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## Taking Risks Ethically

John D. Haskell

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## TAKING RISKS ETHICALLY

*John D. Haskell\**

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### I. INTRODUCTION: APOLOGY AND UTOPIA

In his *Grotius Series Lecture*, the legal theorist Nathaniel Berman noted that the international legal order is plagued by two warring tensions.<sup>1</sup> On the one hand, there is the tendency to look at the horrors in places like Sudan or the Congo and say something must be done. We cannot just allow aggression to go unchecked. Remember Rwanda. We see intervention in Kosovo if not legal at least legitimate. There may be dark sides to our virtue—human rights the language of aircraft carriers not peace protesters—but even so, what is the point of our military resources if we do not use them for good? Is that not, at least partly, what we have them for?<sup>2</sup>

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1. See Nathaniel Berman, *In the Wake of Empire*, 14 AM. U. INT'L L. REV. 1515, 1554 (1999).

2. See David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 99 (2001); see also DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004).

On the other hand, the professional policymakers and bureaucracies of global governance remain, or have become skeptical, of things like humanitarian intervention or normative projects for civil society.<sup>3</sup> These misgivings come from all sides of the aisle, ranging from arguments concerning territorial sovereignty to accusations that, as in the case of the former Soviet Union, humanitarians' best intentions often do more harm than good for the people they are trying to help (e.g., eradicating their cultural traditions, destabilizing populations).<sup>4</sup> A liberal democratic model seems increasingly unable to meet the technological and cultural transformations of the international community.

Indeed, things seem to have somehow gotten away from the normative aspirations of the liberal humanitarianism of the post-Cold War: the war on terrorism, the widening gap between rich and poor, unresponsive and overreaching governments, as well as cultural tensions both at home and abroad concerning issues of religion, traditions, and politics.<sup>5</sup> Polemics for democratic institutions harbor deep cynicisms toward domestic administrations, the celebratory declarations of progress and emancipation of the almost shrill enunciation of hegemonic anxiety. Just as words like "civilization" and "colonialism" became unpopular in the years following the World Wars in Europe, many today have become skeptical toward the sincerity and feasibility of a humanitarian rule of law and liberal democratic values.<sup>6</sup> The world feels more than ever outside of our own making. In the

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3. There are at least two dimensions of this skepticism that should not be conflated. First, a behavioral assumption that states by some intrinsic quality will abuse power, and should therefore be kept outside the henhouse of international law proper. See, e.g., HANS J. MORGENTHAU, *SCIENTIFIC MAN VERSUS POWER POLITICS* 192 (1946). Second, a historicist presumption that no matter how tightly woven, international rules of conduct will always be subject to a double standard, what Ian Brownlie called "old fashioned hegemonic intervention." See Ian Brownlie, *The Principle of Non-Use of Force in Contemporary International Law*, in *THE NON-USE OF FORCE IN INTERNATIONAL LAW* 17, 26 (William E. Butler eds., 1989). However practitioners and theorists attempt to purify international law of its vagaries (e.g., of its "idealism" or "apology"), the outcome seems almost predestined to some cynical outlook about the possibilities of law and governance, if not humanity.

4. See John Haskell & Boris Mamlyuk, *Capitalism, Communism . . . and Colonialism?: Revisiting Transitology as the Ideology of Informal Empire*, 9 *GLOBAL JURIST* art. 7 (2009).

5. See Jose Casanova, *Religion, European Secular Identities and European Integration*, *EUROZINE*, July 27, 2004.

6. The classic modern description of this sentiment comes from the Nazi jurist, Carl Schmitt who advanced the polemic that any rule of law was ultimately grounded on the maxim: "Sovereign is he who decides the exception." See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (trans. George Schwab, 1988). While this line of critique has often enjoyed currency within more conservative American "real-politic" advocates, a variety of skeptical appraisals have also come from other corners, such as post-modernism and Marxism. See generally KENNEDY, *supra* note 2; see also CHINA MIEVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* (2005); EVGENY PASHUKANIS, *THE GENERAL THEORY OF LAW AND MARXISM* (1924).

words of the American poet, Robinson Jeffers, modern man dances to a “dreamled . . . Disastrous rhythm,” somehow both intimate and irreversible.<sup>7</sup>

