowing,” they do not lend themselves easily to generalization or conceptual *elevation*. But, among the side-effects of this attention to detail and of the concentrated and dedicated study of a very concrete, local instance of “law in action” is the risk of a loss of engagement with the experience and the work of other (socio-legal) scholars, who are engaged in just such studies in different places. Ironically, again, while the comparative lawyer will likely spend and end their life in the painful awareness of neither ever having “looked” far enough nor having ever fully “understood” the world beyond them, the socio-legal scholar might too often forego embarking on a

journey to connect with other socio-legal investigators in "far-away places" altogether. What might potentially get lost, then, is not only the exchange with one's colleague over the parallels or differences between their respective preoccupations, their examples and their methods with which they scrutinize them. What is perhaps an ever greater opportunity not coming to fruition or too often being postponed until some unspecified "later date" is the shared experience of being confronted with phenomena that cannot be reduced nor fully explained by reference to the concrete context in which they become apparent. A transnational approach to socio-legal studies, then, would have to build on the hard-won insights among comparative lawyers regarding the difficulty to actually "understand" other people's law but it would, at the same time, have to go beyond that. The task is not one of reducing one's search in a "foreign" jurisdiction for similarities in, say, a legal rule, principle or even legislative initiative between "their" and one's own law. Instead, a *transnational* socio-legal scholar must try to investigate the underlying, deeper as well as systematic conditions out of which legal challenges emerge locally. That requires, however, a distinct displacement and *ironicization* of what is accepted as "true" in one's own legal (political—philosophical—cultural) imagination in order to create a space in which competing, alternative explanations can become visible. At present, there is much that prompts such a *transnationalization* of socio-legal studies. The ubiquitous, world-wide despair over "the ways of the world" seems to translate itself into ever more accelerated as well as differently shaped forms of protest. Meanwhile, there is also a clearly wide-spread, again world-wide interest in recently published critiques of inequality, populism, racism and xenophobia as well as of an ever more comprehensive incorporation of the individual in globe-spanning data collection and surveillance infrastructures which, too, points to the existence of more systematic and spatialized causes for the local emergence of illness symptoms. Still, another compelling development concerns the important rise in

amplitude and importance of regional and local law & society scholarship and related projects and networks outside of the “home” base of North America and, to a different degree, Europe. These latter developments, for example in Latin America, Africa and Asia, are noteworthy not least because they signal a distinct emphasis on the engagement with indigenous and subaltern as well as feminist and, more recently, LGBTQ-oriented legal critique, about which more will be said in parts III. and IV. of this paper, but also because they—as in the case of Latin America and Africa—occur in connection with direct calls for scholars to write in their own, local language. With that, socio-legal scholars and activists are not only well positioned but also importantly being called upon to pay particular attention to the transnational dimension of their research agendas and their research methods, a crucial dimension of which will be to critically revisit and engage the epistemologies which underlie the conceptual frameworks now in circulation.

With reference, in particular, to the LSM’s continuing emphasis on both *empirical* and *inter-disciplinary* work, this paper proposes to complement and, hereby, challenge the issue complex of “place,” “time” and “authorship/agency” in contemporary law & society scholarship (and, activism) from a transnational legal studies perspective. For that purpose, I want to highlight what are already important, if not readily visible—transnational—dimensions of socio-legal studies today. By that I mean to make more explicit the ongoing transnational work within the LSM but also outside the movement’s core cohort as increasingly visible among an emerging generation of legal anthropologists and sociologists, geographers, political economists as well as cultural theorists, media and image scholars. A lot of the compelling and timely scholarship and critical engagement in this regard is not only explicitly ethnographic but also seeking to constantly problematize the tension between facts and norms, between the empirical base and the conceptual framing, between field work and epistemology. Outspokenly

claiming a foundation of post-colonial critique, these strands in contemporary law & society scholarship are—empirically, ethnographically speaking—infinately more messy and entangled, embedded and “long haul” while they are—in terms of their underlying epistemes—distinctly critical vis-à-vis the theoretical frameworks through which problems are otherwise regularly being framed, engaged and evaluated.

As will hopefully become clearer through the course of this paper, this *turn to the empirical and the epistemological* is a core concern of the way in which I think we should today understand law *as* transnational. Such an approach does not attempt to draw a neat dividing line between “domestic” and “global” as allegedly two confined spaces. It’s distinctive methodological push is neither to argue for a resurrection of methodological nationalism nor for a nihilist collapse of the conceptual tension between the domestic and global. Instead, the here embraced idea of transnational law goes emphasizes the need to critically engage the conceptual and rhetorical frameworks through which these lines are either defended or attacked. Transnational law, *in nuce*, seeks to focus on the *actors, norms* and *processes* that are involved in generating, enforcing, adjudicating but also resisting law in a global context. While this “global context” does not demarcate an autonomous sphere of human interaction which exists in neat iso- and insulation from the nation-state, it is also one that cannot satisfyingly be defined or grasped through dualisms of public/private, state/society or domestic/global(international)—as long as these dualisms are taken as universally valid and, as such, are understood as elements of a universally “true jurisprudence.” By contrast, if one starts investigating any of such dualisms in light of a pluralist understanding of value systems, contested epistemologies and diverse-yet-violently-entangled histories of development, the contours of what I understand to be an emerging *transnational jurisprudence* begin to become apparent. In this vein, this paper is based on the assumption that such an approach to (transnational) law has a number

of important affinities with law & society. For one, such affinities are grounded in the awareness among LSM scholars that most of their analysis and their policy arguments will never be free of volatility and circumstantial relativity. Secondly, both transnational lawyer and socio-legal scholar recognize the existential need to keep an ironic distance in relation to whatever legal idea or principle is being presented as “canonical” or “universal,” recognizing that the devil lies in the incoherent and intriguing detail which prompts both to look more closely, more critically and, indeed, more ironically.

In what follows, we shall touch upon a small number of LSM “battle grounds,” instances that seem to represent, perhaps more poignantly than others, the ambitious task law & society scholars continue to set themselves. Meanwhile, these examples illustrate, quite directly, the already mentioned problematique of place and time, meaning that in each case the problem will inevitably look differently depending from which—and, whose—vantage point it is being assessed. Through a brief discussion of these examples, then, it might be possible to see how “the transnational” *shines through* what at first sight appears to be a wholly local and extremely momentaneous affair and concern. It is, then, through the interpenetration of the empirical and the conceptual which comes to the fore in each instance, that we can more clearly recognize how the usage of “law,” for example, in relation to “the state,” but also in distinction from “non-law,” needs to be updated and relativized. Such a deconstruction of the state-law nexus, on the one hand, and of the law/non-law distinction, on the other, emerges as a logical consequence of problematizing LSM’s habitual working assumptions against the background of post-colonial theory. As we will see, the latter is as happily unruly and continuously evolving as LSM once was—and, arguably, might still be. And, the same, of course, is true of transnational law. As a methodological framework to critically engage law’s forms and functions in a global

context—geographically as well as epistemologically—transnational law is being introduced to bring together these different strands of critique but also to highlight their specific qualities against the background of a new, post-binary methodology of law in a global context.

## II. BATTLEFIELDS

Writing in 1916, the year Woodrow Wilson appointed him to the Supreme Court, the jurist Louis Brandeis observed:

within the last fifty years, we have passed through an economic and social revolution which affected the life of the people more fundamentally than any political revolution known in history. . . . Political as well as economic and social science noted these revolutionary changes. But legal science—the unwritten or judge-made laws as distinguished from legislation—was largely deaf and blind to them.<sup>12</sup>

Ninety years later, Marc Galanter, a leading socio-legal scholar and one of the founders of LSM, described the movement's take-off thus:

LSS (law and social science) flourished at the intersection of legal optimism, academic expansion, and interdisciplinary enterprise. The Law and Society Association was founded in 1964, the year that the federal government launched the War on Poverty and embarked on an ambitious program of employing legal services strategically to improve the condition of the poor . . . .<sup>13</sup>

The interest of scholars who associate with LSM the socio-economic dimensions and the social impact and consequences of legal and regulatory governance has remained constant, but the foci of empirical study, research, and conceptualization have continued to evolve.<sup>14</sup>

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12. Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 463–64 (1916).

13. Marc Galanter, *In the Winter of Our Discontent: Law, Anti-Law, and Social Science*, 2 ANN. REV. L. & SOC. SCI. 1, 3 (2006).

14. See Errol Meidinger, *Regulatory Culture: A Theoretical Outline*, 9 L. & POLY 355 *passim* (1987).

Looking at the more recent context, snapshots from three different areas of socio-legal engagement—land rights, corporate governance and the war on terror—might further illustrate the diversity in the work being done. Since around the time of Galanter’s account, just into the start of the new millennium, the law and development and feminist legal scholar, Ambreena Manji, has offered a series of revealing insights into the continuously expanding land acquisition processes in vast parts of Africa.<sup>15</sup> Analyzing, for example, the Ugandan land reform against the background of parallel contemporary legislation in other African states, Manji directs our attention to the gendered blind spots inherent in legal interventions to render land—seen as “dead capital”—into an economically profitable asset, while failing to account for the inherent power asymmetries and structural disempowerment of women:

A range of commercial and political hurdles stand in the way of protecting women. In the public sphere, commercial and political interests throw their weight behind attempts to liberate “dead capital.” Such efforts are parasitic upon, and threaten to worsen, unequal power relations within the private sphere of the family.<sup>16</sup>

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15. Ambreena Manji, *Whose Land is it Anyway?*, AFRICA RESEARCH INSTITUTE, COUNTERPOINTS (June 2015); Ambreena Manji, *The grabbed state: lawyers, politics and public land in Kenya*, 50 J. MOD. AFR. STUD. 467, *passim* (2012). See also Jampel Dell’Angelo et al., *The Tragedy of the Grabbed Commons: Coercion and Dispossession in the Global Land Rush*, 92 WORLD DEV. 1 *passim* (2017); Laura German et al., *Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?*, 48 WORLD DEV. 1 *passim* (2013).

16. Ambreena Manji, *Commodifying Land, Fetishising Law: Women’s Struggles to Claim Land Rights in Uganda*, 19 AUSTL. FEMINIST L.J. 81, 91 (2003); see also Ambreena Manji, *‘The Beautiful Ones’ of Law and Development*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 152, 167 (Doris Buss & Ambreena Manji eds., 2005) (“The household is taken to be an undifferentiated unit in which the needs and interests of men and women converge.”). For a resounding socio-legal, feminist critique of family law that addresses the gendered blind spot identified by Manji as “family law exceptionalism”, see Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 *passim* (2010), and, before them, see the seminal work by Frances Olson, *The Family and the Market: A Study of Ideology and Legal Reform*, 96

As she extends her critique into the conflicted zones of development, corruption, and investment driven transformations of local political economies, Manji does more than merely echo previous iterations regarding the split between “family” and “market” as, for example, famously explored in the early 1980s by Frances Olson, who observed:

Given this simultaneous glorification and denigration of both the home and the marketplace, it should be no surprise that the sharp split between the two spheres had complex effects upon women. The market/family dichotomy tended to exclude women from the world of the marketplace while promising them a central role in the supposedly equally important domestic sphere.

Manji is part of an empirically informed, ethnographic approach to law and society which benefits from what has to be understood as the *transnationalization* of legal ethnography and anthropology.<sup>17</sup> Rather than engaging in legal comparison of particular doctrines or concepts between two or more countries, this scholarship focuses on the connections between regulatory transformations in different societal communities around the world, against the backdrop of an appreciation of migrating norms, standards, and movements of ideas, critique, advocacy, and intervention.<sup>18</sup>

In the second example, we enter an area of similar conceptual turmoil and border-crossing/ignoring policy debate over the field’s underlying values: here, scholars of company law, corporate governance, and financialization

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HARV. L. REV. 1497, 1500 (1983).

17. MARINA WELKER, ENACTING THE CORPORATION: AN AMERICAN MINING FIRM IN POST-AUTHORITARIAN INDONESIA *passim* (2014); Sally Engle Merry, *Law, Anthropology, and Transnational Processes*, 21 ANN. REV. ANTHROPOLOGY 357 *passim* (1992); see Laura Knöpfel, *CSR Communication in Transnational Human Rights Litigations Against Corporations* (Transnational Law Inst., TLI *THINK!* PAPER 1/2019, 2019), <https://ssrn.com/abstract=3311545>.

