

## TOGETHER AGAIN

JOHN HENRY SCHLEGEL\*

- Gee, it's good to be together again.
- I just can't imagine that you've ever been gone!
- It's not starting over, it's just going on!  
The Muppets Take Manhattan

Duncan Kennedy and I go back a long way – to the first Critical Legal Studies meeting in Madison, Wisconsin in the summer of 1977. Being together again, even only intellectually, is always fun, for when reading any new attempt by Duncan to write history I am usually guaranteed two things. The *Three Globalizations of Law and Legal Thought: 1850-2000* is no exception. First, I always will learn something that I would never have come upon any other way. Second, it can be guaranteed that Duncan will enrage me. Before I explain how these two responses are true in this case, it would be best for me to explain what Duncan's piece is and is about.

*The Three Globalizations* is an example of the use of structural analysis to understand the position of contemporary legal actors. The point of this effort is to provide such actors, specifically those on the left,<sup>1</sup> with suggestions for ways that the current constellation of legal thought might allow for arguments to be made that might support the causes of the various pieces of the Party of the Left. The argument that Kennedy makes in this effort is historical, in the sense that it documents change over time, but not causal, in that it mostly avoids assertions about why such structures of legal thought as he documents take the form that they do or why the change from one structure to another takes place. Because the historical argument is structural and eschews causal speculation it is relatively easy to summarize.

For Duncan the story of legal thought, or at least the portion that he wishes to tell, begins in the 1850s. This is his well-told story about Classical Legal Thought, (“Toward a Historical Understanding”) an understanding of law that he sees as having given out by the onset of the First World War. This understanding was based on a strong distinction between public and private spheres of autonomous action, a commitment to individual and property rights and a belief in legal interpretation as a

process of deduction from within a coherent, and equally autonomous, legal order. These elements fused into a program for law that emphasized fault and the freedom of the individual will to act in furtherance of its own projects.

Rather than following Classical Legal Thought with what to American academics is the normal trilogy of Sociological Jurisprudence, Legal Realism and Legal Process, (Duxbury) Duncan instead posits a unity between these three bits of jurisprudence that he calls The Social. He dates this understanding of law to the years between 1900 and 1968. While acknowledging that The Social had developed in opposition to Classical Legal Thought, Duncan sees it as equally importantly affirming law as a purposive activity that featured regulatory mechanisms that would bring about “the evolution of social life in accordance with ever greater perceived social interdependence.” (“Three Globalizations” 22) It emphasized group, not individual rights, social welfare as producing social justice, the primacy of institutions and institutional arrangements, and more than a bit of corporatism.

Duncan’s third period, extending from 1945 to 2000, conspicuously lacks a name. Though some people might expect that he would describe this period as the synthesis of Classical Legal Thought, seen as a Hegelian thesis, and The Social, seen as a Hegelian antithesis, Duncan eschews any such interpretation. Instead, he presents his view of this period of law “as the unsynthesized coexistence of transformed elements of CLT with transformed elements of the social.” (“Three Globalizations” 63) To him it seems to emphasize somewhat contradictory things -- human rights and nondiscrimination, the rule of law and pragmatism, and the possibility for multiple and conflicting projects of normative reconstruction of society so as to emphasize The Social or Classical Legal Thought or some mix of both.

For Duncan each of these understandings of law has its own visions of economic life – the free market, market alternatives, the pragmatically regulated market, respectively. Each also spread globally from a specific national sight – German, France and the United States, respectively, hence the first words of the title of his piece, *The Three Globalizations*. Overall, after luxuriating in the great and insightful specificity of his insights, the reader has the impression that true to his

structuralist roots, for Duncan thought happens, sometimes in reaction, sometimes in synthesis, with what came before, but happens relatively autonomously from other cultural, economic, political or social projects and so can be, and was, shaped in specific ways in specific national, colonial or post-colonial circumstances.

With the basic structure and content of Duncan's narrative set forth it is time to return to First and Second. As for First – learning -- I am totally fascinated with the information Duncan provides about the details of French and German scholarship in law during the second half of the Nineteenth and the first half of the Twentieth Centuries. Likewise, his reports about the work done by his graduate students on Asian, African and South American law are quite enlightening. Duncan is obviously an excellent thesis advisor. I am even more impressed by Duncan's attempt to make sense of the deployment of legal rhetoric over the past fifty years. I now understand clearly what I saw only as a confused mess before I read this piece. And last, it is nice to see Duncan continue his attempt to rewrite the categories with which we think about the history of the past 150 years in legal thought.<sup>ii</sup> As is the case with legal doctrine, until we have different categories, we will be unable to think different thoughts. And God knows we need different thoughts!

