Situating Legislative Drafting

Mary E. Vogel*

A. Introduction

In thinking about the legislative process, there are a host of non-legal, contextual factors that affect the way a bill is best crafted, what can be enacted and how implementation is likely to unfold. Context also plays a role in determining what legislation is likely to be postponed and which to be shelved permanently. In this paper I situate the process of legislative drafting socially by exploring non-legal factors that must be taken into account.

In this paper, I shall begin, first, by considering the nature of law and changing conceptions of legality and control today. Second we shall ask why we might obey law. Third, we examine new thinking about the contexts of law. Fourth, we explore whose law it is by examining identity and the politics of recognition against a backdrop of universal citizenship. Finally, fifth, I conclude by illustrating the way law may be transformed in implementation despite the most careful drafting and the concomitant need to reflect on how law works in practice as a prelude to law reform. Let me pause, first, for a moment, though, to say a word about the socio-legal method which guides this study.

As a method, socio-legal research studies the relation of reciprocity between law and society. It examines both the consequences of enacted laws and judicial decisions in terms of how they are implemented and the extent to which they achieve their intended consequences or spawn unintended ones. It is preoccupied especially with how law comes into being and what forces shape the form it takes. At the same time, we ask, whose interests law serves, why we obey it and how it will it affect society, or some part of it? Typically, socio-legal research is at least partly empirical though it may be theoretically informed or contribute to theory building.

B. Imagining Law in Modernity

To bring non-legal factors in legislation into focus, one must first conceptualise law. Let me say a few words about traditional theorising in that area and then about some of the ways it is being re-imagined today. Those new conceptions are raising crucial questions about the very nature of law itself. Traditionally, there have been three main lines of thinking about what law is and its relation to

* Reader at King's College London.

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society. Each builds on the work of a key 19th century theorist – Emile Durkheim, Karl Marx and Max Weber – and imagines the interconnection in a very different way.

Durkheim sees social life in terms of social solidarity that brings a people together in community.[1] He queries why, with all our diverse experiences and interests, society does not crumble into a squabbling mass. For him, the answer lies in the phenomenon of social solidarity, which has both structural and moral foundations. Solidarity serves the dual functions of providing integration and regulation – that is, it offers a cognitive orientation and meaning, on the one hand, and guidance and rules that limit behaviour, on the other. In Durkheim's view, law formalizes norms and shared beliefs that reflect society's underlying forms of solidarity.[2] Though implementation of law was, in Durkheim's view, increasingly, in modernity, relegated to the state, it maintained, especially in criminal law, a link with fundamental norms. For Durkheim, punishment had the effect of defining an offender as in violation of those norms and of re-affirming them in the face of the violation lest they become weakened by too widespread deviance.[3]

If society was about solidarity for Durkheim, it was about conflict for Marx.[4] Marx envisioned humans as embodying 'species being' – that is, as inherently cooperative, sociable and inclined to express their nature through work.[5] Under capitalism, however, each is embedded in a system of competitive market relations that transforms our nature into more egoistic, self-interested beings and pits us against one another in the quest for goods and also for a livelihood for our selves and our families.[6] Institutions of private property mean that those who own the means of production (i.e., factories, machines) do so exclusively and that those who do not work for a wage.[7] In this context, Marx argued, it is always in the interest of the owner to pay the worker less.[8] Out of this arises the dialectical tension of capitalism – namely, class conflict.[9] In Marx's view, politics and law tend to reflect disproportionately the interests of a ruling class who have the resources and wherewithal to exert strong influence in law formation.[10] Ideologies of the political equality of universal citizens under liberalism and of the rule of law (e.g., applicability of law to all, formal procedural equality before the law) serve to mask underlying material inequalities which remain.[11]

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1 E. Durkheim, The Division of Labor in Society (1997); R. Bellah (Ed.) Emile Durkheim: On Morality and Society (1975) and E. Durkheim, Suicide (1997).
2 Durkheim, Division of Labor, *supra* note 1.
3 E. Durkheim, The Rules of the Sociological Method (1982).
4 K. Marx, Capital, Vol. I. (1992); K. Marx & F. Engels, Communist Manifesto (1975).
5 K. Marx, Early Writings (1975).
6 Marx, *supra* note 4.
7 K. Marx & F. Engels, The German Ideology (1970).
8 Marx, *supra* note 4.
9 Marx & Engels, *supra* note 4.
10 Marx & Engels, *supra* note 7.
11 Marx, *supra* note 5.

The work of Max Weber has traditionally offered still a third alternative.[12] For Weber, history unfolds as a process of rationalization.[13] Criticizing Marx for too little attention to the role of ideas in history, Weber argued they act as 'switchmen', akin to those on a railroad, that can change the track along which interests are played out.[14] For Weber, formal legal rationality, especially in contract, introduces predictability into social life that fosters market growth. In politics, Weber sees law as holding the capacity to introduce a basis of legitimation for authority into the actions of officials and citizens in modernity.[15] Thus, whether as affirmation of shared beliefs, mask for inequality or basis of legitimation for political authority, law has been envisioned by each of these theorists to play a fundamental role in modernity.

In a number of crucial ways, thinking about law has come under challenge and begun to change in recent decades as new conceptions have been advanced. Let me now turn to five major developments in theorizing about how to imagine law. They are: 1) the rise of regulatory regimes and disciplinary power; 2) *autopoesis*, or self-generating regulation, and the alleged 'hollowing out' of the state; 3) self-regulation, partnerships and public application of law as last resort; 4) the legacy of colonialism and hegemonic dynamics of law; 5) transgressing of the boundaries of public and private; and 6) the rise of legal pluralism.

In the modern West, law has been central to the project of governance. In fact, Foucault suggests that modernity has been distinctive for its focus on governance as a public project and on the centrality of law within it. Law's place in governance has been portrayed through the imagery, dating back to Kant, of the 'rule of law'. The notion of a rule of law implies that law is written in form and knowable in advance of an act which may breach it. Law in this view applies universally to all and provides formal equality, or procedurally equal treatment, to each person coming before the court. Judges are seen, and must institutionally be placed, beyond the control of elected or appointed officials. Citizens are envisioned as autonomous political subjects and 'bearers of rights'. This vision saw power as embedded in sovereignty. This liberal conception of law and citizenship has been challenged at times as having failed to fulfil its promise and also as applicable primarily to Western societies.[16]

In recent years, another very different conception of power has surfaced, notably in the writings of Michel Foucault.[17] It, at once, criticized prevailing liberal views of power as too state-centred and Marxian ones, the main alternative,

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[12] M. Weber, Economy and Society (1978); H. Gerth & C. W. Mills, From Max Weber: Essays in Sociology (1946).