18. See, e.g., KIM FORTUN, *ADVOCACY AFTER BHOPAL: ENVIRONMENTALISM, DISASTER, NEW GLOBAL ORDERS* *passim* (2001). See also Sara Dehm, *Accusing ‘Europe’*. *Articulations of Migrant Justice and a Popular International Law*, in *PEOPLES’ TRIBUNALS AND INTERNATIONAL LAW* 157-181 (Andrew Byrnes & Gabrielle Simm, 2017).

have been struggling to resist claims about an “end of history for corporate law” in an effort to mount evidence against the alleged, all-around triumph of shareholder primacy in understanding the place of the modern business corporation in society.<sup>19</sup> By scrutinizing the nonchalance of domestic corporate governance reform under the banner of creating attractive jurisdictions for global investors<sup>20</sup> in relation to the detrimental effects the endorsement of shareholder value primacy has on workers, employment law and the constitutionally protected institutions of collective bargaining,<sup>21</sup> critics have been emphasizing the global and transnational *embeddedness* of company law regimes in defense against global capital’s search for the most permissive legal framework.<sup>22</sup>

Finally, the global “war on terror” has, in a relatively short and constantly accelerating time span,<sup>23</sup> settled and

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19. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 *passim* (2001). For a more “skeptical” take on this thesis and its supporting methodology, see Ruth V. Aguilera & Cynthia W. Williams, “Law and Finance”: *Inaccurate, Incomplete, and Important*, 2009 BYU L. Rev. 1413 *passim*; Simon Deakin, *The Coming Transformation of Shareholder Value*, 13 CORP. GOV. 11 *passim* (2005).

20. See, for example, the observation by the International Finance Corporation in their 2016 report: “Companies, regulators, and legislative bodies in markets at all stages of development acknowledge the value of good governance and the role it plays in heightening investor interest, improving access to capital, and strengthening markets.” INTERNATIONAL FINANCE CORPORATION, FROM COMPANIES TO MARKETS: GLOBAL DEVELOPMENTS IN CORPORATE GOVERNANCE, vii (2016).

21. Zobaida Khan, *Transnational Labour Governance: A Critical Review of Proposals for Linkage Through the Lens of the Rana Plaza Collapse in Bangladesh*, 33 CAN. J.L. & SOC’Y 177, 182 (2018) (“Constant fear stemming from capital’s power to relocate to more hospitable places created an increased ‘risk of underbidding’ by labourers.”).

22. Simon Deakin, *Corporate Governance and Financial Crisis in the Long Run*, in THE EMBEDDED FIRM: CORPORATE GOVERNANCE, LABOR AND FINANCE CAPITALISM 15 *passim* (Cynthia W. Williams & Peer Zumbansen eds., 2011); John C. Cioffi, *State of the Art*, 48 AM. J. COMP. L. 501 *passim* (2000) (reviewing COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH (Klaus J. Hopt et al. eds., 1998)).

23. Lucas Walsh & Julien Barbara, *Speed, International Security, and “New*

become sedimented in uncountable legal/regulatory frameworks worldwide, revealing the domestic origins and drivers<sup>24</sup> of what has expanded into a hyper-complex transnational disciplinary assemblage.<sup>25</sup> Ill-defined and endlessly manipulable, the war on terror has since transformed itself into a highly effective justificatory rhetoric and vastly fragmented and decentralized control framework, blurring the boundaries between freedom and security, friend and enemy, domestic and global, and public and private.<sup>26</sup> And, all of it is fed to and consumed by a global, 24/7 “informed,” media public:

The convergence of news and entertainment media conjures a seamless integration of communication, entertainment, commerce, and politics, through which the viewer is visually bombarded by a disorienting array of choice between news, fiction, “edutainment,” and “infotainment”—all of which are delivered instantaneously in the “here and now.” As news, “reality television,” fictions, and various levels of human and computer-mediated interaction take place through this electronic portal, the social and political impacts of the proliferation of virtual environments and multiple realities intensify.<sup>27</sup>

As such, the “war on terror” continues to assert itself as the cauldron in which the survival of civil liberties and the

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*War” Coverage in Cyberspace*, 12 J. COMPUTER-MEDIATED COMM. 189, 193–94 (2006) (“Today, war coverage in cyberspace has intensified the impression of a worldwide theatre of war in which conventional demarcations of fact and fiction, real and imagined, an entertainment and education are dissolved and infused by the weight, power, and immediacy of convergent mass media.”).

24. Michael J. Boyle, *The War on Terror in American Grand Strategy*, 84 INT’L AFF. 191 *passim* (2008); Stephen E. Flynn, *America The Vulnerable*, 81 FOREIGN AFF. 60 *passim* (2002); Alison Forrest, *The Canada/U.S. Dynamic Post 9/11: Maintaining Sovereignty, Balancing Security Interests and Civil Liberties in Canadian Immigration Policy-Making* (Osgoode Digital Commons, Research Report No. 4/2005, 2005), <http://digitalcommons.osgoode.yorku.ca/clpe/172>.

25. Gavin Sullivan, *Transnational Legal Assemblages and Global Security Law: Topologies and Temporalities of the List*, 5 TRANSNAT’L LEGAL THEORY 81 *passim* (2014).

26. Cian C. Murphy, *Transnational Counter-Terrorism Law: Law, Power and Legitimacy in the ‘Wars on Terror’*, 6 TRANSNAT’L LEGAL THEORY 31 *passim* (2015).

27. Walsh & Barbara, *supra*, note 23, at 196.

future of democratic, inclusive, and equitable societies remains at boiling point.<sup>28</sup> Meanwhile, it has become another battleground for the conflict over what Upendra Baxi suitably calls the “postcolony”:

“[P]ostcolony” now recurs as cruelly and poignantly as before though in a different narrative vein- via global “wars” on “terror”; and via hyper-globalizing world economic orderings which characterize different trajectories of myriad forms of “colonization without colonizers”. In this paradigm shift some new signifying practices/semiotics, genres and grammars more fully emerge; these re-articulate the “postcolonial” in complex and contradictory by phrase-regimes so well beloved of the United Nations and the European Union) [sic] which seek to so fully dissipate as well as remake the state of the “postcolonial” in such vastly staggering imageries of the developed” [sic], “developing”, “underdeveloped”, “least developed”; and now via the hype of even “emergent” formations such as BISA (Brazil, India, South African) frames of the postcolonial. These narratives of dissipation of the “colonial” into “postcolonial” afford little dignity of discourse for the non-European others.<sup>29</sup>

Disturbingly, the materiality of the war on terror, itself having been and continuing to be a crucial target of critical deconstruction regarding its mind-bending impact on rhetoric and politics of “the normal” and “the exceptional,”<sup>30</sup> has become fused with and integral to the consolidation of exclusionary, racist, xenophobic, exclusionary, and anti-democratic climate of neoliberal politics<sup>31</sup> that render Carl

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28. See, e.g., MOUSTAFA BAYOUMI, *THIS MUSLIM AMERICAN LIFE: DISPATCHES FROM THE WAR ON TERROR* *passim* (2015); Ramon Grosfoguel, *The Multiple Faces of Islamophobia*, 1 *ISLAMOPHOBIA STUD. J.* 10 *passim* (2012).

29. Upendra Baxi, *Postcolonial Legality: A Postscript from India*, 45 *VERFASSUNG UND RECHT IN ÜBERSEE* 178, 179 (2012).

30. E.g., Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 *EUR. J. INT'L L.* 613 *passim* (2005); Anne Orford, *Biopolitics and the Tragic Subject of Human Rights*, in *THE LOGICS OF BIOPOWER AND THE WAR ON TERROR: LIVING, DYING, SURVIVING* 205 *passim* (Elizabeth Dauphinee & Cristina Masters eds., 2007).

31. Wendy Brown, *Neoliberalism's Frankenstein: Authoritarian Freedom in Twenty-First Century "Democracies"*, 1 *CRITICAL TIMES* 60, 69 (2018) (“[T]he terrorist fuses with the job-stealer, criminal, and neighborhood malingerer, and where, conversely, false promises of restored economic potency mix with false

Schmitt’s anatomy of “friend and enemy”<sup>32</sup> an almost simplistic blue print.<sup>33</sup> This toxic mix continues to emit fumes so dense that they dull our senses and blind our vision. As a growing and deepening concern tries to express itself by decrying, in a manner that today sounds almost naïve, an

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promises of restored racial and gender supremacy. Porous boundaries of neighborhood and nation, eroded socio-economic status, and new forms of insecurity are braided together in a racialized causal logic *and* economized redress. As the Brexit slogan had it, ‘we will control our country again.’ Or the French again, ‘it is our house.’”); *see also* Sally Davison & George Shire, *Race, Migration and Neoliberalism: How Neoliberalism Benefits from Discourses of Exclusion*, 59 SOUNDINGS 81 *passim* (2015) (discussing pre-Brexit-Britain); Chaim Kaufmann, *Threat Inflation and the Failure of the Marketplace of Ideas: The Selling of the Iraq War*, 29 INT’L SECURITY 5 *passim* (2004).

32. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 25–26 (George Schwab trans., The Univ. of Chi. Press 1996) (1932) (“In contrast to the various relatively independent endeavors of human thought and action, particularly the moral, aesthetic, and economic, the political has its own criteria which express themselves in a characteristic way. The political must therefore rest on its own ultimate distinctions, to which all action with a specifically political meaning can be traced. Let us assume that in the realm of morality the final distinctions are between good and evil, in aesthetics beautiful and ugly, in economics profitable and unprofitable. The question then is whether there is also a specific distinction which can serve as a simple criterion of the political and of what it consists. The nature of such a political distinction is surely different from that of the others. It is independent of them and can only speak clearly for itself. The specific political distinction to which political actions and motives can be reduced is that between friend and enemy.”).

33. *See, for example*, Edward Fairhead, *Carl Schmitt’s Politics in the Age of Drone Strikes: Examining the Schmittian Texture of Obama’s Enemy*, 22 J. CULTURAL RES. 39, 42 (2018) (“Displaying contemporary foresight for our politico-legal present moment, Schmitt envisages that the aggressor will employ framing techniques which correspond inversely with such universal claims to justice and humanity, by marking the enemy as the ‘enemy of humanity’, which then allows parties ‘to treat entire states and nations as pirates.’”); *see also* Susan Schuppli, *Deadly Algorithms: Can Legal Codes Hold Software Accountable for Code that Kills?*, 187 RADICAL PHIL. 2, 3 (2014) (“The document [the U.S. Department’s of Defense’s 2011 ‘roadmap’ on the use of unmanned technologies] is a strange mix of Cold War caricature and Fordism set against the backdrop of contemporary geopolitical anxieties, which sketches out two imaginary vignettes to provide ‘visionary’ examples of the ways in which autonomy can improve efficiencies through inter-operability across military domains, aimed at enhancing capacities and flexibility between manned and unmanned sectors of the US Army, Air Force and Navy. In these future scenarios, the scripting and casting are strikingly familiar, pitting the security of hydrocarbon energy supplies against rogue actors equipped with Russian technology.”) (bracketed explanation added)

“era of globalization,”<sup>34</sup> but also an “age of global terrorism,”<sup>35</sup> an “age of drone strikes”<sup>36</sup> and an “age of anger,”<sup>37</sup> this still is only a glimpse of the actual despair and frustration that has taken hold of progressive thinkers in what they experience as particularly dark times.<sup>38</sup> If anything, these snippets are likely to only further the impression that we find ourselves in a particularly difficult moment where the design of policies appears to occur without a reliable set of references and anchor points but, instead, manifests itself in hyperbolic, divisionist rhetoric and polemic stand-offs. Categories and “markers” are being offered at a similar speed at which the phenomena, “trends,” and creeping institutional processes emerge which a set of struggling social and political theories is trying to depict.<sup>39</sup> And, still, despite all this and the uncanniness of much current analysis, it is important to keep an eye “on the clock”—lest we forget how history maps out, perhaps without rhyme or reason, those moments at which we stare “uncertainty” and “unpredictability” in the eye, but do so with the odd intuition that we will, after all, come up with an answer. Meanwhile, we remain entrapped in a specific set of perspectives, as we inevitably seem to rely on concepts and even terminologies that are as much children of their respective times as they are their victims.<sup>40</sup> Breaking out of

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34. See, for example, the reflections from a scholar of global business strategies regarding the claims of an “end of globalization” in MICHAEL A. WITT, *THE END OF GLOBALISATION? passim* (2018), <https://knowledge.insead.edu/node/5046/pdf>.