As for Second – enagement -- like much of Duncan's work this piece presents law bloodlessly thinking itself up with only the modest aid of scholars sitting in offices while they think deep thoughts and write deeper books. For him, ideas are at best loosely tethered to humans, but seldom, if ever to what this old Midwestern Populist is not embarrassed to call the “real,” even the old fashioned Marxian “material,” world of humans doing things to people and things, for reasons spanning the spectrum from love though indifference to hate, to secure emoluments from honor through dueness to lucre, on the basis of justifications from right through use to might. My objection to Duncan's stories about law is not the old Marxist claim that law is epiphenomenal and thus irrelevant to material life, but that, as Duncan tells these stories, law's materiality, both as a matter of origin and of destination, does no work. It is off stage as it were, if not off scene, and thus at the least too messy for the law professor to deal with. It is as if Duncan wishes us to watch the tip of the oar

and not the legs, back and shoulders of the oarsmen, to ignore the cadence of the coxswain and the gaze of The Great Helmsman.

These are harsh words I suppose. They should not be taken to mean that nothing has changed in Duncan's story about legal thought over the past forty plus years. I note that now there is explicit room for action on the part of local legal elites with respect to the shape of a particular instantiation of each of the three globalizations, such that there were various brands of The Social from Fascist to Social Democratic, just as it seems to me that there may be various brands of capitalism. (Schlegel) And a bit of economic life has seeped into the story with the appearance of, among other things, import substitution strategies for developing countries, just as was the case under Hamilton's plans for the economic development of the Early American Republic.<sup>iii</sup> Various post-war financial institutions make appearances as well. All of this is for the good. But a full-blown situatedness of any of Duncan's three brands of legal thought we do not yet have.

I do not propose to more than suggest the absent situatedness. It has taken me over fifteen years to begin to understand the relationship between law and economy in the United States since 1865, only one of many material aspects of law. So, I will mostly stick to what I know best – American economic, social and political history. But, I do wish to add a bit of concreteness to Duncan's story by focusing on what he calls globalization, in particular to the globalization of economic life. However, I do not wish to start in 1860, but rather in the early Nineteenth Century. And with another great structuralist – Fernand Braudel.

In *Civilization and Capitalism*, Braudel tells a story about economic globalization. It is a very long story totaling almost 2000 pages, and even I would not have read all of it had the effort not been part of a program of rest designed to recover from an episode of carpal tunnel acquired when working on a new laptop. The story is also a very interesting one in which Braudel explains the slow shift of the center of European commerce from Venice to Antwerp to Genoa to Amsterdam and finally to London. In doing so he makes clear that his is the story of *a* world economy, not *the* world economy.

Braudel's story is one about globalization not because it makes the claim that the entire world looked to Venice as the center of the world economy. Rather, it is a story of globalization because what counts as the center of an expanding horizon depends on where one starts. In 1250 the globe was just the same size as it is today, but most everyone's world was quite a bit smaller. The southern European world of which Venice was the center was the world of the Mediterranean, primarily its eastern end. Northern Europe had no commercial center; it was primarily a world apart. To the extent that the two worlds met it was at the great fairs in the Champagne region of France, southeast of Paris.

It is clear from his story that for Braudel economies can change geographic shape over time. And though in *Civilization and Capitalism* he concentrated on economic life, regularly other topics appear in his story. This is because for Braudel no economy exists in isolation from, or is determined by, the rest of life. The space occupied by a world economy was also occupied by "other spheres of activity – culture, society, politics – which are constantly reacting with the economy, either to help or as often hinder its development. . . . One could formulate the following equations in any order: the economy equals politics, culture and society; culture equals the economy, politics and society, etc." (Perspective of the World 45)

For Braudel, any economy has an hierarchical structure with "a narrow *core*, a fairly developed middle zone, and a vast *periphery*." (Perspective of the World 39) Money flows to the center and practices from it, though ties are looser and life more rudimentary the farther from the center one travels. He sees the core/periphery model as true for culture and probably society and politics too, though in these latter two cases a geographic array is obviously the wrong image. However, for Braudel, these structural similarities do not imply that all spheres of activity share the same center. For example, he argues that Florence was the cultural center of Europe at the same time that Venice was its economic center.