[13] M. Weber, The Protestant Ethic and the Spirit of Capitalism (2001).

[14] Gerth & Mills, *supra* note 12.

[15] Weber, *supra* note 12.

[16] H. Arendt, The Origins of Totalitarianism (2004); S. Zifcek, *Globalism or Imperialism: An Analysis of the ICJ's Mission to Indonesia*, unpublished paper presented at the Centre for Socio-Legal Studies, University of Oxford (1999).

[17] M. Foucault, The Archaeology of Knowledge and the Discourse on Language (1982); M. Foucault, *Governmentality*, *in* G. Burchell *et al.* (Eds.), The Foucault Effect: Studies in Governmentality 87 (1991); M. Foucault, Madness and Civilization (1988); M. Foucault, Politics, Philosophy, Culture: Interviews and Other Writings, 1977-1984 (1988); M. Foucault, Power/

as too economistic.[18] Foucault directed our attention instead to what he called the rise of 'the disciplines' – regulatory regimes – constituted of webs of social practices and institutional relationships.[19] In contrast to the juridico-political power of sovereignty, these regimes are largely private. Foucault explores how the disciplines, largely placed in the middle-level institutions of society, constitute their practices as knowledge and engage in a process of classifying and social sorting that profoundly shapes the life chances of those who come their way.

The process of exercising power employed by the disciplines differed from that of sovereignty.[20] While the latter had traditionally employed repressive power in the form of rules backed up by enforcement and the threat of punishment, the disciplines employed processes of normalization. Normalization meant that, rather than just refrain from breaking rules, person were charged with discerning and internalizing prevailing norms by adapting their own behaviour through a process of self-regulation.[21] While these techniques of 'disciplinary power' had developed in the context of private regulatory regimes, they could and increasingly were also applied by the state even as the disciplines have increasingly exercised a growing share of power relative to the state in the project of social control.[22]

Another facet of this new style of regulatory power centres on Foucault's concept of governmentality.[23] Here we are reminded of the state's power to diagnose social problems with the consequence of designating a target population and specifying solutions. Thus, anti-social behaviour by youth on a street corner may be diagnosed as a problem of social welfare or a problem of crime, with very different consequences for those involved. Increasingly, Foucault turned his attention to an entirely new form of power which he termed biopower that he saw as focusing its control on the physical interiority and the uniqueness of each individual body.[24]

A second line of new thinking about law picks up on Foucault's work on disciplinary power to argue that today we are, paradoxically, seeing a world in which there is more law but less state, or role for public power, in it.[25] This line of thought speaks variously of a 'retreat' or 'hollowing out' of the state, of 'private prudentialism' in which small private groups provide security for themselves, friends and family in gated communities and private investment funds and leave the 'public' to fend for itself.

Teubner points to the directions new regulatory regimes might take. Teubner highlights the emergence of self-generating private regulatory systems as a kind

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Knowledge (1980); M. Foucault, Society Must Be Defended: Lectures at the College de France 1975-76 (2004).

18 Foucault (1980), *supra* note 19.

19 Foucault, Madness (1988), (1980) & (2004), *supra* note 19.

20 Foucault (2004), *supra* note 19.

21 A. Barron, *Foucault and Law*, *in* J. Penner, D. Schiff & R. Nobles (Eds.), Introduction to Legal Theory and Jurisprudence 955 (2002).

22 V. Munro, *On Power and Domination: Feminism and the Final Foucault*, 2 European Journal of Political Theory 79 (2003).

23 Foucault (1984) & (2004), *supra* note 19; Munro, *supra* note 24; Barron, *supra* note 23.

24 Foucault (2004), *supra* note 19.

25 S. Strange, The Retreat of the State (1996).

of modern day '*lex mercatoria*'. He draws on Eugen Ehrlich's term '*bukowina*', which translates 'living law', to describe the gradual elaboration of customary law to address new kinds of legal problems as they arise. Like merchants of late medieval times who travelled from fair to fair and generated a privately enforced system of agreed rules, or '*lex mercatoria*', to govern their transactions, so, Teubner argues, transnational commercial interests are today generating private systems of binding international commercial arbitration to regulate disputes that may arise.[26] While technically having recourse to remedies in public should the decision of an arbitrator be violated, these are virtually never used. Instead, parties mutually recognize the greater predictability and efficiency of an arbitrator. Those breaching a ruling would also almost certainly face the penalty of club-like exclusion from future business dealings. The arbitrator in these massive undertakings is jointly chosen by the multinationals involved. The predictability provided by the approach arises from the fact that the arbitrator has expertise to penetrate the operations and documents – indeed s/he may have acted in a previous dispute. The arbitrator is also chosen with her or his predilections well known in advance. Thus, there has emerged in this modern day '*lex mercatoria*' a largely private system of transnational governance operating for the most part beyond the scrutiny and control of public law. It is not, however, alone. The Financial Action Task Force (FATF) is another private non-statutory transnational regulatory regime of recent vintage that exercises broad power, and there are others. What is striking and also troubling is the likelihood of more limited openings for political accountability that this sort of regime may provide.

A third line of rethinking has spawned various lines of argument about why so few prosecutions are undertaken for some types of public harms. Two of the most interesting arguments are Keith Hawkins' and John Braithwaite's works on 'law as last resort' and graduated systems of penalties, respectively.[27] While working from different intellectual roots than Foucault, each elaborates the theme of alternatives to the full application of the force of public law in interesting ways. They probe self-regulation and public-private regulatory partnerships as a means of control. Noting that in areas such as environmental regulation, prosecutions are very few, Keith Hawkins argues that officials are likely to use the threat of prosecution to cause problems to be rectified and, ultimately, prosecute formally only after other options have failed.[28] This is consonant with Braithwaite's proposal that a graduated system of approaches could be used as an alternative to strict proportionality in sentencing – with formal prosecution and, especially, custodial penalties being reserved for the most serious repeat offenders.[29]

In one particularly interesting development, regulation, including that in the financial services sector, is being thrust either on the sector itself or on public-private partnerships. In the former, emphasis has been on private peer regulatory

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[26] G. Teubner, *"Global Bukowina": Legal Pluralism in the World Society*, *in* G. Teubner (Ed.), Global Law Without a State 3 (1997).