35. MYRIAM FEINBERG, *SOVEREIGNTY IN THE AGE OF GLOBAL TERRORISM passim* (2016).

36. Fairhead, *supra passim* note 33.

37. PANKAJ MISHRA, *AGE OF ANGER: A HISTORY OF THE PRESENT* (2017).

38. *THINKING IN DARK TIMES: HANNAH ARENDT ON ETHICS AND POLITICS passim* (Roger Berkowitz et al. eds., 2009).

39. For a brief yet illuminating survey of past critical theory work, see Bernard E. Harcourt, *Counter-Critical Theory: An Intervention in Contemporary Critical Thought and Practice*, 1 *CRITICAL TIMES* 5 *passim* (2018).

40. Compare John H. Herz, *Rise and Demise of the Territorial State*, 9 *WORLD*

such linguistic and conceptual frameworks requires a continuous, critical engagement with time capsules and with the vocabulary through which its inhabitants sought to understand themselves and the world around them.<sup>41</sup> A crucial starting point for such an undertaking must be, however, the relativization of one’s accustomed perspectives on time, “history,” and of the modes through which one is inclined to define and endorse reference points, and to construct and rationalize the narrative of a particular trajectory.<sup>42</sup> It is this type of relativization that lies at the heart of the here proposed project of a *critical transnational legal theory*.<sup>43</sup> Resisting a narrative of “law as victim of

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POL. 473, 490 (1957) (“Hardly has a bipolar world replaced the multipower world of classical territoriality than there loom new and unpredictable multipower constellations on the international horizon. However, the possible rise of new powers does not seem to affect bipolarity in the sense of a mere return to traditional multipower relations; since rising powers are likely to be nuclear powers, their effect must be an entirely novel one. What international relations would (or will) look like, once nuclear power is possessed by a larger number of power units, is not only extremely unpleasant to contemplate but almost impossible to anticipate, using any familiar concepts.”), with Andrés Rivarola Puntigliano, *21<sup>st</sup> Century Geopolitics: Integration and Development in the Age of ‘Continental States’*, 5 TERRITORY POL. GOVERNANCE 478, 490 (2017) (“A particularity of the 21<sup>st</sup> century might be to consolidate the venue of the later part of the 20<sup>th</sup> century, where the path towards the construction of continental states and their *lebensraum* is no longer related to annexation, but rather occurs through what Carl Schmitt called ‘spatial supremacy’ and the control of *grossraum* . . . . In this sense, the return of geopolitics can also be regarded as a return to the 16<sup>th</sup> and 17<sup>th</sup> century’s notion of *cuius region, eius economica*.”). For Schmitt’s elaboration of the “Grossraum” theorem, see his *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF JUS PUBLICUM EUROPAEUM passim* (G.L. Ulmen transl., Telos Press 2006) (1950); see also PAUL J. BOLT & SHARYL N. CROSS, *CHINA, RUSSIA AND TWENTY-FIRST CENTURY GLOBAL GEOPOLITICS passim* (2018).

41. For an insightful observation on how mid-twentieth century labor law would need to be transitioned and transformed from a passing welfare statist environment into an increasingly neoliberal realm, see HARRY W. ARTHURS, *CONNECTING THE DOTS: THE LIFE OF AN ACADEMIC LAWYER* 38–39 (2019).

42. I have made an earlier attempt at outlining this idea in: Peer Zumbansen, *Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law*, 56 AM. J. COMP. L. 769 (2008).

43. See a—hopefully—more elaborate pronouncement of this theory in: PEER ZUMBANSEN, *TRANSNATIONAL LEGAL PLURALISM: TOWARDS A JURISPRUDENCE OF HUMILITY* (forthcoming 2019).

globalization,” as it has become a trope of twentieth-century Western legal thought,<sup>44</sup> our here pursued aim is to create an imaginary space in which to take the task of “rethinking the law” (*repenser le droit*)<sup>45</sup> seriously. In this light, there can be little that can remain unquestioned, whether it concerns a philosophical understanding of the “foundations of law,”<sup>46</sup> the association of law with “the state”<sup>47</sup>—understood almost as an immovable, timeless entity, space, and institutional framework—or the separation of law and morality,<sup>48</sup> law and

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44. See, e.g., Jacques Chevallier, *Mondialisation du droit ou droit de la mondialisation?*, in *LE DROIT SAISI PAR LA MONDIALISATION* 37, 37 (C.A. Morand ed., 2001) (“Véritable « paradigme », rendant compte des transformations de tous ordres induites par l’émergence d’un « monde sans frontières », la mondialisation ne saurait dès lors manquer d’avoir une incidence sur le droit: ouvrant une brèche dans le monopole que les Etats - Nations s’étaient arrogés sur le droit, elle sape les fondements du droit moderne, tels qu’ils avaient été posés dans la pensée occidentale entre le XVIème et le XVIIIème siècles; non seulement elle affecterait les formes et les modalités de la régulation juridique, mais encore elle obligerait à repenser le droit. Si le rythme de l’évolution reste incertain, en revanche le sens de la trajectoire est nettement tracé.”); see also Ralf Michaels, *Welche Globalisierung für das Recht? Welches Recht für die Globalisierung?*, 69 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 525, 536–37 (2005) (“[D]as Recht muß mit allen diesen Erkenntnissen umgehen: Es soll den Markt regulieren, es soll die Macht von Staaten begrenzen (und ist doch zugleich auf diese Macht zu seiner Durchsetzung angewiesen), es soll die Gesellschaft regulieren, die Weltgesellschaft geworden ist, und es soll sich selbstverständlich von Einsichten der Ethik inspirieren lassen. Wie ist das zu bewerkstelligen?”) (Law needs to engage with all these insights. It is supposed to regulate the market, it shall curtail the power of states (but is, at the same time, depending on this power for its own enforcement), it shall regulate society, which has become a world society and, certainly, it is meant to be inspired by insights of ethics. How can that be done?) (author translation).

45. Chevallier, *supra passim* note 44.

46. *PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW* (Wil Waluchow & Stefan Sciraffa eds., 2013).

47. Sidney Richards, *Globalization as a Factor in General Jurisprudence*, 41 *NETH. J. LEGAL PHIL.* 129, 130 (2012) (“Although globalization is many things, it is perhaps most clearly a theoretical and practical challenge to various forms of *state-centric* thinking. Jurisprudence is at present, and has historically been, overwhelmingly state-centric. The term ‘law’ is synonymous with ‘state-law,’ and any form of inter- or transnational phenomena is derivative of state-law or state-authority.”).

48. En lieu of so many others, see the inimitable H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 594 (1958)

politics,<sup>49</sup> and “law as . . .” altogether.<sup>50</sup>

Crucially, and as we—scholars, teachers, bloggers, activists—continue to struggle for a way to effectively, meaningfully, and impactfully navigate theory and practice, epistemology and intervention,<sup>51</sup> we risk suffocation in the oxygen-less digital spaces in this “age of anger.”<sup>52</sup> “Post-truth,” “post-capitalism,” “post-democracy” are as much the ubiquitous bits and buzz-words in a hyper-accelerated global “debate” as they are offered as labels, perhaps, for new

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(“Contemporary voices tell us we must recognize something obscured by the legal ‘positivists’ whose day is now over: that there is a ‘point of intersection between law and morals,’ or that what *is* and what *ought* to be are somehow indissolubly fused or inseparable, though the positivists denied it. What do these phrases mean? Or rather which of the many things that they *could* mean, *do* they mean? Which of them do ‘positivists’ deny and why is it wrong to do so?”).

49. Miro Cerar, *The Relationship Between Law and Politics*, 15 ANN. SURV. INT’L & COMP. L. 19, 21 (2009) (“The relation between politics and law has both a progressive function and a safeguarding function. Law and politics, separately or together, both encourage and suppress the development of societal relations, while they both also function to bring about justice and order.”); Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. QUART. 8, 8 (1927) (“Property and sovereignty, as every student knows, belong to entirely different branches of the law. Sovereignty is a concept of political or public law and property belongs to civil or private law.”).

50. Christopher Tomlins & John Comaroff, “*Law as . . .*: *Theory and Practice in Legal History*,” 1 U.C. IRVINE L. REV. 1039 *passim* (2011); see also Kirsten Anker, *Law As . . . Forest: Eco-logic, Stories and Sprits in Indigenous Jurisprudence*, 21 L. TEXT CULTURE 191, 192 (2017) (“In inviting us to eschew the ‘law and . . .’ binary, and its modernist tendency toward functional and causal explanations, ‘Law As . . .’ asks us to embrace instead, through a syntax of simile or metaphor, the realm of image and imagination.”); Catherine L. Fisk & Robert W. Gordon, *Foreword to “Law As . . .”: Theory and Method in Legal History*, 1 U.C. IRVINE L. REV. 519 *passim* (2011).

51. For a powerful invitation to think about the relation to critical thought and critical practice, see Harcourt, *supra*, note 39, at 15 (“The implications for counter-critical *practice* are significant. The effort must be to expose illusions and struggle for new meanings and interpretations—not for some truth or real interests, and not necessarily within the narrow confines of traditional critical praxis, but to struggle for new ways of governing and living together.”). See, in that regard, also the masterful book-length intervention by RATNA KAPUR, *GENDER, ALTERITY AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL* (2018); and ROSE SIDNEY PARFITT, *THE PROCESS OF INTERNATIONAL LEGAL REPRODUCTION: INEQUALITY, HISTORIOGRAPHY, RESISTANCE* (2019).

52. MISHRA, *supra* note 37.

critical theory inroads. What this constellation illustrates is the deep orientation crisis to which we alluded at the start of this paper and which manifests itself in the fading light of structuring epistemologies and recognizable geopolitical outlines.<sup>53</sup> And because, as a sign of the times, we are repeatedly and deafeningly urged to accept the unavoidable recourse to “emergencies,” to what is deemed inevitable and necessary,<sup>54</sup> a careful and interdisciplinary scrutiny of “crisis” must remain a central concern.<sup>55</sup>

Let there be no doubt, while the depth of this crisis is

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53. PUB. POLICY FORUM, DEMOCRACY DIVIDED: COUNTERING DISINFORMATION AND HATE IN THE DIGITAL PUBLIC SPHERE 3 (2018) (“By and large, the internet has developed within a libertarian frame as compared, for instance, to broadcasting and cable. There has been until recently an almost autokinetic response that public authorities had little or no role to play. To some extent, the logic flows from a view that the internet is not dependent on government for access to spectrum, so therefore no justification exists for a government role. So long as it evolved in ways consistent with the public interest and democratic development, this logic—although flawed—was rarely challenged. And so governments around the world—and tech companies, too—were caught flat-footed when they discovered the internet had gone in directions unanticipated and largely unnoticed.”).

54. CARL SCHMITT, POLITICAL THEOLOGY 6–7 (G. Schwab trans., MIT Press, 1985) (1922) (“It is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty. The precise details of an emergency cannot be anticipated, nor can we spell out what may take place in such a case, especially when it is truly a matter of extreme emergency and how it is to be eliminated.”); see also *Countering Terrorism*, NATO (July 17, 2018, 4:25 PM), [https://www.nato.int/cps/ua/natohq/topics\\_77646.htm](https://www.nato.int/cps/ua/natohq/topics_77646.htm) (“Terrorism in all its forms poses a direct threat to the security of the citizens of NATO countries, and to international stability and prosperity. It is a persistent global threat that knows no border, nationality or religion and is a challenge that the international community must tackle together. NATO’s work on counter-terrorism focuses on improving awareness of the threat, developing capabilities to prepare and respond, and enhancing engagement with partner countries and other international actors.”).

55. See, e.g., NAOMI KLEIN, THE SHOCK DOCTRINE. THE RISE OF DISASTER CAPITALISM (2007). In that regard, see also Craig Calhoun, *A World of Emergencies: Fear, Intervention, and the Limits of Cosmopolitan Order*, 41 CAN. REV. OF SOC. 373, 376 (2004) (“It is as though there were a well-oiled, smoothly functioning “normal” system of global processes, in which business and politics and the weather all interacted properly. Occasionally, though, there emerge special cases where something goes wrong - a build-up of plaque in the global arteries causes a stroke, there is a little too much pressure in one of the global boiler rooms - and quick action is needed to compensate.”).

sensible to the quotidian newspaper reader and “ordinary citizen,”<sup>56</sup> the efforts among different social sciences to counter the “populist backlash,”<sup>57</sup> the “strange non-death of neo-liberalism,”<sup>58</sup> “inequality,”<sup>59</sup> and “climate change”<sup>60</sup> continue to take place in considerable distance from the rancor and rage on the streets. With little confidence in my ability to bridge this gap, this Paper still seeks to make an intervention from within a discipline (law) that perennially appears to be both caught up *in* and strangely aloof in relation *to* the socio-economic, cultural, political, and environmental crises that mark our time. “The law” which I intend to throw into the fray of this frightening moment is one which is fundamentally shaped by a socio-legal perspective on the relationship between legal and social ordering,<sup>61</sup> and it is on this basis on which the different

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56. Silvio Waisbord, *The Elective Affinity Between Post-Truth Communication and Populist Politics*, 4 COMM. RES. & PRAC. 17 *passim* (2018); Silvio Waisbord, *Why Populism is Troubling for Democratic Communication*, 11 COMM. CULTURE & CRITIQUE 21 *passim* (2018).