Where law and legal theory fit in all of this is not clear. Braudel seldom speaks of any law other than commercial law. A new colleague, an analytic philosopher I might add, said, "Everywhere." This seems correct, though a bit stretched since Braudel thinks of culture as the art and drama and music of the

wealthy, dominant classes, the group that is the focus of his references to politics too, at least until he reaches the late Eighteenth Century and the first Industrial Revolution in England. Still, his understanding of globalization seems to me to be adequate for present purposes. And so with it as an aid, I wish to build a story parallel to Duncan's.

In the early Nineteenth Century, London was still the economic center of Braudel's Europe, though what we now call Germany, then an ugly map of a growing central state and surviving principalities and small kingdoms, was Europe's cultural and intellectual center. The geographically large, but otherwise small, United States was at best part of the middle zone, limited as it was to small towns largely surrounded by subsistence agriculture once one got more than a short way from places where water born travel was easy. The country was little more than a supply region, to use Jane Jacob's terminology, (57-71) with respect to international trade.<sup>iv</sup> Primarily it sent natural resources and eventually one agricultural product – cotton – to Europe in exchange for manufactured goods, and of course that unnatural resource, slaves.

Though the growth of factories/mills came over fifty years earlier in England than in New England, by the 1840's it could be said that an industrial economy had developed along the Atlantic coast, as well as along a few inland waterways. In the 1830's large factories that had once produced only yarn destined for home manufacture of textiles had grown to weave and die cloth as well. The most advanced of these, such as the mills at Lowell, provided housing and social activities for workers – New England farm girls who would work for a few years and then return to their families, and most often marriage. However, by the 1850's the growth of the railroad network acted to expand the effective scope of competition beyond what were once relatively protected, narrower markets that offered producers a modest ability to maintain price above marginal cost.

The combination of this competitive pressure with an increase in immigration and the expansion of the products of mass manufacturing into items such as clocks, guns and locks, turned millwork into anything but an exercise in

modest paternalism. Whole families, traditionally English and Scottish, increasingly increasing Irish families and non-english-speaking northern Europeans who benefitted from the reduced cost of ocean travel that accompanied the development of the steamship. They came to work in the mills and were left to fend for themselves in local communities. Labor unrest soared.

After our uncivil war, the continuing growth of the railroad network, funded significantly with watered securities, again intensified competitive pressure by further expanding its geographic scope. Simultaneously, the long deflation that followed that war strained capital structures. Mass manufacturing spread out from New England and the costal Mid-Atlantic states into the Mid-West, principally into the area east of the Mississippi. No matter where located, pressure on wages, one of the few costs that manufacturers could control, brought significant labor unrest. Soon the flood of immigration from southern and eastern Europe and the continuation of the process of de-skilling jobs that factory production implied made cheaper un- and semi-skilled labor a plausible alternative to more skilled Americans. Shifting employment toward lesser skilled immigrants added to this unrest.

Manufacturers and transportation providers responded to competitive pressures in one other way. Initially, they combined local entities in the same trade under names like "Union," that gave away its motivation, or "Buffalo," that hoped to draw on local pride. Later came larger national combinations -- first trusts, then holding companies, finally outright mergers -- all for the purpose of acquiring some control over pricing. Similarly, wage earners tried to secure some price control over their product through unionization. Farmers, consumers and their do-gooder allies sought legislative relief, most famously through passage of the Sherman Anti-Trust Act and the statute establishing the Interstate Commerce Commission. Later came the Federal Reserve Act, the Clayton Act and the Federal Trade Commission. The country finally had a permanent national bank, though, as these bits of legislation suggest, it still was quite ambivalent about judicial and administrative process.

During the years up to WW I immigration reached it peak. As the country's population both increased and spread westward, the increasingly national market provided a base from which large manufacturing firms became significant exporters

to Europe and South America. The pure size of the national market, when combined with the growth of the export market, was sufficient to make the United States a significant part of, and then the dominant player in, the now North Atlantic economy. The center of that economy thus shifted from London to New York, as was made clear when that war was stalemated until the Americans entered the fray. However, given American isolationism, London remained the political center of the North Atlantic economy, though the cultural and social parts of the North Atlantic world remained deeply fragmented.

