Book Reviews

Empire's Law

Michael Hardt & Antonio Negri, *Empire*. Cambridge, Mass.: Harvard University Press, 2000. Pp. xvii, 478. $36.95 (cloth), $18.95 (paper).

David Singh Grewal

Most serious studies of "globalization" quickly derail into simple analyses of the immediately identifiable global institutions and actors, with little inquiry into the deeper interrelationships animating them. We associate globalization with increased trade,[1] or broader cross-cultural contact,[2] or perhaps with "Americanization,"[3] but none

1. Both critics and proponents of "globalization" understand trade—economic "openness"—as key to globalization. *See, e.g.*, PHILIPPE AGHION & JEFFREY G. WILLIAMSON, GROWTH, INEQUALITY, AND GLOBALIZATION: THEORY, HISTORY, AND POLICY (1998); KEVIN H. O'ROURKE & JEFFREY G. WILLIAMSON, GLOBALIZATION AND HISTORY: THE EVOLUTION OF A NINETEENTH-CENTURY ATLANTIC ECONOMY (1999). For a critical view, see DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? (1997).

2. Consider the flurry of recent work in political and cultural theory assessing new demands for cultural recognition, in multicultural societies and in global discourse more

of these fits precisely. What we lack is an analysis of globalization that inquires into the deeper currents transforming the contemporary world.

In a provocative answer to that lack, Michael Hardt and Antonio Negri's *Empire* constructs a sweeping, theoretically rich account of the nature of globalization. Hardt and Negri argue that we live in a new global hegemony, which they call "Empire," a system of governing principles without bounds, neoliberalism ascendant.[4] In calling the emerging global order "Empire," they seek to evoke the world of ancient Rome rather than the European imperialist projects of recent centuries.[5] Unlike those nation-based empires, our current world order more closely resembles the ancient empires, understood as moral and legal frameworks operative over an expansive, fluctuating territory. Similarly, Empire has no demarcated territory: it is characterized by a denial of limits, territorial or otherwise, to its expansion.

Hardt and Negri explore this "Empire" in its many forms: its emerging international legal order with its challenge to conventional national sovereignty;[6] its economy, based on new forms of networked, global production; its politics with new sources of legitimacy and power. In so doing, they outline an unconventional intellectual history of modernity, from the Renaissance to the late twentieth century. They also explore in detail the new "subjectivities"—the forms of identity and self-understanding—that emerge in Empire, situating their argument within ongoing postmodern and post-Marxist discourses. Analysis on such a grand scale necessarily borrows much from others, particularly contemporary European social theorists.[7]

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broadly. *See, e.g.*, ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION (1995); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995); JOHN RAWLS, THE LAW OF PEOPLES (1999); CHARLES TAYLOR, MULTICULTURALISM AND THE POLITICS OF RECOGNITION: AN ESSAY (Amy Gutman ed., 1992). Such important work in political and cultural theory rarely makes its way into more popular treatises on "globalization."

3. *See* ANTHONY GIDDENS, RUNAWAY WORLD: HOW GLOBALIZATION IS RESHAPING OUR LIVES 33 (2000).

4. Alain Touraine has argued that the movement against "globalization" should really be a contest over global neoliberalism. *See* ALAIN TOURAINE, BEYOND NEOLIBERALISM (2001). *See also* JOHN GRAY, FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM (1998).

5. On the history of different forms of empire and imperial expansion, see, for example, MICHAEL W. DOYLE, EMPIRES (1986); ANTHONY PAGDEN, PEOPLES AND EMPIRES (2001).

6. Hardt and Negri's analysis of the decline of national sovereignty borrows from the work of sociologist Saskia Sassen, among others. *See* SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION (1996).

7. They are indebted particularly to Michel Foucault, from whom they borrow such ideas as biopower, and to Deleuze and Guattari, whose theoretical approach Hardt and Negri adopt in considering globalization. *See* GILLES DELEUZE & FELIX GUATTARI, A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA (1987); 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (1988), Hardt and Negri's theory of sovereignty is borrowed from GIORGIO

The resulting argument is complex and nuanced, but sometimes difficult to follow and maddeningly impenetrable.