57. For a provocative analysis (as usual), see Eric A. Posner, *Liberal Internationalism and the Populist Backlash*, 49 ARIZ. ST. L.J. 795 *passim* (2017).

58. COLIN CROUCH, *THE STRANGE NON-DEATH OF NEOLIBERALISM* *passim* (2011).

59. Celia B. Banks, *The Sociology of Inequality*, 14 RACE GENDER & CLASS 175, 186 (2007) (“Uncovering the contributing factors to social inequality opens dialogue to discuss those factors, and, secondly, to identify how to eradicate them.”).

60. Dipesh Chakrabarty, *The Climate of History: Four Theses*, 35 CRITICAL INQUIRY 197, 199 (2009) (“As the crisis gathered momentum in the last few years, I realized that all my readings in theories of globalization, Marxist analysis of capital, subaltern studies, and postcolonial criticism over the last twenty-five years, while enormously useful in studying globalization, had not really prepared me for making sense of this planetary conjuncture within which humanity finds itself today.”).

61. Susan Silbey, “*Let Them Eat Cake*”: *Globalization, Postmodern Colonialism, and the Possibilities of Justice*, 31 L. & SOC’Y REV. 207, 230 (1997) (“Not only is there a noticeable structural homology between the narratives of globalization and liberal legalism, but the gap between law on the books and law in action revealed in much sociolegal scholarship can also be observed in the accounts and practices of globalization. Not only do we observe consistent contradiction—a gap between ideal and reality—but the same gap is produced: abstract formality and substantive concrete/experiential inequality.”).

layers and dimensions of law & society scholarship (and, activism) continue to emerge and become amplified, tested and contested. As such, lawyers, in their diverse professional orientations, are called upon to engage with this continuing conversation about the relationship between law *and* society and the practice and meaning of law *in* society.<sup>62</sup> But, the challenge is no longer—if it ever was—adequately addressed by reference to merely more *empirical* work. The strident success of the law & economics school in catching a ride on the post-legal realist methodologies of impact-focused research, of “collecting the numbers” and getting down and dirty with facts, stats and trends teaches a lesson about the dangers of erecting dividing walls between theory and practice, policy programs and practice (“the way things work”). Without a critical assessment of the conceptual framework which shapes the tools of empirical data collection, there is always the danger that the proverbial, anecdotal example (the infamously “undeserving,” vacation travelling welfare recipient) is being elevated as proof of the validity of an entire world view. At question, then, is not only a continuation of detail-oriented and context-sensitive research into the actual operations of law (and, non-law) norms on the ground, but a sustained effort to question the way in which the “bigger picture” is drawn up in relation to the micro-level of analysis. On which epistemological and normative foundations, in other words, rests the conceptual framework which is operationalized for the identification the engagement of “the problem”? Where do the “markers” and “indicators” come from, what is the basis of standards and yardsticks by which the rule of law qualities of a particular state or governmental process is being evaluated?

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62. Very insightful in this regard is the continuing conversation between David Nelken and Roger Cotterrell. See, e.g., ROGER COTTERRELL, *SOCIOLOGICAL JURISPRUDENCE* *passim* (2017); Roger Cotterrell, *Law and Sociology: Notes on the Constitutions and Confrontations of Disciplines*, 13 *J.L. & SOC'Y* 9 *passim* (1986); David Nelken, *Blinding Insights? The Limits of a Reflexive Sociology of Law*, 25 *J.L. & Soc'y* 407 *passim* (1998).

The developments alluded to in the beginning of the paper within the—seemingly disparate—subject areas of family law and women’s rights in the context of development and land rights, of corporate governance’s financialization woes, and the not only permanent but seemingly normalized “war on terror” provide a small glimpse on the battlegrounds that legal theory is not only drawn into but which it must boldly intervene in and help shape. As there is the beach under the asphalt, there are, beneath the surface of the clamor and twitter-propelled accusatory and exclusionist rhetoric, which deafens our senses today, the troubling and yet crucial ambiguities of “the formal,”<sup>63</sup> “the political,”<sup>64</sup> “the social,”<sup>65</sup> and “the religious”<sup>66</sup> and “cultural,”<sup>67</sup> but also those

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63. Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 *passim* (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 *passim* (1976); D. Kennedy, *Legal Formalism*, in 13 ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 8634 *passim* (Neil J. Smelser & Paul B. Baltes eds., 2001); Karl Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 *passim* (1932); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 *passim* (1931); Peer Zumbansen, *Law After the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law*, 56 AM. J. COMP. L. 769 *passim* (2008).

64. CAROLE PATEMAN, *THE SEXUAL CONTRACT* *passim* (1988); Hilary Charlesworth, *Feminist Critiques of International Law and Their Critics*, 1994 THIRD WORLD LEGAL STUD. 1 *passim*; Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 *passim* (1992).

65. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 19 *passim* (David M. Trubek & Alvaro Santos eds., 2006).

66. BENJAMIN L. BERGER, *LAW’S RELIGION: RELIGIOUS DIFFERENCE AND THE CLAIMS OF CONSTITUTIONALISM* *passim* (2015).

67. Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973, 975 (2005) (“[T]he technicalities of law are precisely where the questions that interest us actually are played out. Humanists should care about technical legal devices because the kind of politics that they purport to analyze is encapsulated there, along with the hopes, ambitions, fantasies and day-dreams of armies of legal engineers.”).

of “the global”<sup>68</sup> and the “transnational.”<sup>69</sup> These ambiguities express themselves differently in relation to their particular context and time, which suggests that they are markers of a progressive move in critical thought “from the domestic to the global.” This, however, might be the stereotypical view by a lawyer for whom the world has become infinitely complex and contested as it became globally connected. For a sociologist as well as for a socio-legal, critical lawyer, there is no such simple, linear trajectory from the local to the global, from the domestic to the international. For them, these ambiguities and the way in which they manifest themselves at different moments and across a wide spectrum of legal areas<sup>70</sup> are a mere reflection of the ever-changing politics and geographies of law, which demand our interdisciplinary attention.<sup>71</sup> Instead of finding that this or

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68. See ARJUN APPADURAI, MODERNITY AT LARGE. CULTURAL DIMENSIONS OF GLOBALIZATION (1996); Arjun Appadurai, *How Histories Make Geographies: Circulation and Context in a Global Perspective*, 1 TRANSCULT. STUD. 4 *passim* (2010). See also Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 *passim* (2005); Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37 *passim* (1993); Gunther Teubner, *The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy*, 31 L. & SOC'Y REV. 763 *passim* (1997). See also ELAINE FAHEY, INTRODUCTION TO LAW AND GLOBAL GOVERNANCE (2018).

69. PHILIP C. JESSUP, TRANSNATIONAL LAW *passim* (1956); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 *passim* (1996); Gregory Shaffer, *Transnational Legal Ordering and State Change*, in TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE 1 (Gregory Shaffer ed., 2013); Alfred C. Aman Jr. & Carol J. Greenhouse, *Transnational Law. Cases and Problems in AN INTERCONNECTED WORLD* (2017); PEER ZUMBANSEN, ADVANCED INTRODUCTION TO TRANSNATIONAL LAW (forthcoming 2020); Peer Zumbansen, *Transnational Law, Evolving*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 898 *passim* (Jan M. Smits ed., 2d ed. 2012).

70. See, e.g., H.W. Arthurs, *Labour Law Without the State?*, 46 U. TORONTO L.J. 1 *passim* (1996); Graf-Peter Calliess, *The Making of Transnational Contract Law*, 14 IND. J. GLOBAL LEGAL STUD. 469 *passim* (2007).

71. To the degree that such introspection and exposure are already problematic, here is a reference to two examples of my own continuing work on this: Peer Zumbansen, *Manifestations and Arguments: The Everyday Operation of Transnational Legal Pluralism*, in THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM (Paul Schiff Berman ed.) (forthcoming 2019); Peer Zumbansen, *Transnational Law, With, and Beyond Jessup*, in THE MANY LIVES OF

that legal field is “domestic” in the sense that it emerges and evolves within an established institutional and procedural legal-political framework, a sociologically informed, critical perspective is always wary not only of how precarious and inherently unstable such a system is, but also to which degree, for example a domestic, local, or national legal system has always been embedded in particular socio-economic, political, and cultural contexts which are distinctly not congruent with a jurisdictional space.<sup>72</sup> This critique has been powerfully enhanced as well by subaltern, post-colonial and indigenous legal scholars in recent years, focusing on claims to land and “sovereignty.”<sup>73</sup>

By consequence, it is the interdisciplinary engagement with the notion and materiality of *context* that opens our eyes for the way in which, on the one hand, the “spatialization” and, on the other, the “functional differentiation” of—to be sure, from *our* discipline’s perspective<sup>74</sup>—(legal-)regulatory areas emerge in multifarious forms.

In the following second part, we shall reflect on the *form*

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TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP’S ‘TRANSNATIONAL LAW’ (P. ZUMBANSEN ED.) (forthcoming 2019).

72. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11 *passim* (1998); Peer Zumbansen, *Spaces and Places: A Systems Theory Approach to Regulatory Competition in European Company Law*, 12 EUR. L.J. 534 *passim* (2006).

73. See, e.g., NOURA ERAKAT, *JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE* (2019); ALEXANDRE KEDAR ET AL., *EMPTIED LANDS: A LEGAL GEOGRAPHY OF BEDOUIN RIGHTS IN THE NEGEV* (2018); see also PARFITT, *supra* note 51.

74. Drawing on Niklas Luhmann’s theory by which every social sub-system evolves according to a self-referential, cognitively open yet operationally closed rationality, see Martin Gren & Wolfgang Zierhofer, *The Unity of Difference: A Critical Appraisal of Niklas Luhmann’s Theory of Social Systems in the Context of Corporeality and Spatiality*, 35 ENV’T & PLAN. 615, 620 (2003) (“[A]ll subsystems of society are able to deal with problems of their environment insofar as these problems can be selected by the specific programs and submitted to the specific codes of a subsystem. The capacity of the society to solve problems is basically provided and limited by its functional differentiation. Within modern world society there is no position available that could represent the society as a whole. By consequence, all multifaceted problems need first to be compartmentalised and translated into issues that functionally specialised systems can handle.”).

and the *forum* and *fora* for law in our age of global and local division. The short formula of “transnational law” (TL) will be introduced here, but obviously not to reference a longstanding, well established field or body of law. Instead, the use of TL for the present purposes is to investigate the different dynamics that shape law in the present context.

### III. TRANSNATIONAL LAW AS CRITICAL LEGAL PROJECT

There is little reason to believe, at least at first and second glance, in transnational law’s inherently normative stance. In fact, if anything, transnational law is not commonly taken as the label for a progressive, critically minded legal theory or legal concept. Rather, the opposite appears to be the case. As TL is most commonly seen in close relation to the demographics and institutional formations of globalized business interests,<sup>75</sup> its re-imagination as a “critlaw” project is anything but intuitive. The evidence of the “actors, norms and processes”<sup>76</sup> that are usually associated with TL surely points in that direction. But what distinguishes the here understood project of *transnational law as a critical methodology of law in a global context* from references to law as “transnational” or “global,” which are made in response to the obvious legitimation problems that nation state-based concepts of the rule of law, representative democracy or parliamentary law-making have continued to

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75. Arturo Ortiz Wadgymar, *Neoliberal Capitalism in the New World Economy*, 8 INT’L J. POL. CULTURE & SOC’Y 295, 306 (1994) (“Globalization is the game of free play for powerful transnational interests, associated with one another or linked to second-class partners among local bourgeoisies, operating without regulation from national governments, and seeking to take control of international markets.”).