In the years immediately before and after this first “World War”,<sup>v</sup> the American manufacturing economy remained centered in the Northeast, Mid-Atlantic and Midwest. It was largely focused on the production of metals and metal products, starting with the natural resources necessary for such production. A good deal of this production was increasingly directed toward consumer products for a middle class that had expanded from the traditional bourgeois shopkeeper and small businessman to encompass the network of middle-management staff and line jobs that seemingly were a necessary part of large corporations. The major product was the automobile, but “labor-saving” electrical products were also important. In the long term, the most significant product turned out to be the truck.

During these years, small businessmen, mostly wholesalers, retailers and farmers, tried to gain some of the control over price that large manufacturers had already secured. One vehicle was fair trade legislation, but the major ones were ideas about associations of manufacturers and marketing cooperatives of farmers, both designed to bring “order” to markets and so “stabilize” prices. Wage earners continued their push for unionization, but found that legislative success was seldom met with judicial approval, an experience that consumers and other do-gooders shared.

The Great Depression, far more severe than those of 1873, 1885, 1893 or 1907, truly crippled the American economy over the ten plus years following its onset in 1929. It started in Europe and ended in War. Federal response to this debacle produced much legislative and judicial discord, but when that discord subsided careful observers would have noted that the growth of the administrative state had begun with modest structural regulation of banking and securities, modest

protections for unions and their members, price and entry regulation for the new airline and communications industries, and a start toward the provision of social insurance benefits covering old age and unemployment.

There is no reason to believe that any of these legislative programs, which followed in the footsteps of previously existing programs in other North Atlantic economy countries, did anything to hasten the end of the Depression. Indeed, Federal programs directed toward alleviating the impact of that catastrophe were quite limited and short lasting, except for the efforts of the Civilian Conservation Corps in building structures in local, state and national parks. Rather, it was the onset of war in Europe that quickly restarted the American economy, as preparations for war had restarted the German and Japanese economies.

Manufacturing employment quickly rose when domestic and foreign buyers came with money. Consumer purchasing soon recovered. And then, after the United States entered the War, it crashed. Many companies that had produced consumer products “volunteered” to do war work, quite often unrelated to the products previously produced. My favorite of these transformations is the Wurlitzer Corporation. It manufactured torpedo detonators, though before the war it made both organs and jukeboxes. Consumer products were in short supply, when not simply unavailable because their production was prohibited. Rationing covered many consumer staples in order both to limit and to fairly distribute the supply that was not being delivered to the armed forces. Workers, now including more women than ever before, had little to spend their wages on and so bought war bonds with increased savings.

This war again proved that the United States was the center of the North Atlantic economy and also the nascent North Pacific one. Indeed, at the end of the War, the American economy was the only functioning economy to be found among the major members of the North Atlantic economy, other than Canada’s tiny one. The subsequent expansion of our economy was amazing. Soon consumer goods were to be found in great abundance; new, mostly suburban housing was being put up everywhere; and the significant, unionized proportion of the working class expanded quickly. An hourly middle class was born.

A system of interstate highways knit the country together in ways that the rail system never had. Airplane travel helped cut travel time even more for those who could, or whose employers would, afford it. The governmental structure forged during the Depression and partly legitimated by the administration of production during The War seemed to be working just fine. Few noticed that the spread of manufacturing into the South and West, a result of wartime policies directed toward industrial dispersal, that when combined with the development of a highway system all but designed for trucks, meant that the industrial center of the American economy could more easily shift.

American aid to Western European national economies (and Japan) helped them restart production and our purchases from them soon provided profits on the basis of which those economies expanded. However, at the same time it was apparent that, as a result of "The War," Washington had become the political center of the North Atlantic economy, a fact made most clear by the recurrent attempts of the French state to assert that such was not so. The center of culture was still in dispute, though it too it had shifted, in this case to Los Angeles by the beginning of the Sixties. Only social structure was significantly unsettled with the United States as the only major hold out from the European states' model of broad social insurance protection, a difference that would easily have been resolved in European favor had economy, politics and culture not have already migrated westward.