Within the liberal cosmopolitan sentiment today, it has become almost a rite of authority to admit personal ambivalence or misgiving toward the nature and momentum of not only our institutions, but our very language and roles. Ambivalence reigns as practicing lawyers are viewed as national diplomats, and academic discourse distrusted or seen as simply unapproachable.<sup>8</sup> Law and politics are flip sides of the same coin, ideals serving the agendas of powerful political actors who cannot be clearly identified. There is a general feeling that the international community is poised at the edge of some emerging epoch, though exactly what this may bring is up in the air.<sup>9</sup> We perceive ourselves in a world without historical context—and yet, nevertheless, as the post Cold War becomes the post 9/11 world, we wait for the next danger to arise, whether it comes in the form of ecology, economics, or some new military conflict.

It is within this moment without foundation or certainty that we come searching for a post-foundational posture that might lead us forward.<sup>10</sup> This challenge is complicated because as the world becomes increasingly interlinked, any set of normative values must somehow be international in scope, sufficiently able to derive consensus, while also meeting the particular needs and agendas of disparate social hierarchies and cultures. On the one hand, abstract principles will lead, at best, to an abstract consensus, and tends to ignore the historically contingent character of values. On the other hand, to rigidly define liberty would

7. See ROBINSON JEFFERS, *REARMAMENT* (1935).

8. Kae Matundu-Tjiparuro, an Ovambandero—Ovaherero activist and journalist, expresses this distrust poignantly. In *An Open Letter to Professor Hinz and Fellow “Verkampte” Academics* (on file with author), he writes, “It is time to speak to the pseudo good intentions of some German siblings masquerading as academia. It’s a suspicion I’ve been harboring for some time. And suspicion is putting it very mildly.” In particular, he is skeptical of academics’ “self-proclaimed liberalism, humanitarianism, and critical thinking.” For Matundu-Tjiparuro, these academics are “daily, and at a cruising speed, revealing their true colors. At the end of the day, blood is thicker than water.”

9. In reviewing the findings of their polling, for example, Balz and Brownstein observed that “large numbers feel themselves uprooted by developments that they cannot understand or control . . . that they can no longer shape their own future.” See MARTIN CASTELLS, *THE POWER OF IDENTITY* 173 (2004).

10. The post-foundational tradition in political philosophy dates at least back to interwar German philosophers and jurists, such as Heidegger and Schmitt, and has recently re-entered international legal theory to various degrees through authors such as, David Kennedy, Martti Koskenniemi, Anne Orford, and Tracy Strong. For a concise but useful overview of post-foundational thought, see OLIVER MARCHART, *POST-FOUNDATIONAL POLITICAL THOUGHT: POLITICAL DIFFERENCE IN NANCY, LEFORT, BADIOU, AND LACLAU* (2007).

ironically only result in liberty denied.<sup>11</sup> In the current economic crisis that has descended around the globe, these challenges feel all the more radically present, demanding some new way forward.

In this Article, I have adopted a two-fold approach to these challenges. First, I want to briefly think about some common “illusions” that may restrict our ability to cope with the violence and paranoia that haunts our horizons. My suspicion is that too often we see ourselves in the role of architects, embroiled in debates over the structural aspects of civil society at home and global governance abroad. In this sense, I want to suggest that it is not our institutions or ideological underpinnings that stifle our efforts, but something more intimate, something about our most cherished conceptions of our past, those illusions about our own personality and the projects we sign up to. This might be seen as the search less for a set of concrete virtues, and more for a posture or sensibility to guide us forward. Second, I want to turn and think about how this sensibility might be applied in practice, and specifically to think about this in relation to the looming financial crisis. My hope in this work is not to provide an in-depth analysis of any of the current challenges that face global law and policy, but to focus on the sensibility that experts more often than not bring to the table, and to inject into this ongoing conversation some more recent advances within Continental European philosophy<sup>12</sup> and critical theories of international law and development.<sup>13</sup> The task here, in other words, is to propose an initial step into thinking how we might move more boldly beyond the politics of knowledge, of self-reflection and ambivalence, to a politics of truth—what we might see as an experience of the freedom, or perhaps the thrill, of taking risks ethically.