The book has its problems, and the central arguments can be lost in poorly considered prose and a style at once highly abstract and bombastic. In one passage, we are encouraged to recognize ourselves as the "simians and cyborgs we are,"[8] and elsewhere, we are told of the "joy of being a communist."[9] Frequently, the reader is subjected to awkward, jargonistic prose that no high theoretic commitments can justify. The shame is that the argument hidden by such language merits consideration.

LOGICS OF EMPIRE

Hardt and Negri argue that Empire constitutes a form of governance without government. Where Empire expands, it replicates a series of social orderings without relying on a territorial core. Empire consists of various "logics"—for example, the logic of capital, the logic of police intervention, and the logic of networked or post-industrial production.[10] These logics can be established anywhere, thus breaking down the old distinction between core and periphery in favor of a resolutely global terrain; they do not depend on any existing political or juridical formation, such as United States military power or the World Trade Organization, even as they motivate the creation of these institutions and articulate their purposes.

Framing the argument in terms of globalizing logics puts national sovereignty in the background, but Hardt and Negri do not see states as actors playing a game whose rules they cannot control.[11] Rather, they resuscitate Polybius's vision of the tripartite constitution of the Roman Empire and update it to the present day, suggesting a "pyramid of global constitution."[12] In their version, the monarchical power consists of the United States monopoly on military force and the G-7

AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (1998), a complex and interesting book adapting Carl Schmitt's idea of sovereignty and Arendt's and Foucault's visions of political life to describe the current world political order. *See* CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (1985).

8. MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 92 (2000).

9. *Id.* at 413.

10. Hardt and Negri claim that the world is being integrated "by conforming to the structural logics that are active in the construction of Empire, such as the police and military logics (or really the repression of potential subversive forces in the context of imperial peace), the economic logics (the imposition of the market, which in turn is ruled by the monetary regime), and the ideological and communicative logics." *Id.* at 341.

11. *See, e.g.*, GIDDENS, *supra* note 3, and SASSEN, *supra* note 6.

12. The argument is not that this constitution consists of "ordering elements" but "matrixes that delimit relatively coherent horizons in the disorder of global juridical and political life." The pyramid is, in other words, a metaphor and analytic tool more than a description of a clear-cut order. *See* HARDT & NEGRI, *supra* note 8, at 309.

monopoly over the terms of global monetary policy and exchange. The aristocratic function, made up of nation-states and multinational corporations, distributes monarchical control broadly across the world. The people are represented in the pyramid through representative organizations—NGOs, the media, certain global forums—which constitute the "popular" function.[13] In this more complex rendering, Hardt and Negri reject both the state-centered view of traditional analysis and the pervading critical view, which often imagines globalization as a straightforward expansion of corporate power overtaking the state.[14] However, perhaps more attracted by the aesthetics of this concept than its analytics, they do never clearly delineate the nature of the interlinkages between these functions of the pyramidal constitution of Empire.

Empire's Juridical Structure

The description of the new global order as "Empire" implies a post-national conception of sovereignty, which Hardt and Negri see developing out of the demand for international interventions and the necessity of supranational juridical scaffolding that is capable of supporting such interventions. As they explain, "All conflicts, all crises, and all dissensions effectively push forward the process of integration and by the same measure call for more central authority."[15] Thus, the military interventions in Kosovo, the IMF bailout of Indonesia and Thailand during the 'East Asian Crisis,' and recent humanitarian missions in Africa are all justified on a new, explicitly supranational morality, supported by discourses that both draw on and reinforce our sense of global community and international interdependence. As they put it, "moral intervention has become a frontline force of imperial intervention."[16]

Consider an exemplary current example, the global anti-terror campaign of the United States, "Operation Enduring Freedom," a transnational mission against a diffuse and shifting enemy in which all states must decide, as President Bush has put it, whether they are with America or "with the terrorists."[17] This multifaceted operation

13. Hardt and Negri treat all NGOs as complicit in the imperial order. In doing so, however, they neglect the enormous proliferation of grassroots NGOs (particularly in the developing world), without links to transnational media, foundations, or international organizations. Their blanket dismissal seems particularly unfounded, given the deeply reformist aims they suggest for "counter-imperial" action. *See infra* text accompanying notes 31-33.

14. See, for example, DAVID KORTEN, WHEN CORPORATIONS RULE THE WORLD (1995), for this latter view.

15. HARDT & NEGRI, *supra* note 8, at 14.

16. *Id.* at 36.