And then it all fell apart. Duncan dates the coming apart to 1968; he is more attuned to the significance of the events of that year than I. Instead, I would choose 1962, the year of the adoption of the Interest Equalization Tax, or 1973, the year when the United States finally admitted that it was no longer going to adhere to the gold exchange standard and when the OPPEC oil embargo and fourfold price increase in the aftermath of the Yom Kippur War shocked everyone with unheard of increases in gasoline and lines at gas stations. But these are differences in degree, not in kind. What now is clear, to me at least, though not to many other people then, and still some now, is that the economic model that was shared by the nations that made up the North Atlantic economy was based on the ability to insulate national economies from each other.

That insulation was created by transportation costs and/or regulatory and/or customs barriers. In European countries such insulation also protected the competitive advantage that national health insurance gave to their manufacturers. However, the growth of the Common Market in Europe and the decline of ocean freight rates, especially following containerization for the movement of goods to, and not nearly as often from, the North Atlantic economies, as well as the vaunted status of The Dollar as the currency of choice for international trade purposes and the flood of dollars unleashed by our little, disastrous misadventure in Vietnam, eliminated the ability of these countries to insulate themselves from other economies, as well as from each other. Serious competition had broken out again. The results in the United States are well known.

No one to this day knows what to do either to alter this situation or to create an alternative economic structure that might mitigate the effect of the return of price competition where marginal cost equals marginal revenue. Oh, yes, there are many nostrums. There are the people who believe that Humpty Dumpty can be put together again and those people who believe that unraveling the modest social contract that we have is the right answer. Some believe that specialization in finance is a good idea, if only we could get rid of pesky regulations,<sup>vi</sup> while others believe that green energy will lead the way to a brighter future. A return to the gold standard is bruted about, as if a radical reduction in the money supply would bring joy to all, and more education is prescribed, as if a world where every one had a Ph.D. would be one where everyone would want to live. The list goes on and on, but the fact that there is such an endless list is the best evidence that there is no obvious answer.

Now then, it is time to consider Duncan's story about Classical Legal Thought and The Social. Here, just as he says is the case, we can see The Social began to appear at sometime near the apogee of Classical Legal Thought. Those terms are not ones I like, but I can see their virtue as an attempt to avoid old arguments over Formalism and Sociological, then Realist Jurisprudence. After all, all law is a formalism; it is a simple canard to call one type of legal thought a formalism and then attach to the name a negative connotation. The real difference between

Classical Legal Thought and *The Social* is that the former most prominently seeks justification for legal norms in logical entailment from assumed first principles,<sup>vii</sup> while the latter seeks justification from considerations of assumed social advantage.

However, I wish to start this discussion, not where Duncan does, but somewhat earlier – in the Early Republic. As Howard Schweber makes clear in a wonderful piece, the legal theory that dominated the much smaller United States of the early Nineteenth Century was well described as “Protestant Baconianism.” This understanding of legal method combined Baconian induction from observation of the natural world, including the humans in that world, with a Protestant understanding that study of the natural world would demonstrate the truth of the biblical worldview. It was thus a view of nature and law as constrained by revealed truth.

Schweber argues that this synthesis was forged to avoid both Blackstone’s notion of law as the custom of the English judiciary, an authoritative source that the post-revolutionary generation believed did not fit American circumstances, and the notion of law as one of the moral sciences, an exercise in deduction from republican first principles, such as was taught by George Wythe, an understanding that for some implied the possibility of law contradicting scriptural authority. Whether or not this is true, Schweber treats the sources of Protestant Baconianism as both the obvious one, Francis Bacon, and the Scottish Common Sense philosopher, Thomas Reid.

Whether similar sources for this understanding of law could be found in continental Europe, as Duncan has presented for both Classical Legal Thought and *The Social*, I do not know, though I am sure Duncan could find out. He might even already know. However, it probably matters little; in the provinces all sorts of strange ideas take root and survive, as the story of Montaignou demonstrates. (*Le Roy Ladure*) In these years the United States was clearly one of the provinces, though not one of the most distant. No, what is important for me is the fact that the presence of a Protestant Baconian understanding of law raises the question of how it might have come to be displaced by Classical Legal Thought.