[27] *Id.*, K. Hawkins, Law as Last Resort: Prosecution Decisionmaking in a Regulatory Agency (2003), J. Braithwaite, *Between Proportionality and Impunity*, 43 Criminology 283 (2005).

[28] Hawkins, supra note 27.

[29] Braithwaite, supra note 27.

schemes or on ones in which enterprises to be regulated participate in the planning and conduct of the process. The thinking is that such approaches, as more moderate and sensitive to the concerns of business, will enlist more cooperation. Some critics contend that it is, at best, little more than an earnest pipedream. In other new developments, public regulators, notably in the banking industry are being asked to find private partners in the industry to shoulder the costs of the regulatory activity so as to offload them to the private purse. This, of course, raises particular challenges of accountability in designing and drafting regulations.

A fourth line of rethinking about law focuses on western hegemony and the legacy of colonialism. In crafting regulatory schemes of transnational scope, it is significant that western priorities of transparency, anti-protectionism, rationality and efficiency may be viewed quite differently in large swathes of the 'later developing' world. Historically global investment has sought predictability.[30] To this end, transparency has been pit against corruption at the same time that protectionism has been attacked as non-competitive. Privatisation replaces states ownership. Nations compete as traditional niches erode. Institutional reform seeks free market liberalisation in the name of 'progress'. But less often asked is 'for whom'?

Historically, western institutions, such as the World Bank, in pursuing such goals required tumultuous 'reforms' in developing countries. In many areas, notably West Africa, this 'rationalization' of land holdings produced an appropriation of the property of small holders – especially women – and concentration of ownership in the hands of a few. The World Bank projects also recurrently introduced multinational corporate partners such as Caterpillar Tractor, who, along with mining and oil exploration firms, historically did much to channel a significant share of the profits offshore and to foster a process of 'dependant development'. Financial regulators also imposed requirements of transparency and anti-protectionism which, while contributing to market rationality, appear to have impaired these nations' ability to compete on world markets in early stages of industrialization when their competitors and their partners had industrialized long since. In this context, such regulatory schemes are often depicted as part of postcolonial control and of hegemony, or ideological control, by the West.[31]

One of the earliest, and still striking, analysts of the consequences of ideological control by colonial powers was Frantz Fanon who wrote *Black Face, White Mask* and *The Wretched of the Earth*. Born in Martinique and then living in Algeria under French colonial rule, Fanon became a psychiatrist and a keen observer of the psychodynamics of colonialism. Fanon argued that among the most destructive controls introduced by colonials were those ideologies of race and sexuality employed as part of a process of domination. He argued that the colonizer's image of a subjugated people that is imposed on a colonized people and internalized by them is, perhaps, colonialism's most enduring and destructive legacy. Among the most insidious qualities of such ideologies is the way they naturalise subjugation and may diminish among subordinated groups resistance

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30 F. H. Cardoso & E. Faletto, Dependency and Development in Latin America (1992).

31 *Id.*

to colonial domination. Among Fanon's most controversial arguments is his claim that the effect of such self-images is so powerful that it may require violence to rout out.[32] Recent writings depict postcolonial domination as moving beyond such ideologies of domination to new structures of 'global oligarchy' or, in Michael Hardt and Antonio Negri's words, *Empire*.[33]

In a fifth strand of rethinking of law, much attention centres on the boundary between public and private realms. Feminists, in particular, have questioned whether the delineation of a realm of privacy and its insulation from state intrusion through law has had as an unintended consequence to bar application of law in some crucial areas – e.g., domestic violence and marital rape – in ways that have disadvantaged women.[34] The problem, some feminists argue, is that much of women's activity takes place in the domestic spaces of that private sphere. Has 'privacy,' they ask, been used to exclude women from legal protection?[35] Yet, in imagining extension of legal protection into the 'private' realm, one is compelled to ask whether patriarchal control will follow. For example, will legal restriction of abortion result? Thus, one major issue in current rethinking of law is whether the public/private distinction is weakening.[36] If so, what will it mean and what should our response be? Maintaining it may leave women unprotected but eroding it may restrict autonomy and choice.

Beyond regimes of disciplinary power and privatisation, rethinking raises a final challenge of the dilemmas posed by legal pluralism.[37] While legal pluralism is not an entirely new problem, its salience is increasingly recognized. Legal pluralism refers to the situation where persons live under multiple systems of laws to which obligations, some of which may conflict, are owed. For instance, religious laws may mandate behaviour, such as head covering, which is at odds with public law. Thus, an individual may feel competing claims.

In a related argument, scholars such as de Sousa Santos point out that legal codes, public and private, are perhaps most insightfully envisioned as a single multi-layered system of legality. It is one, he argues, in which the meanings of law at one level interpenetrate others and shift their meanings. De Sousa Santos provides an image of law by using the metaphor of a map. Maps, he points out, serve different purposes and, for this reason, are created to different scales of relation to spaces they depict. Some offer quite a close-up vision and are rich in detail but show only a small area. Others cover a large space but present only a few of its most significant contours. De Sousa Santos' point in the comparison is that each map presents the reality of a space from a different perspective and, in so doing, distorts the picture it presents. So legal codes tend to tackle different sets of

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32 F. Fanon, The Wretched of the Earth (2001).

33 M. Hardt & A. Negri, Empire (2001).

34 G. S. Hammock & D. Richardson, *Perceptions of Rape: The Influence of Closeness of Relationship, Intoxication and Sex of Participant*, 12 Violence and Victims 237 (1997).

35 *Id.*

36 L. C. Bowers, *Queer Acts and the Politics of 'Direct Address': Rethinking Law, Culture and Community*, 28 Law and Society Review 1009 (1994).