76. For an elaboration of the A-N-P triad as a central pillar of a transnational legal method, see Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism*, 21 TRANSNAT’L L. & CONTEMP. PROBS. 305 *passim* (2012). For a recent application of this concept, see for example Kinnari Bhatt, *New ‘Legal’ Actors, Norms and Processes: Formal and Informal Indigenous Land Rights Norms in the Oyu Tolgoi Project, Mongolia* (Transnational Law Inst., TLI THINK! PAPER 63/2017, 2017), <https://ssrn.com/abstract=2995505>.

run into for the past twenty or so years, is the way in which the former seeks to epistemologically bridge the domestic and global experiences of and with law. The distinctive proposal of such a critical project consists in, first, recognizing the immense variety of such domestic legal trajectories in order to, then, challenge an uncritical assumption of what is in effect only a particular—namely one's own—experience of a history of *state and society* and *public and private* as being generalizable. Resisting this generalization is the more important the more the particular and idiosyncratic account is likely to be mobilized and canonized as a quasi-universal account of how *law* (and, the state) became "globalized."

So, when we review what circulates as a typical account of *the* state's and its law's infelicitous fate in an era of globalization, it is important to keep in mind where such a story comes from and how it is being disseminated. To the degree that the typical account unfailingly advances an all too often bleak mixture of anxiety and reminiscence, we may better appreciate how it originates from within a reference context in which—over the course of the short, yet turbulent twentieth century—the rule of law and, along with it, the welfare state, had become both a standard and a yardstick. But, as these dimensions of a governmental system resting on an intricate relationship between legality and legitimacy were universalized as well as exported, transplanted and globally imposed, their particularity—in time and space—had been rendered invisible. As a result, not only would the advent of "globalization," that is the world-wide expansion of hyper-accelerated financial transactions, movements of goods, services and people and the seemingly "ungovernable" proliferation of private and quasi-public regulatory actors be painted in colours of destruction and destabilization in relation to the state as sovereign, but perhaps even more problematically, the colonial background of the rise of the Western state to become the driving power of international/global affairs had never been made part of this

narrative. Consequently, the dominant tale of the state and the law's experience of globalization became one in which the erosion of sovereignty and of an alleged loss of the state's regulatory prerogative were front and center, but the historical underpinnings of the (Western) state's place in the world were typically not included in the story line. The charged nostalgia regarding the Western welfare state's inability to continue to maintain the thus-far enjoyed living standards for its constituents made immense "sense" and had a strong attraction as it continued the still largely ahistorical and de-contextualized idealization of the state and its law—at least until further notice. That notice, however, could not be delayed infinitely. With decolonization gaining increasing momentum since the 1960s, with the political and cultural backlash against the totalizing "war on terror" from the early 2000s onwards in both the Global South and North and in light of the significant geopolitical transformations in Asia, Africa, and Latin America, the days of the "American Century" have for a while now seemed counted. Questions such as "What's Next?" pose themselves with the same urgency as those that ask "In Whose Name?" What that means is that many of the popular accounts of "globalization" are (or, should be problematized) as contested in the same way that post-colonial theory has pointed out with regard to notions of "progress," "civilized nations," etc. And that implies a considerable urgency in expanding the usual time-lines that are applied in relation to the "state in an era of globalization" by critical, transnational historiographies of the state's colonial, imperialist historical trajectories. Only then will the contextual and relational operation of the state and its already mentioned formal and material attributes become more clearly recognizable against a background much of which is often-times hidden in darkness. Shedding more light on these neglected and ignored parts of the storyline is a major achievement of post-colonial historiography, cultural and legal theory.

While I will address the consequences of the post-colonial

critique of existing state-law “before” and “after” globalization in the last part of this paper, it seems worthy to return to the “typical” state-and-globalization account for a moment. A closer look at the way in which the challenges to the nation state are being depicted in the current moment helps in understanding the ideological stakes that are involved in challenging this very narrative. If, in effect, the current state, along with its associated qualities such as a constitutional foundation, a functioning electoral system and a working judiciary as well as a recognized list of political and socio-economic rights and guarantees towards the state, is taken as role model and benchmark, this explains not only the continued attraction of the state-as-victim-of-globalization narrative; furthermore it makes more visible how this narrative serves to insulate the state and its alleged “problems” from a much more comprehensive critical engagement with the capitalist system of which the present-day state (and, its law) are an integral part. A critical scrutiny of the larger economical and ideological context in which the history of the state unfolds would help to better understand the frustration that unavoidably accompanies any present-day efforts to “ameliorate” difficult economic conditions or “mitigate” inequalities. As it stands, however, accounts of the state and its law in an era of globalization, including of its more recent variations of re-nationalization, cling to established narratives of how the state evolved and what trials and tribulations it had to undergo as it fought to secure safety nets and equal rights against the corroding forces of global markets. Such laments only too rarely place the state within a story about the role of political agency in facilitating and enhancing the very developments, the state is depicted to be the helpless victim of.

How is the story being told, and why does it matter? In light of a large-scale shift to private governance regimes, both as a domestic manifestation of post-Western welfare

state transformation,<sup>77</sup> on the one hand, and the fast expanding realm of transnational private regulatory governance,<sup>78</sup> on the other, the state as a confined governance unit is being contrasted to a continuously changing landscape of newly emerging power brokers, private norm makers, hybrid, public-private expert committees, standardization bodies, consultancies and think tanks, which are deeply invested in new and extremely fragmented games of norm making and the creation of powerful regulatory regimes outside of the state's traditional frameworks of governmental political administration.<sup>79</sup> It comes as no surprise that the growth and expansion of private regulatory governance in institutional and spatial dimensions continues to be the subject of extensive normative analysis. What is noteworthy, however, is the changing scope of such critique—as it unfolds in response to an increasingly complex and multilayered regulatory “assemblage”<sup>80</sup> which is but prompting the creation of an

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77. With regard to the U.S., see, for example, Mimi Abramovitz, *The Privatization of the Welfare State: A Review*, 31 SOC. WORK 257 *passim* (1986), and Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 *passim* (2001). For a focus on Germany and the UK, see Lutz Leisering, *Pension Privatization in a Welfare State Environment: Socializing Private Pensions in Germany and the United Kingdom*, 28 J. COMP. SOC. WELFARE 139 *passim* (2012).

78. Benjamin Cashore, *Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority*, 15 GOVERNANCE 503 *passim* (2002); Philipp Pattberg, *The Forest Stewardship Council: Risk and Potential of Private Forest Governance*, 14 J. ENV'T & DEV. 356 *passim* (2005).

79. Critical insights in this regard have been provided by scholars in the field of International Relations and (Global) Political Economy. See, e.g., TIM BÜTHE & WALTER MATTLI, *THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY* *passim* (2011); PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS *passim* (A. Claire Cutler et al. eds., 1999);

80. Gilles Deleuze, in an interview in 1980, reframed his idea of “assemblage” thus: “In assemblages you find states of things, bodies, various combinations of bodies, hodgepodes; but you also find utterances, modes of expression, and whole regimes of signs.” GILLES DELEUZE, *TWO REGIMES OF MADNESS* 177 (David Lapoujade ed., Ames Hodges & Mike Taormina trans., 2007). Partly drawing on Deleuze's work on assemblage, sociologists, political theorists and lawyers have more recently been applying the concept to the multifarious and non-unified

altogether new or fundamentally revamped analytical vocabulary and conceptual toolkit to capture its object of analysis.<sup>81</sup> While the proliferation of these new *actors* and their increasingly diversified and deepened involvement in regulatory activity, innovation, and intervention<sup>82</sup> is the stuff of sociological scrutiny, it is the consideration of the newly emerging materialities of regulatory *norms* and the wide-eyed acknowledgement of the varied types of *processes* through which such norms come into existence, are disseminated, enforced, and contested, which prompts the development of interdisciplinary conceptual frameworks to grasp the advanced degree of complexity in the here surfacing forms of global social organization.<sup>83</sup>

But, because the breathtaking speed and scope of functional and geographical differentiation of legal regulatory regimes is a hallmark of law in a complex global context, it is helpful to place present-day analysis in

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governance regimes in what systems-theory scholars term functionally differentiated systems of specialization. See, e.g., SASKIA SASSEN, *TERRITORY – AUTHORITY – RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES passim* (2006).

81. Gavin Sullivan, *Transnational Legal Assemblages and Global Security Law: Topologies and Temporalities of the List*, 5 *TRANSNAT'L LEGAL THEORY* 81, 82 (2014) (“The concept of assemblage has been rarely used in legal theory because its emphasis on materiality, distributed agency and heterogeneity challenges received notions of legal formalism and the way international norms are ordinarily thought to be constituted, transmitted and contained. Yet I suggest that it is precisely these qualities that provide the assemblage with analytical advantage in understanding how this listing regime functions in the transnational context.”).

82. Gráinne de Búrca et al., *Global Experimentalist Governance*, 44 *BRIT. J. POL. SCI.* 477 *passim* (2014).

83. *Id.* at 481 (“Institutional inertia and political deadlock, the rise of non-hierarchical organizations, and the proliferation of linkages between international organizations and civil society actors – all fomented by and contributing to greater uncertainty – have led to the emergence of a variety of higher-order governance arrangements, the most representative of which are regime complexes. . . . Regime complexes, including different mixes of states, sub-state units, international organizations, civil society organizations and private actors, have in various issue areas replaced more tightly integrated international regimes . . . [and] have been identified in the areas of climate change, food security, refugee policy, energy, intellectual property and anti-corruption.”).

historical relation. The legal anthropologist, Mark Goodale, depicted the reality of increasing institutional and interactional complexity with regard to the post-WWII aspirations for a world-wide effective human rights system in the following manner:

Eleanor Roosevelt, the chair of the inaugural United Nations Commission on Human Rights, had hoped that a “curious grapevine” would eventually carry the idea of human rights into every corner of the world, so that the dizzying—and regressive—diversity of rule-systems would be replaced by the exalted normative framework expressed through the 1948 Universal Declaration of Human Rights. In fact, the curious grapevine of non-state and transnational actors did emerge in the way Roosevelt anticipated, but the resulting networks have been conduits for normativities in addition to human rights. Ideas, institutional practices, and policies justified through a range of distinct frameworks and assumptions—social justice, economic redistribution, human capabilities, citizen security, religious law, neo-laissez faire economics, and so on—come together at the same time within the transnational spaces through which the endemic social problems of our times are increasingly addressed.<sup>84</sup>

What this suggests is that even a legal field whose appeal is so fundamentally based on its principled, non-partisan, generalized normativity, “lives” in the tiniest detail of locally and substantively diverse and destabilizing struggles for rights.<sup>85</sup> With a lively debate raging over the trajectory, possible futures as well as the possible exhaustion

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84. Mark Goodale, *Locating Rights, Envisioning Law Between the Global and the Local*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 1, 3 (Mark Goodale & Sally Engle Merry eds., 2007).

85. See, e.g., Helen Quane, *Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?*, 33 *OXFORD J. LEGAL STUD.* 675, 677 (2013) (highlighting the tensions between international human rights law and legal pluralism). This is further illustrated by the analysis respectively provided by Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 *J. LEGAL PLURALISM* 1 *passim* (1981), and Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, in *LAW IN TRANSITION: HUMAN RIGHTS, DEVELOPMENT AND TRANSITIONAL JUSTICE* 215 *passim* (Ruth Buchanan & Peer Zumbansen eds., 2014).

of Human Rights,<sup>86</sup> the significance of post-colonial theory interventions into both the imperialist dimensions and the epistemological underpinnings of human rights programs and applications today cannot be overestimated. And this has enormous consequences for both mainstream and critical projects with a deeply unsettled geopolitical geography across which "rights" and legal emancipatory projects forms a highly volatile backdrop for political movements of different ideological orientation.

In light of this and with the benefit of legal-anthropological and legal-sociological insights,<sup>87</sup> questions regarding the type and orientation of a legal theory that can adequately capture such unstable assemblages of actors, norms, and processes<sup>88</sup> pose themselves in a dim light. At once, such a legal theory would have to be able to both make sense of the *spatial* dimensions of specialized regulatory regimes and be sensitive and receptive to their local and never fixed idiosyncrasies. It would appear, then, that a suitably *globally minded* and *locally grounded*, critical legal theory must serve a number of functions. For one, it has to be an ordering framework through which the different building blocks that form part of border-crossing yet locally specific and diverse regulatory regimes can be accounted for and be made amenable for conceptual as well as practical use. In other words, such a legal theory needs to provide a platform on which to deliberate the conceptual coherence of the theory's scope and normative orientation. This sounds more obscure than it has to, as we already have a number of comparable examples at our disposition, even in our allegedly well-known and settled, yet as such regularly underestimated, local and national realm of law and

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86. And this debate has been newly fueled by Sam Moyn's provocative intervention a few years ago: SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2012).

87. *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL*, *supra* note 84.