Schweber suggests that the impact of Darwinian thought made implausible the notion that induction could be limited by scriptural authority. That is probably true, though I think that there are other things going on. Capitalism is a bitch. It is

quite scary to have all of one's accumulated capital at risk in a market where marginal cost equals marginal revenue and any decline in revenue raises the possibility of the steep, well-greased slide into bankruptcy. Now admittedly, living thusly is hardly as scary as not knowing where one's next meal is coming from, but to understand law, which is to say money, one has to understand the mind of those with money. And so, were I talking about law in the Seventeenth and Eighteenth Centuries in England I would focus on the fears of the landowning class, as well as the tradesmen's fears that drew on the even older idea of a just or fair price for one's services or wares.

The great theme of Nineteenth and Twentieth Century economic history is the attempt of capitalists to avoid competition, to gain even modest control over price. Doing so, exploiting the space between trade and theft, can be had through squeezing suppliers or employees or purchasers. At least the last two might be squeezed in circumstances that allow for combination, and so limit competition, but squeezing employees alone is always a possibility. Remember, a marginal decrease in cost is still better than none; a few cents more in price or less in wages can make a big difference. However, using law to accomplish this kind of squeezing in a world of Protestant Baconian thought is difficult. Jesus was not exactly a capitalist apologist, whatever Weber's Calvinists might have been willing to tell themselves. (Weber) In a land where individual freedom, for everyone but slaves and women at least, and in some corners even the limitations on the freedom of these people was being questioned, it was difficult to argue directly that because I, the capitalist, cannot sleep well at night, you, the employee or customer, should contribute to stilling my fears. Such an argument was not very Christian.

If a direct argument was difficult to sell, what other arguments were available in the law's commodious green bag? Well, as Duncan surely knows for he singlehandedly recovered one of the relevant works from the historical dustbin, the early Nineteenth Century was a world where Blackstone's notion of powers absolute within their spheres had met the long insistence on the language of rights drawn from land law. These notions could be tied together with three things: the ancient idea of law as a formal language that was resuscitated by the recovery of Roman Law, Coke's understanding of law as the special language of lawyers, and the nascent

English interest in the logical analysis of legal concepts, of what became known as analytic jurisprudence. With all of these pieces at hand, it was rather easy to give up the Protestant part of Protestant Baconianism, keep a little Baconianism, as Langdell did by focusing on rummaging through the corpus of reported cases, (Kinball) and ignore results by focusing on logical entailment as a method of analysis. Taken together, these tools were flexible enough to stiff consumers with *caveat emptor* (the Latin here is significant) and workers with the combination of the common law's abhorrence of combinations in restraint of trade and love for the protection of property rights.

Now, is it in any way necessary that the language of rights and the idea of justification by logical entailment from first principles worked to put customers and workers at the mercy of capitalists and merchants? Of course not. After all, the language of workers rights eliminated the capitalists in Soviet Russia, and without the notion of justification by logical entailment. But languages are not free from baggage, the economic, cultural, social and political circumstances in which they might be deployed. Thus, it is highly unlikely to be the case that if the languages that made up Classical Legal Thought were not available to American lawyers because these counters had not been created earlier in Common and Civil legal thought, someone would have had to invent them. Most likely, they would have gone uninvented. The capitalists would have made do with some other languages, possibly with some other results on the ground for consumers and employees. However, it is the economic, cultural, social and political circumstance that "tilt," to use Morton Horwitz's old phrase, (Holt) languages in one direction or another, and so it is a mistake to suggest to students that the formal fact of availability of a language suggests a real possibility of adoption in pursuit of any possible objective.

Then, what of the slow shift from Classical Legal Thought to The Social and beyond? Here it seems to me important to remember that in the United States the drive to advance the causes that made up The Social – children, consumers, employees, farmers, immigrants, mothers and women – began to gain momentum only after the center of the North Atlantic economy began to shift to New York. This was at a time when much consolidation of American business into large units had begun to tame the rigors of capitalism. Which is not to say that the capitalists

were happy with the changes based on The Social on any of these fronts. They were not. But it is unlikely to be a coincidence that movement on many of these fronts came after the significant enlargement of the upper-middle and middle class that comprised management of the now larger corporations, and especially with the squeezing of such people during the Depression. One might also add to this change the radical limiting of immigration after WW I, an event that might well have provided the middle classes, largely Protestant, it must be remembered, with a sense that their social circumstance were not going to be overwhelmed by hordes of people speaking strange languages, many of them Roman Catholic even.