37 B. de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 Journal of Law and Society 279 (1987).

concerns and adopt a particular focus. National laws tend to deal with protection against external threat and rights, among other things. Local laws, in contrast, usually focus on social order. Yet, across their differing levels and foci, the bodies of rules interpenetrate and shift meanings reciprocally across levels.[38] Thus, what is interpreted as 'jihad' in a religious sense may be classified 'terrorism' in public law but the tension between the two categorizations inevitably interpenetrates, distorts and reshapes the other.

C. Why Obey?

In designing and drafting legislation, perhaps no consideration is more important than whether and under what conditions people obey the law, and why.[39] Inevitably this raises questions not only of compliance but also of legitimation.[40] It leads us to distinguish authority from power as a basis of governance.[41] Because law in modern society is the very basis of an authoritative government, we must consider what can be the basis of valid law. What, we are also compelled to ask, is the significance of our approach to the nature and role of sovereignty and of law's crucial role in it? Let's look first at legitimation and then probe its significance.

Legitimation, based in law, implies a certain degree of subjective acceptance on the part of a people of the demands rules make. Compliance is more likely where such legitimacy prevails. Usually, political legitimation arises out of a justificatory framework of which law is an integral element. But how can we, in turn, demonstrate the validity of law? In our era, such demonstrations tend to take one of two forms: positive law or discourse ethics. The positive law approach, in the simplest sense, claims that law is valid purely because it is enacted. The regime doing the enacting may – and often does – come to power through force but that is treated as a separate problem independent of the validity of law. Once the regime has come to power, its enactments, in the eyes of positive law theorists, possess validity. The discourse ethics approach, in contrast, queries the nature of the regime enacting the law. It emanates from the work of Jurgen Habermas. A discourse ethics approach argues that law is valid when democratically established under conditions that preserve the autonomy and assure the commitment of all participants. In this view, such laws will be based on norms that could be accepted by all parties, interacting freely and rationally, and without coercion.

Concern with these issues, especially the validity of law, tends to be especially vital in democracies. This is because of the unique role played by law in political authority – the basis on which democratic regimes historically have governed.[42] Authority entails a right to command and a duty to obey. It can be distinguished as

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38 *Id.*

39 Weber, *supra* note 12; T. Tyler, *Governing Amidst Diversity: The Effect of Fair Decision-Making Procedures on the Legitimacy of Government*, 28 Law and Society Review 809 (1994); J. Habermas, Between Facts and Norms (1998).

40 Weber, *supra* note 12; J. Habermas, Legitimation Crisis (1975).

41 Weber, *supra* note 12.

42 Weber *supra* note 12; Habermas *supra* note 39.

a means of governing from power which signifies an ability to impose one's will even over the resistance of another. Thus, Roman Abramovich exercises power while Nelson Mandela wields authority. Democracies, by virtue of their claim to represent the will of all, seek to govern through authority. Thus, legitimation emerges as a key concern of such regimes since it is from this basis that subjective acceptance of law by a people follows.

Because the validity of law, which opens the possibility of authority, lies in its making, sovereignty is an anchor of modern legal validity. Sovereignty is the supreme power to govern a country or broader political entity. It is the basis of public governance and, where democracy exists, is integrally related to a nation's capacity for self-determination.[43] Sovereignty is normally established and justified in one of two ways: 'foundational violence' or 'popular sovereignty'. The first approach suggests that, once a regime is set in place and is governing, it can claim sovereignty. It is an approach found in Carl Schmitt[44] and in Jacques Derrida,[45] among others. In Schmitt's work, sovereignty can shift through the decision of a leader, who proclaims a suspension of constitutional provisions and ushers in a 'state of exception'.[46] In contrast, 'popular sovereignty', as espoused by Jurgen Habermas, connotes that rule lies with the people themselves.[47]

In reflecting on the capacity of law to elicit obedience, or compliance, it is salient that, today in Western Europe, it is positive law theory that tends to prevail. That is, law is regarded as valid by virtue of its being enacted. This makes legitimation and, with it, compliance especially challenging since norms may diverge from prevailing norms. This is true all the more so with the growing diversity of populations and appearance of subgroups whose norms may differ from the law.[48] Tyler has explored what factors influence a people's willingness to obey the law under such conditions. He found that, where the procedures through which laws are made are perceived as fair, people are more likely to obey the law even when they disagree with its substantive content.[49] Thus, Tyler highlights the importance of a certain amount of transparency in decision-making and, especially, of procedural fairness.

Democratic governance is today sprouting up all around the globe.[50] Whilst today two-thirds of all governments are democracies, as recently as the 1970s two-thirds would have been recognizable as authoritarian. Despite growing popular support, democracy is, by its nature, uniquely fragile. This fragility lies in the fact that democracy must sustain order, and do so without resort to force. It is so because of democracy's claim to reflect popular will. Any use of coercion casts this assertion in doubt. Instead of using force, a democracy must normally

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43 N. MacCormick, Questioning Sovereignty 123-131 (1999).
44 C. Schmitt, The Concept of the Political (2007).
45 J. Derrida, *Force of Law: the 'Mystical Foundations of Authority'*, *in* D. Cornell, Deconstruction and the Possibility of Justice 3 (2002).
46 Schmitt, *supra* note 44.
47 J. Habermas, *Why Europe Needs a Constitution*, 11 New Left Review 1 (2001).
48 Habermas, *supra* note 40.
49 Tyler, *supra* note 39.
50 J. Dryzek, Deliberative Democracy and Beyond (2002).

govern as completely as possible by means of authority. Authority, as we have seen, entails a sense of duty to obey. This duty arises from legitimation and the subjective acceptance it tends to induce on a people's part. Legitimation, in turn, may have its basis in tradition, in the charisma of a leader or, and this is the most common source for democracies, in law.

Where this latter type of rational-legal authority prevails, a leader implicitly says, obey because our society's rules are enacted in law and our officials are lawfully chosen. Such authority is remarkable because it prevails without the support of habit or traditional acceptance, and without the personal enthusiasm that charisma may elicit. Where authority is recognized, it is a product of the free choices of citizens who respond – and this is the striking element – even when it is not in their immediate interests at a particular moment to do so. The result is that in our late modern democracies, because political authority is anchored in legality, anything that weakens law does more than just create disorder. It undercuts authority itself and forces democracy onto the contradictory and destructive path of power and coercion.