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11. See ROBERT SHEA & ROBERT ANTON WILSON, *THE ILLUMINATUS TRILOGY* 452-54 (1975) (stating and expanding on the line, “[f]reedom defined is freedom denied”). The problem here is at least two-fold. First, as authors as early as G.W.F. Hegel observed, legal rules only correspond to particular “definite circumstances,” and if these circumstances are removed, the legal rules themselves are no longer necessarily beneficial. See GEORG WILHELM FRIEDRICH HEGEL, *PHILOSOPHY OF RIGHT*, § 3R (English trans. S.W. Dyde, 1896). Second, as Justice Oliver Wendell Holmes, Jr., and the subsequent American legal realists observed, rules are themselves always open to interpretation, rendering debates over “hard” and “soft” standards largely unhelpful. For useful introductions to this tradition, see *AMERICAN LEGAL REALISM* (William W. Fisher III et al. eds., 1993); see also *THE CANON OF AMERICAN LEGAL THOUGHT* (William W. Fisher III & David Kennedy eds., 2006).

12. In particular, I am thinking about the political philosophy of authors such as Alain Badiou in response to “radical democracy” theories within French intellectual circles.

13. See, e.g., *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek & Alvaro Santos eds., 2006) [hereinafter *THE NEW LAW AND ECONOMIC DEVELOPMENT*].

## II. A GENTLE CIVILIZING SPIRIT?

Practitioners and theorists within the field of global governance tend to share the sentiment that our professional traditions and liberal humanitarian rigor stand against the violence of empire, and that we are the natural or deserving descendents of those great dead white men of the Enlightenment who first began to dispel the superstitions and irrationalities of our past with reason and genuine, if at times flawed, good will.<sup>14</sup> As John Gray, the British economist and philosopher at LSE, states: “we are all modernizers today.”<sup>15</sup> History may be uncertain, but we all approach it with our technocratic toolboxes, informed by scientific fact and weathered experience. If anything, while we may be suspicious about some of our colleagues’ abilities or views, we count ourselves among that number emancipated from the past and committed to a better tomorrow.

This attitude though ignores that colonial empires have always been controlled by a technology of knowledge, rulership dressed up, consciously or unconsciously, in philanthropic and “lawful” motives to further understanding and order. As the legal theorist Scott Newton points out, we need look no further than the British Museum to see that part of the imperial project was to collect objects from around the world and classify them. I do not imagine that the colonial experts then saw themselves as bad people or acted on bad intentions any more than we understand our roles today. They also held conferences to share their experiences in far off lands about methods of good governance. The Berlin Conference of 1885 dividing Africa into a series of straight lines and right angles was done in the name of the moral and material well being of the African people—carried out by humanitarians, priests, government officers and soldiers. They too were concerned with humanity and armed with the cutting-edge tricks of the day.

In this sense, to some degree the various opinions and debates currently at play are more likely rhetoric and polemics, an intellectual excursion or opportunity for professional networking and entertainment than they actually provide any hope of something new. To draw from Edward Said, we may be merely telling ourselves as every nation does that “[our] mission is not to plunder and control, but to educate and

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14. For perhaps the most eloquent and sophisticated argument within this tradition, see the eminent philosopher and historian of international law, MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2001) (it should be noted, however, that Koskenniemi is no simple “apologist,” and his work has been both at the forefront of more critical appraisals of legal and political practice over the last couple decades and an inspirational point of reference for progressive scholarship).

15. See JOHN GRAY, *STRAW DOGS* 173 (2003).

liberate.”<sup>16</sup> Behind our clever arguments and compassionate sensibilities, in short, lies the fact that perhaps things have not changed except for the technology of our warfare—how the impulse is organized and its targets defined. If this is so, the question falls upon us, how can we address such concerns without slipping into self-induced, post-modern atrophy?