88. Zumbansen, *supra passim* note 76.

jurisprudence:<sup>89</sup> think of, for example, commercial law or property law, or of administrative or constitutional law. While the former two are within the core of what is generally considered “private law,” the latter belong squarely to the realm of “public law.” Each of these fields exists, in highly varied forms, “globally” *and* locally. It is the genius, one might say, of commercial law to provide an effective and comprehensive regulatory apparatus which spans both domestic and transnational dealings through an elaborate institutional and normative framework.<sup>90</sup> But, the more recent beginnings of an emerging *global value chain law*<sup>91</sup> are unthinkable without the groundbreaking legal sociological work on standards and regulatory governance,<sup>92</sup> the study of what has been called “transnational private governance”<sup>93</sup> and “transnational business governance interactions.”<sup>94</sup> Private law and governance have been and

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89. In that regard, see RODERICK A. MACDONALD, *LESSONS OF EVERYDAY LAW* (2002); Catharine A. MacKinnon, *Reflections on Law in the Everyday Life of Women*, in *LAW IN EVERYDAY LIFE 109 passim* (Austin Sarat & Thomas R. Kearns eds., 1995).

90. See, e.g., Graf-Peter Calliess et al., *Explaining the Transnationalization of Commercial Law*, in *STATE TRANSFORMATION IN OECD COUNTRIES 127 passim* (Heinz Rothgang & Steffen Schneider eds., 2015); Clive M. Schmitthoff, *International Business Law: A New Law Merchant*, 2 *CURRENT L. & SOC. PROBS.* 129 *passim* (1961).

91. Galit Sarfaty, *Shining Light on Global Supply Chains*, 56 *HARV. INT'L. L. J.* 419 *passim* (2015); Klaas Hendrik Eller, *Private governance of global value chains from within: lessons from and for transnational law*, 8 *TRANSNAT'L. LEG. THEORY* 296 *passim* (2017); Benedikt Reinke & Peer Zumbansen, *Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability'*, in *LE DEVOIR DE LA VIGILANCE* 157 *passim* (Sophie Schiller ed., 2019), Manoj Dias-Abey, *Using Law to Support Social Movement-Led Collective Bargaining Structures in Supply Chains*, 32 *AUSTRALIAN J. LAB. L.* (forthcoming 2019), manuscript available at: <https://ssrn.com/abstract=3400564>.

92. Errol Meidinger, *Private Environmental Regulation, Human Rights, and Community*, 7 *BUFF. ENVTL. L.J.* 123 *passim* (1999).

93. Graeme Auld et al., *Transnational Private Governance Between the Logics of Empowerment and Control*, 9 *REG. & GOVERNANCE* 108 *passim* (2015).

94. Burkard Eberlein et al., *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, 8 *REG. AND GOVERNANCE* 1

continue to be crucial zones of conflict research for law and society scholars. See a further example, namely property law. It is the intricacy of that field to be all at once a core doctrinal component of private law, a central category in economic theory, an ideological token in development policy as well as a contested concept in political theory.<sup>95</sup> Whereas private law appears to have a long pedigree as a more suitable candidate for transnationally minded law and society work, driven by private law’s operations’ and instruments’ border-crossing expansion and migration,<sup>96</sup> we can witness a similar degree of spatialization in public law areas such as administrative and constitutional law.<sup>97</sup>

And it is at that moment, where we can sense the growing suspicion that an amalgam such as TL (transnational *and* law) must somehow be *connected to* or become *part of* this congregation of disciplines, investigative strategies, heterogeneous research frameworks as well as advocacy options<sup>98</sup> we are grappling with in light of a host of

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*passim* (2014).

95. Priya S. Gupta, *Transnational Property Law*, in OXFORD HANDBOOK OF TRANSNATIONAL LAW (Peer Zumbansen ed.) (forthcoming 2020).

96. YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER *passim* (1996).

97. Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 *passim* (2015). For an insightful, critical discussion, see B.S. Chimni, *Co-option and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 799 *passim* (2006); Vicki C. Jackson, *Paradigms of Public Law: Transnational Constitutional Values and Democratic Challenges*, 8 INT’L J. CONST. L. 517 *passim* (2010); and Sujith Xavier, *Top Heavy: Beyond the Global North and the Justification for Global Administrative Law*, 57 INDIAN J. INT’L L. 337 *passim* (2017). See also the important, critical interventions from the point of view of public international law, in particular, by Isabel Feichtner, *Realizing Utopia Through the Practice of International Law*, 23 EUR. J. INT’L L. 1143 *passim* (2012); and Christine Schwöbel-Patel, *Populism, International Law, and the End of Keep Calm and Carry on Lawyering*, NETH. Y.B. INT’L L. (forthcoming 2019), <https://ssrn.com/abstract=3300695>.

98. Garrett W. Brown & Ronald Labonté, *Globalization and Its Methodological Discontents: Contextualizing Globalization Through the Study of HIV/AIDS*, 7 GLOBALIZATION & HEALTH 1, 1–2 (2011) (“[T]raditional approaches to the study of globalization often fail to capture many facets involved within its

phenomena that are not only extremely wide-ranging and diverse, but also contested as to their underlying epistemologies and inherent ideologies. As such, TL brings us back the age-old question of “*how* and *what* law can know.” What we seem to still be working on, then, is a legal sociology of “the global.” Drawing on a wealth of distinct and inter-disciplinary work, the stakes of such an “ambitious” theory as a project of transnational “law” and transnational legal pluralism<sup>99</sup> are high. Meanwhile, there are numerous auspicious beginnings and echoes of likeminded attempts. And, if post-colonial theory has “taught” us anything, we must acknowledge that a depiction of a “problem,” a “crisis,” and a particular “affectedness” is always part of a more comprehensive reference framework, whether its influence is directly felt or working implicitly. In the context of received and dominant “critical” social and political theory, the universe of references has for such long time been marked by distinctions between state and market, right and left, conservative, liberal, or progressive, that challenges, alternatives or interventions would regularly arise from within this field of tensions and options. Today, we see numerous initiatives of re-orientation and engagement with local knowledges and alternative frameworks.<sup>100</sup> At the core of such transformations is what Dipesh Chakrabarty famously called “Provincializing,” the displacement of “Europe” as philosophical and epistemological starting

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multifarious and complex processes: that whatever globalization is, it is not something that is easily definable or reasonably encapsulated by a single trend (or bundle of trends) associated with global interconnection. It is more appropriate to think of globalization as a pluralistic phenomenon with indeterminate idiosyncrasies and anomalistic permutations.” (citation omitted).

99. Zumbansen, *Manifestations and Arguments*, *supra passim* note 71; Peer Zumbansen, *Transnational Legal Pluralism*, 1 *TRANSNAT'L LEGAL THEORY* 141 *passim* (2010).

100. See, e.g., Garth Myers, *The Africa Problem of Global Urban Theory: Re-conceptualising Planetary Urbanisation*, 10 *INT'L DEV. POL'Y* 231 *passim* (2019); see also *Critical Theory in the Global South*, Weinberg C. Arts & Science, <https://www.criticaltheory.northwestern.edu/mellon-project/critical-theory-in-the-global-south/> (last visited May 9, 2019).

point.<sup>101</sup> As this call to arms is taken up in different fields,<sup>102</sup> the poignant revival of populism, racism and xenophobia seems to prompt yet other and as to their outcomes if not causes<sup>103</sup> unpredictable reshufflings of political projects. What, then, from a Western perspective, might constitute "pressing" challenges in the shape of democratic governance,<sup>104</sup> "dis-embedded" markets,<sup>105</sup> the globalization of financial capitalism,<sup>106</sup> and the seemingly unstoppable erosion of social safeguards,<sup>107</sup> might be depicted very differently and with contrasting accentuations, explanations and allocations of (political, historical) agency from within different geopolitical but also alternative, "subaltern" framings. Already, when we start challenging, relativizing and decentering the usual state-law nexus which continues to be at the heart of many dominant depictions of a "crisis of

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101. DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2d ed. 2007).

102. See, e.g., Pinar Bilgin, *Looking for 'the International' Beyond the West*, 31 *THIRD WORLD Q.* 817 *passim* (2010); Yong-Soo Eun, *Opening Up the Debate over 'Non-western' International Relations*, 39 *POL. 4 passim* (2018).

103. Dani Rodrik, *Populism and the Economics of Globalization*, 2018 *J. INT'L BUS. POL'Y* 12 ("Many of these consequences were predictable and are not a surprise. The same can be said about the political backlash as well. A number of empirical papers have linked the rise of populist movements – Trump and the right-wing Republicans in the US, Brexit in Britain, far-right groups in Europe – to forces associated with globalization, such as the China trade shock, rising import penetration levels, de-industrialization, and immigration.").

104. Bruce Jones & Torrey Taussig, *Democracy & Disorder: The Struggle for Influence in the New Geopolitics*, BROOKINGS (Feb. 2019), <https://www.brookings.edu/research/democracy-disorder-the-struggle-for-influence-in-the-new-geopolitics/>.

105. The notion goes back, of course, to KARL POLANYI, *THE GREAT TRANSFORMATION* (1944). For a present-time engagement, see the contributions to KARL POLANYI, *GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS* (Christian Joerges & Josef Falke eds., 2011).

106. Eric Helleiner, *Explaining the Globalization of Financial Markets: Bringing States Back in*, 2 *REV. INT'L POL. ECON.* 315 *passim* (1995).

107. Gary Spolander et al., *The Implications of Neoliberalism for Social Work: Reflections from a Six-country International Research Collaboration*, 57 *INT'L SOC. WORK* 301 *passim* (2014).

law in an age of globalization,”<sup>108</sup> a very different universe of reference points begins to emerge. Instead of confirming the prevailing viewpoint from which law is challenged through various attacks on state sovereignty due to the state’s willing/unwilling integration into global regulatory assemblages<sup>109</sup> and the emergence of truly global problem areas,<sup>110</sup> on the one hand, and through the proliferation of private, “non-state” actors in the context of norm creation,<sup>111</sup> on the other, we are confronted with deep-reaching challenges to the dominant characterizations of the *normal* and the *exception*. While some of these challenges manifest themselves under the umbrella of a post-colonial critique of (Western) law,<sup>112</sup> or—to take the example of public

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108. See, e.g., Eric C. Ip, *Globalization and the Future of the Law of the Sovereign State*, 8 INT’L J. CONST. L. 636, 637 (2010) (“Two major developments highlight the international legal system’s partial withdrawal from its established state-centric orientation and its embrace of globally relevant concerns: the proliferation of specialized regimes of international law, which extend into major domestic policy areas, and the rising prominence of transnational regulatory regimes enacted by nonstate actors. The rise of nonstate regulation of issues previously monopolized by state legal control raises important questions about the future of state law.”).

109. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER passim* (2004); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 529 (1993), 529 (“In this shrinking world, states are increasingly interdependent and interconnected, a development that has affected international law.”).

110. Frank Biermann et al., *The Fragmentation of Global Governance Architectures: A Framework for Analysis*, 9 GLOBAL ENVTL. POL. 14, 16 (2009) (“[T]he notion of global governance architecture in particular for this reason: because it allows for the analysis of (the many) policy domains in international relations that are not regulated, and often not even dominated, by a single international regime in the traditional understanding. Many policy domains are instead marked by a patchwork of international institutions that are different in their character (organizations, regimes, and implicit norms), their constituencies (public and private), their spatial scope (from bilateral to global), and their subject matter (from special policy fields to universal concerns).”).

111. Deirdre Curtin & Linda Senden, *Public Accountability of Transnational Private Regulation: Chimera or Reality?*, 38 J.L. & SOC’Y 163 *passim* (2011).

112. Eve Darian-Smith, *Postcolonial Theories of Law*, in LAW AND SOCIAL THEORY (Reza Banakar & Max Travers eds. 2d ed. 2013); Alpana Roy, *Postcolonial Theory and Law: A Critical Introduction*, 29 ADELAIDE L. REV. 315 (2008).

international law, which has been exposed to an important critique of its colonial and imperialist legacies, for example under the auspices of the so-called "Third World Approaches to International Law" (TWAIL)<sup>113</sup>—their critical and transformative significance is greater still. As argued at the beginning of this paper, their significance is as much political<sup>114</sup> as it is epistemological.<sup>115</sup> While the former

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113. James Thuo Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26, 30 (2011) ("TWAIL scholarship, more than any other scholarly approach to international law, has brought the colonial encounter between Europeans and non-Europeans to the center of this historical re-examination of international law. In doing so, TWAIL scholarship has not only rethought international law's relationship to the colonial encounter, but has also challenged the complacency in international law to treat the colonial legacy as dead letter, overcome by the process of decolonization."); Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?*, 10 INT'L COMMUNITY L. REV. 371, 373 (2008) ("Regarding its predictive-ness, much TWAIL scholarship tends to offer windows into international law's tomorrow. Drawing from the empirical history of international law's engagement with third world peoples, such scholarship tends to imagine and predict the ways in which international law will behave toward the 'third world' (or some part thereof) in the near and long term.").