The flush times that the economy experienced in the years after WW II solidified the modest social gains made during the Depression, as well as permitted the expansion of the middle class downward to encompass the unionized elite of employees. Further expansions of social welfare measures continued into the Nixon Administration and then they stopped. What had happened? Well, as far as I am concerned: one big thing. The economy that made social expansion possible had come apart. The middle classes were feeling squeezed. Be cautious when wishing for a middle class democracy. The middle classes are large enough, mean enough and unsophisticated enough to chase after any political nostrum, however implausible, that promises to increase their disposable income, even marginally. As is the case with the capitalists who get squeezed by competition, there are only a limited number of options for reducing costs. Government expenditures, which of course translate into taxes, are an easy target, especially if cost reduction comes out of someone else's hide.

Now, of course, this was not all that had happened. The modest gains from the civil rights statutes and programs brought out a certain amount of latent, and some not so latent, racism. The white middle classes experienced these changes as otherwise undesirable people butting ahead of "my place" in a line that already seemed likely to run out of goodies before everyone was served. In addition, busing for vague racial parity brought the feeling that neighborhoods were being invaded, a sense that "my space," the space that I had worked so hard to secure, was being threatened. Similarly, there was the social revolution that was Woodstock and Hair and anti-war protests and pro-choice rallies and bra-burning. For a significant part of the

middle classes these events brought forth the feeling that was no longer “my country,” an undesirable feeling for people who had served in WW II and so saw this country the savior of the “free world.” Later, the rise of Hispanic immigration, legal or not, and the rhetorical shift from Americanization to multi-culturalism only added to the fear of white Protestants that their domination of the country was coming to an end, oddly a fear that was shared by white lower-middle class ethnic Roman Catholics.

These cultural *cum* social *cum* political concerns can also be seen in the European piece of the no longer coherent North Atlantic Economy as the European Community’s immigration rules and guest worker policies undermine the already fragile sense of national cultural identity in many member states. I have, however, a sense that in these countries the political response has not yet wrecked the havoc on the expanded lower-middle class that has been the case in the United States. As is often the case with Country Music, two verses, a stub and two different choruses from a recent Ronnie Dunn song, “Cost of Livin’” make this havoc palpable, and so frame the political response from that class effectively.

The middle-middle class is afraid that it will soon be part of the lower-middle class, while guys like me, a law professor at a modest university, and so with a modest salary by law professor standards, thinks nothing of throwing \$30K at a child already over 30 in the hope, hardly a guarantee, that with another, this time “vocational,” masters degree my no-longer child will finally settle down and earn a modest living. The astonishing thing about Duncan’s story is that the legal theory of the past forty years can be plausibly organized in two neat, if not necessarily coherent, piles. That we do not see complete chaos is a monument to the effectiveness of the legal mind, or maybe just Duncan’s mind.

Now that the reader has skimmed through all of this *obscuranta*, I suppose that person might wish to ask, “So, what does this all have to do with “The Three Globalizations?”” First, I hope that reader is willing to entertain the possibility that there have been more than three globalizations. Second, that legal thought, as a part of at least some of those globalizations (and I do believe *all* is likely to be the case), can be more fully understood by taking into account the economic, cultural, social

and political circumstances in which it participated. Third, that the centers of economic, cultural, social, and political life that make up a world that for its inhabitants *is* global move over time. When so doing they reconstitute core, middle zone and periphery. And fourth, that at this time there is no economic center to the global world of the North Atlantic. I doubt that there is a political one. Though culture, now deeply imbued with the idea that the market serves everyone, or at least everyone who is willing and able to pay, seems still centered in Los Angeles, there is no reason to believe that the central social structure is anything but up for grabs.

By saying “up for grabs” I wish both to suggest that Duncan has done a wonderful job of making clear a structured lack of legal intellectual centeredness that is our current circumstance and that this lack opens possibilities that need to be taken seriously. At the same time, I must note again that the range of possibilities is now, and will continue to be, significantly structured by the other economic, cultural, social and political circumstances in which legal action will be taking place. After all, we have no way to know whether the current unsettledness will turn into a North Atlantic-Pacific Rim economy centered somewhere in China or something else more or less broad. However, one might suggest that if China centerness is what comes to pass, and especially if the political center follows the economic, it is unlikely that the Party of the Left will be any more pleased with the on-the-ground political results of such a shift than it is with the present uncentered situation.