For many within the United States, often identifying themselves as progressive or liberal, inspiration may be found in a more fraternal universalism—what is in fact a federalist, and predominantly European, conception of social organization. Nation-states here are obliged to defer domestic legislative authority to ratified international agreements, the generalized interests of “civilized” nations trumping particular political interests, especially when they violate some long-standing, recognized norm of law governing state behavior. Appeals to a universal legal order, however, does nothing to settle suspicions that these appeals actually reflect the agendas of powerful political actors—legal instruments advancing particular actors the same way a papal decree served the Holy Roman Catholic Church. Institutions (such as democracy or human rights) do not end politics, they merely enact them. Powerful nation-states have typically upheld their sovereign will above the reach of any international judiciary that would claim universal or permanent jurisdiction. In practice, the majority of states share at best an uneasy allegiance, more in spirit and diplomatic rhetoric than a sincere appreciation of common interests. One might indeed question how international law may promote national self-determination projects as the authentic expression of a people, and at the same moment submit the emerging sovereignty to a rigid set of expectations and responsibilities completely foreign to it.

In a world increasingly brought together by technological innovation and invisible forces of capital, it seems inevitable that we look to a future of escalating conflict over resources. Blood is thicker than water; the contingencies of the moment triumph over idealism. The future will be marked by more, not less conflict and catastrophe. It is foolish to dream otherwise. To this extent, the tendency to blame American diplomacy or to seek inspiration from Europe or the U.N. framework of process, sanctions and rights seem misguided at best. However, policymakers might be equally cautious of looking back to our own government bureaucracies and national traditions for a more authentic or sincere answer to governance. The litany of reoccurring political scheming and scandals (i.e., Iran Contra affair, officially sanctioned torture, the lobby interests involved in the ongoing health care debate,

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16. See Edward Said, *Imperial Perspectives*, available at <http://www.zmag.org/content/showarticle.cfm?SectionID=22&ItemID=3949> (last visited Apr. 5, 2010).

and so on) have produced a visible attitude within the American mainstream that anything our government leaders say, Democrat or Republican, must be taken with a pound of salt. The good life has become a semantic battle of pundits, government officials and scholars, while Americans uncomfortably confront a future of economic hardship and greater surveillance by a government where public opinion only counts as far as it can be charted and manipulated for political profit and politicians limit their commitments to talking points and carefully staged photo ops.<sup>17</sup>

Intellectual criteria today require a certain internationalist perspective in politics, just as it requires a multidisciplinary approach in academia. In reality, however, the international community remains both physically and metaphorically set in its own backyard. We speak of the Rwandan genocide in Borders Book Store over Starbucks fair trade coffee. We plan humanitarian projects for places where we do not speak the language and have never been ourselves. We may speak for the dispossessed, but it is we speaking—heroic protagonists in a world drama. We travel on large commercial aircrafts to speak at conferences concerning environmental woes. We claim allegiance with the American working class (e.g., ‘main street’) while we wear clothes from overseas sweatshops.

In the international legal community, we have taken words like human rights and the rule of law to stand in as the answers and rationalizations for our future projects. Indeed, if the nineteenth century was the era of nations, we live today in an era of law. The drive for progress through a world ruled by law has become an unimpeachable fact in the existence of humankind’s struggle against chaos as Western scholars and practitioners carry on the colonial mentality—the white man’s academic burden to write histories not his own, to perform humanitarian experiments in strange lands, to continually act as chief architect of humanity, justifying global rulership upon hazy acknowledgments of responsibility or technocratic knowledge and skill.

It may then be time that we come to terms with the fact that progress itself is, in the words of Karl Kraus, merely a “pyrrhic victory over nature”—our best laid plans meet the “sudden surprises . . . and decay” inherent to our human frailty. A more celebratory attitude only marks the bravery of being momentarily out of range. We should not put too much faith in finding solutions in a professional attitude of enlightened self-interest any more than we can hope to nurture some sort of “gentle civilizing spirit.” As part of the cultural elite with cosmopolitan backgrounds, we may have to put aside our architectural inclinations

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17. See generally DAVID KENNEDY, *OF WAR AND LAW* (2006) (discussing the modern limitations of political responsibility and the inadequacies of “shaming” political actors).



and grand ideological differences, and begin to look at our every-day lives and how our experiences are so far removed from the realities that we speak about in our writing, in the classroom, at conferences, or even in conversation. If Gandhi is right that change in the world must start with oneself then the commitment to help Africa or Iraq, for instance, must begin with a rigorous examination of our own habits and customs rather than continually look for inspiration in refashioning the world over our borders.<sup>18</sup> We must begin to historicize our assumptions in order to denaturalize those judgments that keep us tied to pre-written scripts;<sup>19</sup> to explore the limits of our own responsibility, of our ability to take responsibility, and not venture further than where we are actually willing to remain after the cards have been played.