Jurgen Habermas has argued in his writings on democracy that law must connect with the norms of a people. Where laws diverge too far from a people's norms, legitimation weakens. When the gap is significant, the consequence may be what Habermas calls a 'legitimation crisis'. Such gaps are especially likely amidst diversity since law cannot mould itself to the often conflicting norms of many disparate groups. In such circumstances political discourse may erode and participation decline. Society may tend to shift away from democratic dialogue to control, surveillance and policing. According to Habermas, such a crisis appeared in the West during the 1970s.[51]

D. The Changing Context of Law

Ours is a particularly interesting time for law, not only because of rethinking about the nature of law, but also due to changes in its context. Globalisation, legal culture, privatisation and the changing role of the state and transnationalization all present new challenges. Let's look briefly now at each in turn and explore the sorts of issues they present.

Globalisation has been defined by Anthony Giddens[52] as a growing planetary interconnectedness that produces experientially an eclipse of time and space. Increasingly, we live locally but think globally.[53] Hobbs has referred to this as a sign of our 'glocal' culture. Global interconnectedness span politics, economics and culture.[54] Begun long ago, the dynamics of globalisation seem to be accelerating and 'shrinking' our world more rapidly today. While the

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[51] Habermas, *supra* note 48.

[52] A. Giddens, Beyond Left and Right: The Future of Radical Politics (1994).

[53] D. Held & A. McGrew, *The Great Globalization Debate: An Introduction*, *in* D. Held & A. McGrew (Ed.), The Global Transformations Reader 1 (2003).

[54] Held & McGrew, *supra* note 53; Giddens, *supra* note 52.

consequences globalisation brings are many, Giddens has highlighted four.[55] First, competitiveness has increased as localities in all parts of the world are swept into contact with global markets. Orange growers in California compete not just with those in Florida but with those in Spain and Israel as well. Partly due to greater competitiveness, a second development is pressure on the social welfare state. Tax burdens required to support welfarism raise the costs and, thus, prices of goods and services to levels that undercut competitiveness. Third, as societies and cultures come into contact tradition and faith, on the one hand, confront rationalism, on the other. Some depict the resulting tension as a clash of pre-modern and late modern ways of life. Traditional belief, unaccustomed to justifying itself through reasoned argument, may, Giddens argues, respond with violence. He points to Islamic fundamentalist terror as a sign of such response. Finally, self-reflexivity is a fourth symptom of our global times. As cultures intermingle and times bring an escalating pace of change, customary norms that historically guided our lives have faded. In their stead, each of us is called on to individually process and make judgments on dozens of issues each day. The information and absence of accepted mores can seem overwhelming and the burdens great.

Globalisation is reshaping not only the quality of our day to day lives but also the contours of inequality between rich nations and poor ones. As connectedness advances, multinational companies scour the globe searching for inexpensive labour in what some call a 'race to the bottom.' Regional division of labour arises as manufacturing jobs exit advanced industrial societies and wash across the globe in tides to the shores of later developing countries.[56] Global regulatory regimes call for transparency, austerity and anti-protectionism but one is compelled to query whether the introduction of such financial regulation today, now that an uneven playing field is established, may play a hegemonic role in preserving global inequalities by preventing later developing countries from overtaking earlier ones by re-enacting the brash rush to industrialization of the earlier ones.

Cultures are a second crucial facet of context which, along with globalization, colours the construction and interpretation of law today. Culture may be thought of as a system of beliefs, norms, codes and practise that provide orientation and meaning as well as a repertoire on which we draw in our actions. Political and legal cultures may powerfully influence both the crafting and implementation of law. Culture may facilitate or impede the transplantation of legal institutions – including ones as basic as rights. Linguistic struggle over the meanings of concepts such as liberty may also become central to the logic and processes of change. Some years ago, in 1999, an International Commission of Jurists mission journeyed to Indonesia to assess whether the conditions existed for a free election. Its members were challenged by local officials as to whether and why 'rights' might be appropriate to their country. 'Rights', an official explained sincerely, 'are the [legal] creation of an angry and antagonistic West' which is at

[55] Giddens, *supra* note 52.
[56] Held & McGrew, *supra* note 53.

odds with the Indonesian culture of 'harmony'.[57] Such cultural contrasts present special challenges for those involved in crafting both domestic legislation and transnational agreements.

Privatisation and a changing role for the state is a third area in which the contextuality of law is marked by special fluidity. One hears with growing frequency, as noted already, talk of a 'retreat' or a 'hollowing out' of the state.[58] This suggests that state-centred power, which Foucault long ago showed to be coupled with disciplinary power, is, as he also suggested, perhaps being superseded by private power. At a minimum, the balance appears to be shifting between public and private power – in favour of the latter.[59] Visions of 'private prudentialism', also mentioned above, depict clusters of individuals banding together, as in 'gated communities', to provide security exclusively for themselves and their families whilst resisting the tax burden of public provision. We have seen how large international enterprises articulate their own private 'lex mercatoria'. In the extreme view, some suggest that such an approach hints at a kind of incipient 'neo-feudalism'.[60] Even human rights, many argue, has been colonised by neoliberalism.[61] Declining public power inevitably brings with it implications for political accountability.

Where public power remains, we have seen that there appears to be more law but less state in it.[62] Privatisation is reshaping what traditionally has been a public realm.[63] Some tasks, such as prisons and drug treatment, are contracted to private firms. Others, such as policing and some military operations, are at least partially transferred to the private sector. Partnerships involving private enterprises and public regulators are formed, as in banking, to devise strategies for new control regimes. Where public functions, such as the judiciary, remain, one sees expanded informality.[64] Mediation, arbitration, plea bargaining, the ombudsman and pre-trial diversion are relevant examples.