114. Eve Darian-Smith, *Postcolonialism: A Brief Introduction*, 5 SOC. & LEGAL STUD. 291, 292 (1996) ("[P]ostcolonialism operates as a chronological marker and method of periodization. It optimistically suggests the transcendence of nineteenth-century imperialism, and a greater balancing of respective political and economic power between the West and developing countries. This temporal approach to postcolonialism is explicitly political since it involves contested interpretations of what it does and does not represent."); James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. 1996, 1997 (2000) ("This third-world approach thus not only disrupts the hegemonic approaches to the study of international law, but also partly embodies the political goals of the third world, as I see them. It is thus as legal as it is political.").

115. See, e.g., Boaventura de Sousa Santos, *Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges*, 30 REV. 45, 51 (2007) ("the colonial zone is, *par excellence*, the realm of incomprehensible beliefs and behaviours which in no way can be considered knowledge, whether true or false. The other side of the line harbours only incomprehensible magical or idolatrous practices. The utter strangeness of such practices led to denying the very human nature of the agents of such practices. On the basis of their refined conceptions of humanity and human dignity, the humanists reached the conclusion that the savages were subhuman."); see also Walter D. Mignolo, *The Geopolitics of Knowledge and the*

results in radically “complicating” the role that law, its doctrines, its concepts as well as the legal profession itself, are being asked to occupy in the world,<sup>116</sup> the latter points to the potential of calling into question and destabilizing the entirety of the Western liberal legal paradigm in its intertwinement with a long and bloody trajectory of imperialist and, eventually, neoliberal expansion.<sup>117</sup> And, the critique goes to the core as it not only aims at uncovering the victims, the bloodshed and the collateral damage of liberal law’s travels into far-flung corners of the world, but targets colonialist and exclusionary legal effects within domestic, local legal cultures and instruments.<sup>118</sup> It does so

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*Colonial Difference*, 101 SOUTH ATLANTIC Q. 57, 67 (“Epistemology is not ahistorical. But not only that, it cannot be reduced to the linear history from Greek to contemporary North Atlantic knowledge production. It has to be geographical in its historicity by bringing the colonial difference into the game.”).

116. MARTIN LOUGHLIN, SWORD AND SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS 50–51 (2000) (“The logic of legal discourse yields a particular interpretation of events, but that interpretation is invariably susceptible to challenge from what may be called a political perspective. . . . Between the naïve belief that political events can be understood entirely in terms of legal discourse and the blind conviction that the normative world of law can be dismissed as empty rhetoric, there remains a multiplicity of perspectives which might be advanced.”); *see also* PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 128 (1990) (“Time and space are thus a consequence of the human being’s ability to conceive the world in consciousness and to conceive of it as a world of possible willing and acting.”).

117. GRIETJE BAARS, THE CORPORATION, LAW, AND CAPITALISM: A RADICAL PERSPECTIVE ON THE ROLE OF LAW IN THE GLOBAL POLITICAL ECONOMY *passim* (2019); PARFITT, *supra passim* note 51; Robert J.C. Young, *What is the Postcolonial?*, 40 ARIEL 13, 14 (2009) (“Postcolonialism’s concerns are centered on geographic zones of intensity that have remained largely invisible, but which prompt or involve questions of history, ethnicity, complex cultural identities and questions of representation, of refugees, emigration and immigration, of poverty and wealth—but also, importantly, the energy, vibrancy and creative cultural dynamics that emerge in very positive ways from such demanding circumstances. Postcolonialism offers a language of and for those who have no place, who seem not to belong, of those whose knowledges and histories are not allowed to count. It is above all this preoccupation with the oppressed, with the subaltern classes, with minorities in any society, with the concerns of those who live or come from elsewhere, that constitutes the basis of postcolonial politics and remains the core that generates its continuing power.”).

118. *See, e.g.*, John Borrows, *With or Without You: First Nations Law (in Canada)*, 41 MCGILL L.J. 629 *passim* (1996); Monique Mann & Angela Daly, (*Big*)

through a scrutiny, engagement, often also a refutation of inherited, canonical views of how "the law" has evolved as part of the "progress" of human society, and it is here where the merits and, indeed, the importance of postcolonial legal theory engage and challenge assertions of state power and "resistance,"<sup>119</sup> of "center and periphery"<sup>120</sup> as well as of progress, civilization and modernity<sup>121</sup> and culminate in a critique of the all-pervading "coloniality of being."<sup>122</sup> As Nelson Maldonado-Torres highlighted,

Coloniality is different from colonialism. Colonialism denotes a political and economic relation in which the sovereignty of a nation or a people rests on the power of another nation, which makes such nation an empire. Coloniality, instead, refers to long-standing patterns of power that emerged as a result of colonialism, but that define culture, labor, intersubjective relations, and knowledge production well beyond the strict limits of colonial administration.<sup>123</sup>

An important tenet of the *coloniality* critique, then, is to identify and expose the black holes within and the gaps between these different narratives—both within the explicitly outward-oriented, expansionist, and interventionist colonializing context and within core liberal

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*Data and the North-in-South: Australia's Informational Imperialism and Digital Colonialism*, TELEVISION & NEW MEDIA (forthcoming 2019) ("Despite Australia's geographical position within the Asia-Pacific, and the enduring presence and richness of Aboriginal and Torres Strait Islander cultures, Australia's social and political backdrop neglects these in favor of Northern/Western influences, thereby perpetuating the marginalization of Indigenous peoples.").

119. B.S. Chimni, *Co-optation and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 799, 804 (2006).

120. Arjun Appadurai, *Theory in Anthropology: Center and Periphery*, 28 COMP. STUD. SOC'Y & HIST. 356 *passim* (1986).

121. Aníbal Quijano, *Coloniality and Modernity/Rationality*, 21 CULTURAL STUD. 168, 172 (2007) ("Such confluence between coloniality and the elaboration of rationality/modernity was not in any way accidental, as is shown by the very manner in which the European paradigm of rational knowledge was elaborated.").

122. Nelson Maldonado-Torres, *On the Coloniality of Being: Contributions to the Development of a Concept*, 21 CULTURAL STUD. 240 *passim* (2007).

123. *Id.* at 243.

doctrines in the here and now of Western law.<sup>124</sup> By directing critical attention to ideas such as contract, consent, and autonomy and to the way they play out in the context of legal and judicial interpretation and re-affirmation, it becomes possible to identify the structural violence of such universalizing concepts vis-à-vis the vulnerability of marginalized groups.<sup>125</sup> It is here, where the postcolonial historical assessment of the “*where*” and the “*who dunnit?*” becomes crucial<sup>126</sup>—while now no longer being confined to the countries to which we attribute the label “decolonized.”<sup>127</sup> Legal history becomes an important battlefield

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124. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW passim* (2005).

125. Anne O’Connell, *My Entire Life is Online: Informed Consent, Big Data, and Decolonial Knowledge*, 5 *INTERSECTIONALITIES* 68, 70 (2016) (“Many of our institutional and government responses to ethical concerns are instrumental approaches for the ‘how to’ of consent, autonomy, and privacy. While online and digital research protocols are being introduced in relation to these issues, the foundational questions about the communities we want to live in persist. . . . What kind of ethics are we moving toward when our face-to-face encounters are computer mediated, while the body itself is increasingly compartmentalized, exteriorized, and commodified through a tissue economy that includes biobanks, transplant tourism, the human genome project, and reproductive technologies? In an age of increased abstractions, how do categories of race and racism appear less visible or hyper-visible, with little interrogation into the concrete ways they are formed and used to organize knowledge production and ways of ruling?”) (citations omitted); see also Anne O’Connell, *Building Their Readiness for Economic “Freedom”: The New Poor Law and Emancipation*, 36 *J. SOC. & SOC. WELFARE* 85 *passim* (2009).

126. See, e.g., Makau wa Mutua, *Conflicting Conceptions of Human Rights: Rethinking the Post-Colonial State*, 89 *PROC. ANN. MEETING* 487, 487 (1995) (“It is becoming increasingly apparent that sovereignty and statehood are concepts that may have trapped Africa in a detrimental time capsule; they now seem to be straightjackets with time bombs ready to explode. The imposition of the nation-state through colonization balkanized Africa into ahistorical units and forcibly yanked it into the Age of Europe, permanently disfiguring it. Unlike their European counterparts, African states and borders are distinctly artificial and are not the visible expression of historical struggles by local peoples to achieve political adjustment and balance. Colonization interrupted this historical and evolutionary process.”).

127. For a riveting analysis of the gap between the “legal” and the “political”/“economic” decolonization on the part of formerly colonized states after WWII, see SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW* (2011).

on which competing and opposing narratives get tested against the background of their incorporated assumptions and deeply held beliefs.<sup>128</sup> Post-colonial *as* coloniality critique unfolds in a repeated calling-into-question of generally accepted ascriptions of historical reason and meaning. In that regard Walter Mignolo observed:

That "civilization" is somewhat related to "globalization" and "modern/colonial world system" is obvious. How it is related is not obvious. I submit that the colonial difference is one of the missing links between civilization, modernization, and modern/colonial world system.<sup>129</sup>

Whether, in addition to our earlier observations regarding the underlying racism of the "war on terror," we highlight just two areas of considerable contention, it is the idea of human rights being "universal" in contrast to pluralist, subaltern human rights conceptions,<sup>130</sup> or whether

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128. See the account by Renato Ortiz, *Notas sobre la problemática de la globalización de las sociedades*, 41 DIÁLOGOS DE COMUNICACIÓN (1995), <http://dialogosfelafacs.net/wp-content/uploads/2015/41/NOTAS-SOBRE-LA-PROBLEMATICA-DE-LA-GLOBALIZACION-DE-LAS-SOCIEDADES.pdf> ("Es el caso cuando hablamos de relaciones internacionales. Esta noción presupone la existencia de naciones autónomas interactuando entre sí. La dinámica global derivaría de movimiento de las partes. Cada una de ellas, en su integridad actuaría en el contexto mundial. Las mismas premisas subyacer a los conceptos de colonialismo y de imperialismo. En cada uno de ellos destacamos un centro (el imperio o la nación industrializada) como elemento propulsor de movimiento de expansión. El mundo sería así el cruzamiento de las diversas intenciones, transimperiales o transnacionales que, de forma diferenciada incidirían en las colonias o en los países periféricos. Una aplicación común de este tipo de raciocinio es la comparación entre el momento actual y algunos periodos de la historia pasada. Por ejemplo, la analogía de la ascensión y la caída de un país, como los Estados Unidos, a la del Imperio Romano. En los dos casos tenemos la expansión de una civilización, norteamericana o romana, de una lengua, el inglés o el latín, hacia un conjunto de territorios apartados de su núcleo irradiador. Las relaciones de contacto entre esta «periferia» y el «centro» se harían por tanto de acuerdo con normas de dominación elaboradas por los países o por los imperios colonizadores.").

129. WALTER MIGNOLO, LOCAL HISTORIES/GLOBAL DESIGNS. COLONIALITY, SUBALTERN KNOWLEDGES, AND BORDER THINKING 278 (2000).

130. See, for example, the seminal text by C.L.R. JAMES, *THE BLACK JACOBINS: TOUSSAINT L'OUVERTURE AND THE SAN DOMINGO REVOLUTION passim* (Vintage Books 2d ed. 1989) (1963); and, more recently, one of the foundational works in

we are concerned with the contention that it is the central role of “the state” not only to contain and to administer the legal order but also to be “reservoir” of the people and of a democratic populace,<sup>131</sup> the post-colonialist critique goes to the roots of dominant historical narratives and central tenets of Western law. A central focus of critique in this regard is the perpetuated distinction between a “European” law, existing in a timeless and immaterial, abstract space of universal validity and the various localities of “non-European” peoples in which underdeveloped, non-enlightened custom and tradition prevailed.<sup>132</sup> As recently

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the TWAIL movement: ANGHIE, *supra passim* note 124. *But see* and Rebecca Adami, *On Subalternity and Representation: Female and Post Colonial Subjects Claiming Universal Human Rights in 1948*, 6 J. RES. WOMEN & GENDER 56, 58 (2015) (“United Nations delegates from non-Western and Western societies met on an international arena and agreed to disagree on the values that underscore the moral justification of the universality of human rights. Human rights were referred to as practical principles, compatible with divergent cultural value systems. What was under critical consideration in the United Nations by the delegates in 1948 was the disrespect of human rights in national legislation around the world, in Western as well as non-Western countries.”); Ben Golder, *Beyond Redemption? Problematizing the Critique of Human Rights in Contemporary International Legal Thought*, 2 LONDON REV. INT’L L. 77, 79 (2014) (“When operating in this mode, much critical theorising about human rights actually ends up attempting to reimagine (and in doing so, reinforce) the human rights project itself. After having exposed its false claims to universality, its investment in and reproduction of a narrow liberal ontology, its propensity to circumscribe the field and possibility of politics, its inability to break with global capitalist ordering, its indebtedness to and repetition of colonial history, and a host of other related criticisms (in short: the critique of human rights as a particular form of Western political liberalism that gets exported globally with great violence), critical commentators on human rights nevertheless make a curious return to human rights. In this post-critical redemptive guise, human rights emerge in spite of their evident historical and political limitations as the site of reinvestment, reimagining and of futural possibilities.”).