### III. THE END OF AMBIVALENCE?

Here, I want to turn to think about how these notions of ethical responsibility might meet the challenge and propose concrete virtues to the ongoing global economic crisis. For in the wake of the financial meltdown, where we only recently would speak of uncertainty and approach even the most virtuous projects with ambivalence, action now seems the name of the game. Everything is immanent, only bold proposals are open to consideration. In philosophical terms, we speak within the wake of what Alain Badiou called the “incalculable event,” that moment that compels some sort of tenacious militant determinism.<sup>20</sup> Or as the Austrian and Chicago economists put it more

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18. See B.S. Chimni, *Alternative Visions of Just World Order: Six Tales from India*, 46 HARV. INT'L L.J. 389-402 (2005); see also SLAVOJ ŽIZEK, IN DEFENSE OF LOST CAUSES 161 (2009) (noting that the source of Robespierre's “pacificism” does not reside in any “humanitarian sensitivity,” but rather, in the understanding that war between nations serves as “the means to obfuscate revolutionary struggle within each nation”). While Third World Approaches to International Law (TWAAIL) scholars provocatively demonstrated that international legal doctrines were often formed in the antagonisms between Europe and non-European cultures (as opposed to the historical development of ideas by leading jurists), recent scholarship within this tradition has begun to focus on the role that domestic and inter-European rivalries (e.g., cultural, religious, economic, and so on) played in shaping the discipline. For some of the most engaging TWAAIL literature, see ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2004); see also James Thuo Gathii, *International Law and Eurocentricity*, 9 EURO. J. INT'L L. 184 (1998) (book review); James Thuo Gathii, *Rights, Patents, Markets and the Global AIDS Pandemic*, 14 FLA. J. INT'L L. 261 (2002); BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE* (2003).

19. See generally HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* (1973).

20. This theme runs through Alain Badiou's work. See ALAIN BADIOU, *THEORY OF THE SUBJECT* (Bruno Bosteels trans., Continuum 2009); ALAIN BADIOU, *ST. PAUL: THE FOUNDATION*

crassly, “only a crisis, actual or perceived, produces real change.”<sup>21</sup> In my own country, even President Bush appeared to be marching to the same tune. “I’m a market oriented guy,” he said at a speech from November 2008, “but not when I’m faced with the prospect of a global meltdown.”<sup>22</sup>

Of course, what caused the financial crisis or our vision and goals of engagement are up for fierce debate. Is the crisis just one of those things that happen in cyclical fashion—an almost natural event, an economic hurricane, something that can only be engaged with at the last minute, weathered out and dealt with largely after the fact? Or was it due to those mysterious formulas and investment instruments concocted by those nerdy economists from Chicago that came to dominance in the 70s/80s?<sup>23</sup> Likewise, even if the blame ultimately resides with the simple corruption and greed of Wall Street and a coked up capitalist ideology, how do we move forward?<sup>24</sup> At the end of the day, after all our proposals and criticisms are out of the way, De Soto observes that in one form or another “capitalism [still] stands alone as the only feasible way rationally to organize a modern economy,” at least in the immediate term.<sup>25</sup>

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OF UNIVERSALISM (Ray Brassier trans., Board of Trustees of the Leland Stanford Junior University 2003) [hereinafter ST. PAUL]; ALAIN BADIOU, ETHICS: AN ESSAY ON THE UNDERSTANDING OF EVIL (Peter Hallward trans., Verso 2001) (1998). For Badiou, Paul’s conversion to Christianity on the road to Damascus is a clear example of this militancy. “Just as the Resurrection remains totally incalculable . . . nothing leads up to . . . Paul’s faith. . . The event—‘it happened,’ purely and simply, in the anonymity of a road—is the subjective sign of the event proper that is the Resurrection of Christ.” In Badiou’s thinking, the truth, coming as an act of grace, transcending particularity and subjectivity, is ultimately the only stable source of “effective declaration,” for the “possible power of thought.” See ST. PAUL, *supra*, at 17, 88-89.