Public power too assumes new forms. Some scholars, such as Giorgio Agamben, argue that we have moved, amidst unusual or 'exceptional' times, to a new paradigm of governance.[65] It is one in which constitutional constraints on public action play are weakened in the name of 'emergency conditions'. Executive power, in contrast, may be assuming new and unrestricted scope. Agamben builds on a critique of liberalism advanced by Carl Schmitt in Germany during the 1930s. Schmitt argued that liberalism with its focus on neutral and abstract rules failed to spark the imagination of citizens to the extent required for dynamic and effective leadership. Schmitt pointed to provisions in the German Constitution which

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57 Zifcek, *supra* note 16.
58 Strange, *supra* note 25.
59 M. E. Vogel, *The Irony of Imprisonment: The Punitive Paradox of the Carceral Turn and the 'Micro-Death' of the Material*, *in* M. E. Vogel (Ed.), Crime, Inequality and the State 1 (2007).
60 Strange, *supra* note 25.
61 H. Englund, Prisoners of Freedom: Human Rights and the African Poor (2006).
62 Vogel, *supra* note 60; L. Mulcahy, Comments on a lecture given by the author at the WG Hart Conference, Institute of Advanced Legal Studies, London (2006).
63 Strange, *supra* note 25.
64 D. Galligan, Discretionary Powers (1990).
65 G. Agamben, State of Exception [tran. by K. Attell] (2003).

allowed for the suspension of normal constitutional guarantees during times of emergency. He argued that such provisions should be used more frequently. This could open the way for a charismatic leader capable of mobilizing the people politically. "Sovereign is he," Schmitt proclaimed, "who declares the exception." Such sovereignty provided the backdrop for Schmitt's concept of 'the political' rooted in the distinction, specified by the leader, between 'friend' and 'foe'.[66] It is a view of leadership possessed of capacious power. Agamben draws on Schmitt's vision to argue that 'state of exception' has emerged in our day as a permanent paradigm of governance.[67] It enables expansion of executive power although, in England, the judiciary appears to be moving to resist.

One primary path of privatisation today is the growing role of discretionary informality in law.[68] Such practices, especially plea bargaining in criminal cases, tend to be touted as less expensive and cumbersome and as a user-friendly alternative to formal court proceedings such as trial. What is less often noted is their relative lack of procedural protections. Also soft-pedalled is the significant chance of acquittal a defendant faces in Crown Court.[69] Discretionary informality has been the subject of much scholarly interest from Franz Neumann and later from Otto Kirchheimer.[70] Neumann's interest arose from his query as to why the liberal rule of law had not more successfully blocked the excesses of Hitler's National Socialists in Germany during the 1930s. Neumann reflects that, in retrospect, liberals may have erred in their decision to broaden judicial discretion as part of their efforts to rein in monopolies and appropriate properties of aristocratic elites. Having been blocked by none other than Carl Schmitt from making laws that violated abstract generality to achieve their policy purposes, greater latitude for judicial discretion was embraced as an alternate route to the same ends. Broad powers of judicial review were introduced. The Free Law movement announced that law was a system whose gaps should be filled through judicial interpretation. Judges increasingly turned to natural law principles to guide their exercise of discretion. Later Neumann would opine that such broadening of discretion and informality opened the way for politicization of the courts.[71] He inspires us to ask if discretionary informality may, more generally, tend to arise for this reason in times of political reaction.

Transnationalization is a final contextual development that is contributing to a transformation in law and how it works. As global interconnectedness developed, crime moved into the frontier of opportunities that it created. Criminal law, criminal procedure and criminal justice moved to adapt but more slowly than did criminal groups and encumbered by institutional barriers and constraints. It

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66 Schmitt, *supra* note 44.

67 Agamben, *supra* note 56.

68 M. E. Vogel, Coercion to Compromise: Plea Bargaining, the Courts and the Making of Political Authority (2007); Vogel, *supra* note 60.

69 A. Sanders & R. Young, Criminal Justice (2007).

70 F. Neumann, *The Change in the Function of Law in Modern Society*, *in* H. Marcuse (Ed.), The Democratic and the Authoritarian State: Essays in Political and Legal Theory 101 (1957); O. Kirchheimer, Political Justice: The Use of Legal Procedure for Political Ends (1969).

71 Neumann, *supra* note 71.

rapidly has become clear that the scale of many major problems -- including but not limited to economic issues, serious organised crime, and environmental hazards – requires transnational response. As a consequence, transnational governance structures and cross-national cooperation arrangements have been set into place.[72] In thinking about the capacity of legislation to address these challenges, one key question to ask is to what extent they are manmade.[73] Be it poverty amidst riches, risk and organised crime, climate change, environmental racism, disease and malnutrition, human trafficking and smuggling, educational gaps, lack of work, culture conflict or diversity and exclusion, each is at least partly a self-made jeopardy.

Often our age is described as one of anxiety. It would seem that we are encountering new and unmanageable hazards that present new risks.[74] This psychological re-orientation to risk may cause us to focus our attention more than previously on possible future harm. It may be that risk thinking inherently fosters fear along with an oversize sense that one must do something to prevent impending danger. To the extent such hazards are self-made, they may be amenable to remediation. In that process, law often plays a part.

The scale of problems today, many argue, requires transnational response.[75] Such activity is nurturing movements for new forms of governance, both public and private, as well as generating new mechanisms of cross-national cooperation.[76] Among the governance bodies emerging are: regional governance (European Union); world representative bodies (United Nations); international organisations (International Monetary Fund); non-statutory private bodies (Financial Action Task Force); courts of international jurisdiction (European Court of Justice); private self-regulatory systems ('*lex mercatoria*'); and non-governmental organisations. This produces a planetary legal pluralism in which legalities interpenetrate and create multiple, sometimes conflicting, obligations. In terms of cooperation, we find especially: extradition treaties, mutual cooperation agreements, extraordinary rendition, out-posting of liason magistrates, the European arrest warrant and Interpol.

Compatibility, or ability to harmonize, across legal cultures is one very real problem in determining the workability of these forms of reciprocity. Of even greater concern is the historical tendency for transnational governance regimes to be consistently anti-democratic or exhibit a democratic deficit.[77] Absent a demos, low participation tends to create a democratic deficit.[78] Yet, such transnational arrangements, on the other hand, may avert the pitfall that individual nation states seem sometimes to be inherently exclusionary. These issues lead us to query whether governance is moving beyond the nation state.[79] If so, what models are

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72 P. Reichel, Handbook of Transnational Crime and Justice (2004).
73 Giddens, *supra* note 52.
74 U. Beck, The Risk Society (1992).
75 Held & McGrew, *supra* note 53; Reichel, *supra* note 73.
76 Reichel, *supra* note 73.
77 D. Marquand, The New Reckoning (1997).
78 Habermas, *supra* note 47.
79 Dryzek, *supra* note 50.

possible? Do civil society movements or a model of transnational deliberative democracy hold promise? Can democracy work without a '*demos*' or 'people' who share a lineage, culture and language? Could we reimagine democracy transnationally?