131. See, for a critique, Makau wa Mutua, *Politics and Human Rights: An Essential Symbiosis*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 149, 166–67 (Michael Byers ed., 2000) (“There are fundamental defects in presenting the State as the reservoir of cultural heritage. Many States have been alien to their populations and it is questionable whether they represent those populations or whether they are little more than internationally recognized cartels for the sake of maintaining power and access to resources.”).

132. ANGHIE, *supra* note 124, at 5 (“European states were sovereign and equal. The colonial confrontation, however, particularly since the nineteenth century

observed by Kiran Grewal, an important aspect of International Law’s colonizing intervention was its line-drawing between an allegedly universal center and a local periphery, which would be identified as target of a civilizational mission:

Part of the problem has been the production of a binary between the enlightened space of “abstract universal law” and the specifically located site of (“non-Western”) culture and tradition. International law has in this way been both claimed to reflect the embodiment of “Western” Enlightenment principles and simultaneously abstracted to assert a universal applicability.<sup>133</sup>

A crucial dimension of the postcolonial critique is its ability to expose continuities and recurrences of colonialist categories up into the present-day exclusionary politics in the context of migration governance,<sup>134</sup> racialized policing,<sup>135</sup>

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when colonialism reached its apogee, was not a confrontation between two sovereign states, but rather between a sovereign European state and a non-European society that was deemed by jurists to be lacking in sovereignty – or else, at best only partially sovereign.”)

133. Kiran Grewal, *Can the Subaltern Speak Within International Law? Women’s Rights Activism, International Legal Institutions and the Power of ‘Strategic Misunderstanding’*, in NEGOTIATING NORMATIVITY 27, 28 (N. Dhawan et al. eds., 2016).

134. See Ratna Kapur, *The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion*, 8 THEORETICAL INQUIRIES L. 537, 539 (2007) (“The subaltern is not merely a marginalized subject or a minority member, as understood within the terms of classical liberal thinking. The subaltern emerges from the specific ways in which the liberal project and imperialism operated during the colonial encounter, exposing the ‘dark side’ of the liberal project and its exclusionary potential. The insights provided by the colonial past enable us to understand the operation of power through knowledge and how it sets the terms of inclusion and exclusion in the postcolonial present, though this understanding is not confined to postcolonial states.”). See also RATNA KAPUR, *MAKESHIFT MIGRANTS AND LAW: GENDER, BELONGING, AND POSTCOLONIAL ANXIETIES* (2010).

135. ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE AND THE FUTURE OF LAW ENFORCEMENT passim* (2017). See also, for a slightly less pessimistic view, Sarah Brayne, *Big Data Surveillance: The Case of Policing*, 82 AM. SOC. REV. 977, 982 (2017) (“Data-driven policing is being offered as a partial antidote to racially discriminatory practices in police departments across the country. However, although part of the appeal of big data lies in its promise of less discretionary and more objective decision-making, new

and the “war on terror”—without confining its investigation to historically colonized states. As before in the cases of law and development,<sup>136</sup> critical comparative law,<sup>137</sup> and certain strands of legal pluralism,<sup>138</sup> it is through postcolonial legal theory’s inward-turn that it becomes possible not only to see “the South in the North”<sup>139</sup> but to hereby also gain a more adequate grasp of colonial continuities as well as a platform on which to resist<sup>140</sup> the neocolonial regulatory dynamics unfolding in “settler colonial” states.<sup>141</sup>

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analytic platforms and techniques are deployed in preexisting organizational contexts and embody the purposes of their creators. Therefore, it remains an open empirical question to what extent the adoption of advanced analytics will reduce organizational inefficiencies and inequalities, or serve to entrench power dynamics within organizations.”) (citations omitted).

136. Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195 *passim* (2000); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 *passim*.

137. Günter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT’L L.J. 411 *passim* (1985); Peer Zumbansen, *Comparative Law’s Coming of Age? Twenty Years After ‘Critical Comparisons’*, 6 GER. L.J. 1073 *passim* (2005).

138. Sally Merry, *Legal Pluralism*, 22 L. & SOC’Y REV. 869, 869 (1988) (“The intellectual odyssey of the concept of legal pluralism moves from the discovery of indigenous forms of law among remote African villagers and New Guinea tribesmen to debates concerning the pluralistic qualities of law under advanced capitalism.”); Geoffrey Swenson, *Legal Pluralism in Theory and Practice*, 20 INT’L STUD. REV. 438, 445 (2018) (“Legal pluralism does not disappear in a state with a high-capacity, effective legal system, but it is complementary. In other words, nonstate is subordinated and structured by the state because the state enjoys both the legitimacy to have its rule accepted and the capacity to actually enforce its mandates.”).

139. Amar Bhatia, *The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World*, 14 OR. REV. INT’L L. 131 *passim* (2012).

140. GLEN SEAN COULTHARD, RED SKIN WHITE MASKS: REJECTING THE COLONIAL POLITICS OF RECOGNITION 3 (2014) (“I argue that instead of ushering in an era of peaceful coexistence grounded on the ideal of *reciprocity* or *mutual* recognition, the politics of recognition in its contemporary liberal form promises to reproduce the very configurations of colonialist, racist, patriarchal state power that Indigenous peoples’ demands for recognition have historically sought to transcend.”).

141. Adrian A. Smith, *Temporary Labour Migration and the “Ceremony of*

The proliferation of postcolonial legal theory—despite its lingering at the outer periphery of mainstream legal thought (and, pedagogy)<sup>142</sup>—has the potential of fundamentally challenging the universalist and abstract assumptions of law in both theoretical and, indeed, highly practical terms.<sup>143</sup> Both in a wide range of specialized legal sub-fields and in the increasingly unruly realm of “legal theory” can we witness a breathtaking intensification of law’s engagement with and, subsequently, its transformation through interdisciplinarity, politics, history, and social theory.<sup>144</sup> This is a crucial moment for a critical methodology project such as transnational law as here understood. By decentering the still dominant emphasis in contemporary legal theory debates on the law/non-law distinction and, instead, turning towards the elaboration of transnational law as a methodology of law and its attending actors, norms and processes in a global context it should become possible to free law—transnational and otherwise—from the suffocating grip of positivist jurisprudence and to restart a critical engagement with the complexities of law as a multifaceted assemblage of social ordering.

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*Innocence” of Postwar Labour Law: Confronting “the South of the North”, 33 CANADIAN J. L. & SOC’Y 261, 274 (2018) (“Just as Canada’s migration approach functions in ways consistent with colonialism, it too performs the work of settler colonial hyper-exploitation, displacement and dispossession. The production of migrant labour occurs as a basis for preserving if not deepening the colonial settlement project in Canada.”). ERAKAT and AMARA, KEDAR & YIFTACHEL, *passim*.*

142. For a promising counter-point, see Paul Jonathan Sagui, *Ethical Lawyering Across Canada’s Legal Traditions*, 9 INDIGENOUS L.J. 167 *passim* (2010). *But see* John Strawson, *Orientalism and Legal Education in the Middle East: Reading Frederic Goadby’s Introduction to the Study of Law*, 21 LEGAL STUD. 663 *passim* (2001).

143. *See, e.g.*, Mark Goodale & Sally Merry eds., *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* *passim* (Mark Goodale & Sally Merry eds., 2007).

144. An impressive display of such a comprehensive approach can be found in *ANOTHER KNOWLEDGE IS POSSIBLE: BEYOND NORTHERN EPISTEMOLOGIES* (Boaventura de Sousa Santos ed., 2005); and more recently in *LAW AND SOCIETY IN LATIN AMERICA: A NEW MAP* (César Rodríguez-Garavito ed., 2015).

## IV. T.I.N.A., STILL? RESISTING LAW'S NEOLIBERALISM

Where does this leave us? Or, in other words: are the current signs promising or cause for further despair? As the present-day critique engages and attacks law in its multi-dimensional constitution as discipline, as doctrinal framework, as theory and as practice, we can slowly begin to appreciate the stakes if not futility of any attempt at achieving something like a comprehensive survey, exhaustive analysis, or conclusive assessment. Instead, what becomes apparent is the sheer enormity of the task of identifying and deciphering the various dimensions of *law* in its multifarious instantiations in today's global, neoliberal, neo-colonial, and digitalized context. The question which we thus posed ourselves in this Paper concerned the "what" and, ultimately, the "how" of an appropriate legal intervention in the present moment.

The continuing expansion of transnational law—TL—prompts us to reflect on the place and role of law within the wider context of a legal critique of "globalization." As already alluded to, the here-taken approach is one of using post-colonial legal theory as part of a critical transnational law project to develop a conceptual laboratory in which we must ask hard questions regarding "law's" co-existence with and, eventually, difference from other, non-legal normative orders and about the relation of (positivist) "law" and (legal pluralist) *law* to "the state." To be clear, this is not only a task prompted by law's "globalization," that is, by the growing fragmentation of regulatory and "self-regulatory" orders beyond nation-state boundaries. A post-colonial project of *transnational law as critical methodology* rejects the separation between distinctly insulated domestic and international realms of law. Instead, it posits that *law* should be conceived through the lens of legal pluralism in order to more adequately recognize the fluid and changing states of legal orders, the diversity of norms as well as the multitude of actors involved in their generation and dissemination. A closer scrutiny, finally, of the processes through which norms

evolve, is bound to unsettle existing and dominant narratives of authority, sovereignty and legitimacy. The reference to as such idiosyncratic, historically and geographically particular emergences of a principle such as "the rule of law" should be the starting point for a sensible comparative analysis, not the foundation on which to distinguish between developed and developing, modern, civilized and "primitive" societies.

Can legal theory, can legal scholarship, as it were, be trusted to successfully engage in such questions? It seems evident, that we have to interrogate the disciplinary status of legal theory in relation to "other" social sciences in order to maintain an open line of communication between a project such as this one and the longstanding and varied scholarly engagement with legal positivism, legal pluralism and globalization. In this process, each instance of a critical engagement with a pressing legal-regulatory issue in the global context contributes to the intensification of a transnational legal theory at a time, in which the jury still is out with regard to its verdict on whether transnational law should be considered a *field*, a *concept*, or a (likely pro-market, neoliberal) *ideology*. Casting doubts on TL either in terms of being a neatly demarcated and regularly adjudicated area of doctrinal law or be seen as a conceptual elaboration which we would locate somewhere between private and public international law,<sup>145</sup> we have to take seriously the lingering and persistent claims which situate and, arguably, reject TL as being, above all, a systematizing justificatory framework that smoothly suits an intensifying constellation of globalized markets. Acknowledging the weight of such assumptions, we not only need to reconsider law's and legal theory's receptivity to normative critique but also trace, more carefully, the lines of these longstanding concerns about TL. In the first instance, TL seems to have forever been prompting negative reactions to what is believed to be its fundamentally neo-liberal normative

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145. See JESSUP, *supra* note 69, at 2–3.

orientation. Often understood as a field of law embodying the neoliberal roll-back of state-based, democratically generated legal institutions, rights and safe-guards in favor of a system in which the “winner takes all” and where law, along with other power-sustaining institutional frameworks, merely serves to empower a small fraction of society, TL appears to have been off to a bad start. Through an engagement with these concerns and by proposing a reassessment of legal theory in the context of critical social and political theory, the future will show to which degree post-colonial TL can provide a robust methodological framework for a critical legal theory in today’s global, neoliberal constellation.