21. See generally MILTON FRIEDMAN WITH THE ASSISTANCE OF ROSE D. FRIEDMAN, CAPITALISM AND FREEDOM (40th Anniversary ed. 1962).

22. The U.S. White House claims that its actions are “unprecedented,” “aggressive,” and “extraordinary.” See U.S. President George W. Bush, Financial Markets and World Economy 3 (Nov. 13, 2008) (transcript available at [www.us-global-trade.com/Article.Bush.Global%20Financial%20Summit%20\(11.13.08\).doc](http://www.us-global-trade.com/Article.Bush.Global%20Financial%20Summit%20(11.13.08).doc)).

23. See YVES DEZALAY & BRYANT GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 73-94 (2002).

24. The recent letter from the President of the United Steelworkers, Leo Gerard, to U.S. Treasury Secretary Henry Paulson criticizes the “unbridled pursuit of greed that you and your friends on Wall Street have celebrated as a national religion,” but continues on to call for a re-investment in “the American dream”—itself perhaps, in many ways, part and parcel of the very same problems that have buffered the “philosophy that worships only business, free markets, deregulation and free trade.” For a copy of the letter in the context of neocolonial “plunder,” see Ugo Mattei, *Plunder Blog! Mr. Paulson Plunders Taxpayers for the Sake of His Own Firm . . .*, Red Room blog, available at <http://www.redroom.com/blog/ugo-mattei/plunder-blog-mr-paulson-plunders-taxpayers-sake-his-own-firm>.

25. See HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN

But maybe this is wrong. Perhaps this is exactly the problem, that we have forgotten the exhilaration of thinking outside the box, to regain what it would mean to be caught up in the throes of some “new militant apparatus of truth.”<sup>26</sup> After all, nothing is absolute; everything is ultimately contingent.<sup>27</sup> Who could have predicted the rise of the Internet or the fall of the Soviet Union fifty years ago? We find causes after the effects, but even effects more often than not come to us as black swans.<sup>28</sup> There is no reason that the current capitalist order is any more inescapable—it merely reflects the lack of our will to power and imagination.

Whatever the case, the New American Century<sup>29</sup> appears to already have run out of steam. The specter of univocal global order feels increasingly remote. The war in Iraq continues to drain American will and resources; the American military woefully underprepared for urban combat warfare and long-term occupation and reconstruction efforts. The U.S. share of global imports is down to fifteen percent, its currency weakened without any foreseeable reversals, all while alternative stock exchanges and sovereign wealth funds transfer capital to new centers of national power. With the demise of American hegemony and contagious financial instability have simultaneously spread, predictions that the free-market economy itself, whatever that means, teeters on the verge of collapse.<sup>30</sup> If the neo-conservative agenda has proven itself ideologically and practically bankrupt, the hope seems to be that some more equitable order can fill the gap—whether that is expressed in some call for a more democratic balance of powers among nations, or alternatively for the nation-state as a more active stakeholder and regulatory agent in the market. In my mind, both programs are misguided if our goal is to achieve a more progressive, realizable future.

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THE WEST AND FAILS EVERYWHERE ELSE (2000).

26. This phrase comes from Alain Badiou. For an analysis of this idea, see PETER HALLWARD & SLAVOJ ZIZEK, BADIOU 108-10 (2003). Of course, as Zizek has pointed out, there seems to be an irresolvable tension that often rises between meaningful action and taking responsibility. While we may abstractly favor the right of political agents to posit themselves outside the conventional social edifice, we might be “afraid of the potential ‘totalitarian’ terrorist consequences of asserting ‘actual freedom’ as *the direct inscription of the Event into the order of Being.*” See SLAVOJ ZIZEK, ON BELIEF 124-25 (2001) (emphasis added).

27. For a philosophical polemic of this idea, see QUENTIN MEILLASSOUX, AFTER FINITUDE: AN ESSAY ON THE NECESSITY OF CONTINGENCY (2008); see also NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE (2007).