E. Whose Law? Identity Politics

In drafting legislation, perhaps no question is more important than who it is for. Since the end of World War II, we have problematized identity as a concept.[80] Where once we thought of law as applying to universal citizens who were relatively homogeneous, we now consider the unique features that make us what we are.[81] These identities are not only diverse but also fluid. How can we understand that identity? Some feminists urge that we think of identity in terms of difference and our response to it. Radical feminists and Foucault, on the other hand, have urged that we think of identity as a situation in webs of patriarchal power.[82] Increasingly we have come to understand that identity is also multi-faceted.[83] Whether it is essential to us, a matter of patriarchal domination or a matter of 'performativity', as some postmodern feminists such as Judith Butler suggest, is still a matter of lively debate.[84]

Drawing on feminist research, we find many diverse ways of imagining femininity. Let us look now at four theoretical viewpoints as a basis for considering their significance legislatively. Liberal feminists view men and women as fundamentally similar. Thus inequality is a perturbation of that sameness. Equality, in their view, requires similar treatment of men and women. Cultural feminists focus on what they see as essential differences between men and women. Men and women, as they see it, have profoundly different needs. In their eyes, equality requires specialized treatment. Radical feminists challenge the tendency of both liberal and cultural feminists to frame the issue of inequality in terms of difference. Radical feminists, such as Catherine MacKinnon, theorize gender inequality as a problem of domination.[85] Any approach to women's betterment ultimately requires social transformation. For post-modern feminists, identity is linked to power that is diffuse and multi-faceted. However, the fluidity of identity renders it fundamentally 'performative' – that is, a creation arrived at through a series of stylized repetitions. The link to power means that a capacity for resistance is inherent in identity. Post-modernists look not toward liberation

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[80] C. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 Signs 635 (1983); Fanon, *supra* note 32; B. Hooks, Ain't I a Woman: Black Women and Feminism (1999).

[81] I. M. Young, Justice and the Politics of Difference (1990); C. Taylor & A. Gutman, Multiculturalism and the Politics of Recognition (1992).

[82] Munro, *supra* note 22.

[83] T. Jefferson, *Masculinities and Crimes*, *in* M. Maguire, R. Morgan & R. Reiner (Eds.), The Oxford Handbook of Criminology (1997); Hooks, *supra* note 81.

[84] Munro, *supra* note 22.

[85] MacKinnon, *supra* note 81.

but rather to subversion of potentially dominating power. Thus, we see that a concept as seemingly simply as 'equality' can have numerous and even conflicting meanings.

The significance of identity originates in the understanding that self forms through recognition by others. Their response shapes us as their messages are internalized.[86] This led marginalised groups during the 1990s to refocus their work for betterment away from welfarist benefits and toward social inclusion. The quest aimed for recognition of a unique identity for each of us.[87] Theorists such as Iris Marion Young pressed for 'special rights' for disadvantaged groups to compensate for previous marginality.[88] Others, including Will Kymlicka, sought 'cultural rights' for oppressed groups, basing their claims in a view of group culture as a 'primary good' claimable as a matter of right due to its centrality in the constitution of one's self.[89] Alternately, are our identities 'cosmopolitan' and drawn from the shreds of our experiences of different dynamically changing cultures? Or do we, in a postmodern sense, invent and reinvent our identities as a 'performance' so that what needs protecting is not our culture but our right to expressive performativity? What has only gradually come to be asked is whether the new culturalist focus on recognition may have ill-advisedly displaced a socio-economic emphasis on redistribution.[90]

F. Conclusion and Epilogue

May I conclude now with a short story which shows that inquiry into the implementation of laws and procedures to see how they work in practice is a *sine qua non* of any initiative for law crafting or reform? For no matter how carefully drafted and thoughtfully framed, there will always be surprises. Those unintended consequences say a vast amount about what the law is actually doing.

My illustration is that of the practice of plea bargaining in the criminal law. This is a practice recently embraced formally in the British courts since the *Goodyear* case in 2005. Adopting plea bargaining involves borrowing a practice across time and space for it began in America in the 1830s. I speak of this practice as it first appeared in the lower courts of Boston to show how plastic, even then, it proved the criminal law to be and how many surprises it produced. In the years after the American Revolution, the courts proudly embraced the hard won rights of the Republic. To this end, judges urged all defendants in criminal cases to embrace the presumption of innocence and to contest their cases in a vigorous effort to win

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86 G. H. Mead, Mind, Self and Society (1967); Taylor & Gutman, *supra* note 82.
87 Taylor & Gutman, *supra* note 82.
88 Young, *supra* note 82.
89 W. Kymlicka, Liberalism, Community and Culture (1989).
90 N. Fraser, Justice Interruptus: Rethinking Key Concepts of a Post-Socialist Age (1997); Englund, *supra* note 62.

acquittal. The justices went so far as to suggest that those who entered a guilty plea would be sentenced more harshly than others. Yet, what transpired turned out to be precisely the opposite of what they sought to do.[91]

In the years after the American Revolution, political leaders devoted themselves to re-establishing post-Independence political authority. This project faced the challenge that authority was to be based on self rule but be constructed as an urban phenomenon during the 1830s which was a period of the greatest concentration of wealth and increase of economic inequality of the 19th century.[92] What has long been left aside in accounting for the remarkable continuity of popularly elected political leadership in the United States and also of institutions of property and limited labour mobilization is the distinctive contribution of the common law which entered into a project of political stabilization, legitimation of institutions of self-rule and, especially, construction of political authority in unusual and important ways.

Drawing on common law traditions, in particular on widely used practices of discretionary – or what I shall call episodic – leniency, the courts fostered both political stability and a new form of political authority. It was, at once, modern and forward looking in that it was rooted in the ideology of a rule of law (imagining citizens whose compliance was an act of choice) and yet, at the same time, incorporated traditional elements of social hierarchy as well. It was a curious blend of old and new – of continuity and change. In so doing, political equality was emphasized while economic inequality, manifest in those hierarchies, was not only downplayed but reinforced. Let us look at this more closely.