---

## Notes

\* Professor of Law, State University of New York at Buffalo. This paper was prepared for a workshop on “The Three Globalizations” held at the University of Colorado Law School. I will to thank Justin Desautels-Stein and Pierre Schlag for inviting me and the participants for not being audibly bewildered by this contribution to their joint effort. Fred helped, but did not conspire.

i. I use “left” rather than Duncan’s and others’ use of “progressive” because I find it difficult to identify exactly what is progressive about “progressive” political positions. Hopefully, the phrase is something more than a nostalgic reference to the

early Twentieth Century Progressives, or even worse, an attempt at identifying the Party of the Left's causes with some notion of teleological progress. If it is an attempt to distance these causes from their association with socialism, whether Marxist or otherwise, I can confidently report that the attempt is an abject failure.

ii. I might note however, that the persistence of "Classical Legal Thought" is simply a matter of branding, as shown by the later appearance in the piece of "neoformalism" but not neoCLT. And "The Social" is just plain ugly. For a set of categories to catch on they have to trip off the tongue, in addition to being a fairly good approximation of the set of ideas referred to. Formalism and Realism and Legal Process do this job. Classical Legal Thought and The Social do not, however useful, in the case of The Social, the recategorization is.

iii. "Unitedstatesian," the word that Duncan uses to avoid "American," is too ugly a word to use, however generous it is to the sensibilities of his South and Central American, as well as Canadian, students.

iv. Jacobs credits Braudel with originating the concept, (236 n.6) but she uses it far more regularly that he does.

v. The use of this phrase say much about how the peoples of the North Atlantic economy thought of themselves.

vi. A significant amount of the Wall Street "product" invention over the past ten or more years was designed to shift bank services away from marginal cost products and toward products which, because of market opacity, had the characteristic of producing fee income far above the cost, to say nothing of the value, of the service provided.

vii. There may also be a reference to Greek classicism hidden away in Duncan's language, as recognizing a classical impulse toward radical simplification of form to the baroque organization of law in terms of the forms of action. I continue to prefer the term Formalism because a formal justification of formal distinctions seems to me to be significantly different from an explicitly normative justification of formal distinctions. Nothing turns on this dispute about words, unless Classical is taken to suggest oldest, which, of course, this form of legal thought is not, in American at least.

### Works Cited

Braudel, Fernand. *Civilization and Capitalism: 15<sup>th</sup>-18<sup>th</sup> Century*. Trans. Siân Reynolds. 3 vols. New York: Harper & Row, 1984. Print.

--- *Civilization and Capitalism: The Perspective of the World*. Trans. Siân Reynolds New York: Harper & Row, 1984. Print.

Duxbury, Neil. *Patterns of American Jurisprudence*. Oxford: Oxford University Press, 1995. Print.

Holt, Wythe. *Tilt*. 52 *George Washington Law Review* 52:2 (1984): 280-88. Print.

Jacobs, Jane. *Cities and the Wealth of Nations*. New York: Random House, 1984. Print.

- 
- Kennedy, Duncan, "Three Globalizations of Law and Legal Thought: 1850-2000." *The New Law and Economic Development: A Critical Appraisal*. Eds. Trubek, David M. and Alvaro Santos. Cambridge: Cambridge University Press, 2006. 19-73. Print.
- "Toward a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940" Ed. Spitzer, Steven. *Research in Law and Sociology*. vol. 3. Greenwich, CT: Jai Press, 1980. 3-24. Print.
- Kimball, Bruce A. *The Inception of Modern Professional Education: C.C. Langdell, 1826-1906*. Chapel Hill: University of North Carolina Press, 2009. Print.
- Le Roy Ladure, Emmanuel. *Montaillou: The Promised Land of Error*. Trans. Barbara Bray. New York: G. Braziller, 1978. Print.
- Schlegel, John Henry. "On the Many Flavors of Capitalism, or Reflections on Schumpeter's Ghost." *Buffalo Law Review* 56:4 (2009): 965-1025. Print.
- Schweber, Howard. "The 'Science' of Legal Science: The Model of the Natural Sciences in Nineteenth Century American Legal Education." *Law & History Review* 17:3 (1999): 421-66. Print.
- Weber, Max. *The Protestant Ethic and the Spirit of Capitalism*. Trans. Talcott Parsons. New York: Scribner & Sons. 1956. Print.