28. See TALEB, *supra* note 27.

29. The Project for the new American Century is a neoconservation project promoting American world leadership that was founded in 1997 by Robert Kagan and William Kristol. See Welcome to the Project for the New American Century, <http://www.newamericancentury.org> (last visited Mar. 22, 2010).

30. See generally GIOVANNI ARRIGHI, ADAM SMITH IN BEIJING: LINEAGES OF THE TWENTY-FIRST CENTURY (2007).

All roads no longer lead to Washington, but they do not alternatively lead to any necessarily stable sharing of influence among great powers. Not only does the fate of the global order seem to rely increasingly on those next tier of tipping point states but with the diffusion of power now among dozens of actors: media conglomerates, drug cartels, militia, global corporations, regional organizations, and so on. In the world to come, diplomacy and collective action will most likely become more, not less, tricky and precarious. Moreover, unlike the Soviet Union that posed an ideological/political alternative for decolonized states, the ascending national powers today seem all too eager to leverage their positions in the existing economic regime. Indeed, it may be that what Western capitalism could not achieve through economic, political, or cultural coercion, it may succeed through importing crisis. Chaos brings its own temptations and opportunities as nations scramble to shore up their declining sovereignty through massive government commitment to the global economic order. If anything, we may very well be moving from a North-South to an East-West axel-ity reminiscent of the late nineteenth century colonial experience—nations like Russia and China and the United States and within Western European states simultaneously competing with one another for territory and resources while disavowing any responsibility to act as a buffer for the social costs to their national populations.

What we are experiencing in the West, then, is a more immanent, internalized return of colonialism: the development and law policies carried out in Latin America in the 70s and in Central and Eastern Europe in the late 80s and early 90s now visited in full force upon North Atlantic populations. As journalist and freelance author, Naomi Klein, points out, “Under cover of an emergency. . . the [U.S.] administration’s approach to the financial crisis and its approach the Iraq war . . . [bear moving] parallels,” the state hollowed out as a cash source for corporations that in turn do not deliver the goods and end up ratcheting the burden upon an increasingly paralyzed citizenry.<sup>31</sup> For Klein, it is not the banks and corporations being nationalized, but the nation-state being privatized one emergency, or shock, at a time.<sup>32</sup>

In this light, the call for stricter legal regulation to fix the inherited chaos of economic over-speculation and political corruption appears doomed to failure. Capitalism is, after all, made of nothing but law—it is juridical, the very stuff of commercial markets.<sup>33</sup> “Far from a space of

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31. See Naomi Klein, *The New Trough*, ROLLING STONE MAG. ONLINE, Nov. 13, 2008, available at [http://www.rollingstone.com/politics/story/24012700/the\\_new\\_trough](http://www.rollingstone.com/politics/story/24012700/the_new_trough), (last visited Dec. 20, 2009).

32. *Id.*

33. This is a reoccurring theme within Newstream literature and related traditions. See generally KENNEDY, *supra* note 17; see also MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA:

‘utter lawlessness,’” the free market crisis we have inherited is “a space filled to the brim with expertise, procedure, scrutiny and analysis.”<sup>34</sup> Likewise, we should not imagine that any mere nationalization scheme is somehow anathema to capitalism; the social state is as old as industrial capitalism. Here, to treat any set of regulatory law in and of itself as some sort of redemptive force if only properly responsible and enforced obscures not only the fact that these very norms may have contributed to creating and sustaining the problems, but also empty the situation of its “scandalous political content.”<sup>35</sup> Heated discussions how the agendas of particular subcultures and agents prime and manipulate the system become whitewashed into civilized conversations about the structure and limits of fair and efficient administration—what turns into “politics without politics.”

The reliance upon ever more dramatic techniques by the corporatist crusade to remake the world in the image of homo economicus does not necessarily mean it has won the day—we could as easily be witnessing a system unraveling by its own schemes. Or alternatively, perhaps this is just capitalism going through growing pains, reinventing and disciplining itself as new actors force their way into the game.<sup>36</sup> Perhaps we just too easily forget the emotions of crisis, and imagine each time around some apocalyptic scenario, some hope that we have suffered toward something monumental, of long-lasting significance—as President Barack Obama’s worldwide appeal demonstrates, populations want to believe in change.