The 1830s were a period in America when the franchise (e.g., the vote) was 'universally' extended and old traditions of 'deference', whereby those less privileged paradoxically elected their social 'betters', began to fade. As this happened, political and social elites gradually retreated from standing as candidates for elected office to a less formal position of economic power where their vast resources continued to wield significant influence. As they lost political office, the attention of elites turned to the courts. Links between the courts and public policy (especially economic development) grew stronger.

In those early decades of the 19th century, while the Constitution was still new, local political institutions were spare and fragmentary (e.g. no paid police) and local political parties were non-existent. At the same time, crime, violence, rioting and unrest were all too commonplace and social disorder was an increasingly intent concern of urban dwellers. Amidst these problems local political leaders looked frequently to Europe and were extremely conscious of the political mobilization and potential for revolution mounting there. Given the paucity of local political institutions and the many challenges of the day, two institutions – the courts and the tax collector – emerged as central in promoting order. At this point, the courts stepped forward as agents of the state to promote political stability, strengthen the legitimation of institutions of self-rule and nurture conditions conducive to healthy economic development.[93]

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91 Vogel, *supra* note 69.
92 *Id.*
93 *Id.*

Reaching back into the traditions of the common law, the courts focused on mechanisms of discretionary, or episodic, leniency. (This meant that leniency was frequently, but not always, accorded and so could not be counted on and taken for granted.) These included sporadic pardons and decisions not to prosecute or not to convict. What was unique about the tradition of leniency was that to qualify for it, one relied on the intercession of what was essentially character witnesses to whom one was known. As E. P. Thompson has pointed out, in England where litigation was also widespread, this practice created incentives to appreciate, nurture and reciprocate social ties and bonds of patronage with one's betters. As a benefit one might have the stock of good will to cause a prosecution to be foregone or to have a powerful patron to attest to one's worthiness or to plead for mercy on one's behalf if one ran afoul of the law. The result was a system of justice that reinforced the class structure through the social ties that it nurtured at the same time that it bolstered political legitimacy by conveying a formal message of universality (i.e., law applies to all) and equality or equal treatment before the law.[94]

As we turn our attention from England back to the United States, we see that plea bargaining emerged as the most widespread and an extremely pervasive form of episodic leniency which, as in England, promoted political stability – but now in new ways in the novel context of popular electoral politics. As to when we find first evidence of plea bargaining, the answer lies clearly in the 1830s. Before that time, both bargained guilty pleas (both explicit and tacit) and, in fact, guilty pleas altogether were quite rare. Such pleas accounted for only 15% or less of all convictions in the United States prior to the 1830s. Nor, according to prior studies, does the practice seem to have existed in England before the late 18th century. Official reports of guilty plea bases remain quite rare, with the exception of crack'd cases, until at least the last quarter of the 19th century.[95] So how was it that this curious practice emerged?

As the Boston courts grew busier during the 1830s and 1840s, what had been a reticent acceptance of a guilty plea at the 'turn of the century' gave way before the beginnings of plea negotiation.[96] Marked as the 1830s were by the tumult of industrialization and by mounting disorder, crime, riot and violence, political leaders grew increasingly fearful of the prospect that extra-legal or political solutions would be sought to the conflicts of the dangerous classes. Drawing on the new imagery of a democratic experiment in which all members of the republic shared, political leaders in Boston, as in other cities, worked ceaselessly to prevent the type of political unrest they had seen on the European continent.

Turning to the cultural traditions of the common law, Bostonians, during the late 1830s and 1840s, reworked elements of the tradition of discretion and episodic leniency into a creative legal practice which, while closing cases – in a much and loudly sought concession, retained for the courts considerable policy control over

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94 E. P. Thompson Whigs and Hunters: The Origins of the Black Act (1975); D. Hay *et al*., Cal Winslow Albion's Fatal Tree: Crime and Society in Eighteenth Century England (1975); Vogel, *supra* note 69.

95 Vogel, *supra* note 69.

96 *Id.*

both sentencing and its implementation. Plea bargaining took standard vehicles of leniency, such as the pardon, in which leniency was traditionally granted after conviction, and moved it up to a point before a decision was yet made – giving it a more contractual quality. In the case of pleas of nolo contendere which were often used in regulatory cases, conditions might be specified for the grant of leniency. Much less complicated and almost always conditionless was the guilty plea bargain which emerged in criminal cases – especially larceny and assault. At a time when the bar was under challenge to allow any man legitimately hired by a litigant to argue a case in court, the simplicity of plea bargaining and absence of arcane legal formalities had popular appeal.[97]

Plea bargaining appears to have been espoused by old political elites whose electoral power was under siege because of the continued control it gave them, in a broad sense, via judges over sentencing policy. (In Boston during the early decades of the 19th century, virtually the entire bar consisted of former Federalists – now Whigs.) Defendants, largely lower class persons in the lower court, accepted the practice because it held out a sense of leniency, the appearance of control over one's fate through negotiation, and elimination of intrusive state oversight of the lives of defendants through the increasingly frequent practice of leaving cases 'open' on file.[98]

Analysis of data from the lower court in Boston reveals that guilty pleas emerged as a significant phenomenon during the 1830s and that by 1840 the practice of granting concessions in cases where such a plea had been entered was set in place and continued into the 20th century. Plea bargaining did not emerge as a full blown plan or scheme. Instead it was the product of gradual incremental improvisation by a Whig political elite seeking to bolster social order so vital to the healthy functioning of markets and to economic development – and, with it, their own flagging political fortunes.[99] With its simplicity, rationality and regularity, plea bargaining offered a routinization that was appealing. In its exchange, albeit symbolic, the practice also drew attention to the precise costs of criminal acts in a way favoured by consequentialists to create a deterrent effect.

Thus, plea bargaining appeared as an extraordinary mediation at the symbolic level of the social conflict of the times. It entails acknowledgment of guilt in a form, at once, consonant with both the receding colonial religious order and the emerging market metaphor of *laissez faire* liberalism – in form and in meaning an outcome the complete opposite of the full contestation of trials the postcolonial American judiciary had originally foreseen.

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97 *Id.*
98 *Id.*
99 *Id.*