But if everything is contingent, there is always room for strategy and reversals of fortune. In my mind, however, this can only happen if we move from a strictly critical to a more programmatic attitude that looks

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THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005); CHINA MIEVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* (2006); THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 13.

34. I have drawn this idea and the general language from Fleur Johns’ article. Fleur Johns, *Guantanamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT’L L. 613, 618 (2005) (Italy).

35. I have drawn this general idea and language from Susan Marks, *State-Centrism, International Law, and the Anxieties of Influence*, 19 LEIDEN J. INT’L L. (2006) (Neth.). See also BILL BOWRING, *THE DEGRADATION OF THE INTERNATIONAL LEGAL ORDER: THE REHABILITATION OF LAW AND THE POSSIBILITY OF POLITICS* 126 (2008).

36.

Constant revolutionizing of production, uninterrupted disturbance of all social conditions, everlasting uncertainty and agitation distinguish the bourgeois epoch from all earlier ones. All fixed, fast frozen relations, with their train of ancient and venerable prejudices and opinions, are swept away, all new-formed ones become antiquated before they can ossify. All that is solid melts into air.

See KARI MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* 223 (2002).

beyond law or the nation-state or any romantic notions of an international collective responsibility. While we may find fatherly comfort in law and regulation, it ultimately “entail[s] inevitable ideological and distributional choices . . . [that can] only be resolved by resort to values and policies which are external to the law.”<sup>37</sup> We must come to accept that law does not provide “closure to ideological disputes and political conflicts” but merely enacts and naturalizes them.<sup>38</sup> Law always leads us elsewhere, to somewhere outside its own reference points and logic. Moreover, the debate over the extent of state “intrusion” into the market is misguided, a myth of liberalism. “Private economic power operates necessarily through and with the exercise of public power.”<sup>39</sup> What might be more interesting to ask ourselves, is what exactly do we want the state doing. If we are truly experiencing development strategies now being played out upon Western populations, for instance, perhaps we should look to previous moments of resistance and alternative visions of order and growth toward political economy. Likewise, while there has been no shortage of rejections of global inequality, there has been little hard institutional thinking putting forward meaningful alternative projects. How could we escape industrial-led growth and everything that seems to come with it, even if we wanted to?

#### IV. CONCLUSION: TAKING RISKS ETHICALLY

Too often our passion for justice in the past has taken on an international character, resigned to some abstract universalism.<sup>40</sup> We condemn coercion on the global sphere while tolerating it within our national boundaries, always choosing battles that we have the privilege to disengage from at any time if the stakes get too high. The crisis, however, has brought home the uncomfortable fact that colonialism and violence occur in a more broad and intimate field of inquiry than we often assume—within the landscape of London and Los Angeles as much as Namibia and Sierra Leone. In this light, as George Kennan said many years ago, perhaps “the first thing we [Americans] need to learn to contain is, in some ways, ourselves. . . . [and] that a large proportion

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37. See KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM 133 (2002); see also DUNCAN KENNEDY, THE STAKES OF LAW, OR HALE AND FOUCAULT!, 15 LEGAL STUD. FORUM 327 (1991).

38. RITTICH, *supra* note 37, at 135.

39. *Id.*

40. See generally KENNEDY, *supra* note 17.

of the sources of our troubles and dangers lie . . . within ourselves.”<sup>41</sup> Revolutions big and small happen with people like Luther and Lenin, not Derrida and Foucault.<sup>42</sup> In short, we must take risks and put our own houses in order. If this means that we check our wishes, that we cannot escape the limits and boredom of our everyday world, then perhaps that is the price. But if so, it might also allow for a full wager, some politics of truth, which could function as the very opening to the concrete realization of the impossible.

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41. See George Kennan, *Containment: 40 Years Later: Containment Then and Now*, 65 FOREIGN AFF. 885, 889-90 (1987).

42. The general language is derived from a conference presentation by Akbar Rasulov, *Bringing Class Back into International Law: A Response to Prof. Chimni*, presented at Critical Legal Studies Conference, Univ. of Glasgow (Sept. 6, 2008).