17. In his September 20, 2001 address following the events of September 11, President Bush stated, "Every nation in every region now has a decision to make. Either you are with us

pushes forward international integration, not only in the military cooperation it demands, but also in the articulation of national policies and rhetoric and the drive to incorporate the entire world into a single discourse about the idea of terrorism that presupposes the right of intervention across the global stage.

Thus, Empire is legitimated on a new idea of right without limits. Such a right to intervene—in economic, strategic, humanitarian crises—necessarily undermines national sovereignty and the power of nation-states as the building blocks of the international order. In their place, Hardt and Negri point to an emerging transnational consensus imbued with a sovereign legitimacy.[18] This consensus emerges from a series of global discourses—for example, on science, security, human rights, and development—that motivate the framework for a new global order. Hence, "Empire is not born of its own will but rather is *called* into being and constituted on the basis of its capacity to resolve conflicts."[19] Every pressure group, every demand, every call on the highest powers—the monarchical powers, in Hardt and Negri's framework—pushes forward a new moral, imperial order overtaking the traditional sovereignty of states.

Empire's American Roots

In tracing the beginnings of Empire, Hardt and Negri turn to the United States: the "contemporary idea of Empire is born through the global expansion of the internal U.S. constitutional project."[20] They examine several aspects of the U.S. Constitution, particularly the "tendency toward an open, expansive project operating on an unbounded terrain."[21]

The notion of unboundedness appears throughout their analysis of Empire, and they trace it back to the American experience. What precisely is "unbounded" about this experience, however, is left unclear. Do they mean geographic unboundedness, in the sense of an ever-shifting western frontier, or the idea of a political project that does not recognize the distinction between inside and outside, based on principles of universal scope?[22] The latter explanation conforms

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or you are with the terrorists." Elisabeth Bumiller, *Bush Pledges Attack on Afghanistan Unless it Surrenders Bin Laden Now,* N.Y. TIMES, Sept. 21, 2001, at 1.

18. By sovereign here, Hardt and Negri borrow from Carl Schmitt the idea that sovereignty is the right to "decide the exception," to intervene in the crisis for which 'normal' law has no answer. *See* SCHMITT, *supra* note 7. *See also* AGAMBEN, *supra* note 7.

19. HARDT & NEGRI, *supra* note 8, at 15.

20. *Id.* at 182. By "constitution" here they do not mean the literal constitutional text but the broader idea of the constitution as understood in political theory, the established political and social compact, the way in which the British have a constitution.

21. *Id.* at 161.

22. And if the latter, they do not further distinguish the incorporation of new units through

better to their analysis of Empire, but does not necessarily fit lengthy periods of American history nor does it comport with their emphasis on terrain.

Hardt and Negri argue that Empire emerges from this American experience with the organization of an open-ended space according to central principles, which then are projected globally through the liberal internationalism of Woodrow Wilson.[23] Wilsonian internationalism corresponds "to the original logic of the U.S. Constitution and its idea of expansive Empire."[24] In this, our "American Century," we should not be surprised to see our constitutional model articulated globally in the new world order.

Yet, however much Empire may be indebted to the American constitutional experience, Hardt and Negri maintain that we do not live in an American empire. They resist seeing America as "the new Rome," as many anti-globalization activists understand it, even while they understand that it is "privileged" in Empire's development. This denial of American hegemony seems driven by Hardt and Negri's refusal of the idea of a "center" in what they argue is a center-less global phenomenon; as a result, they fail to grapple with the American bias in global neoliberalism. We may recognize that "Empire" is not politically centered around America while still demanding an analysis of American influence over transnational media and capital flows—a subject on which the authors have surprisingly little to say.

Empire and Capital

Hardt and Negri identify the same unbounded ambition in the logic of capitalist expansion. Hardt and Negri outline in detail how the logic of capital drives it towards global articulation, borrowing from Marx's analysis of the global reach of capitalism. Capital knows no limits and thrives by turning the outside into the inside, finding new markets, new technologies, and new sources of labor. In that process, it ultimately runs up against the limits established by national boundaries: "Historically, capital has relied on sovereignty and the support of its structures of right and force, but those same structures continually contradict in principle and obstruct in practice the operation of capital, finally obstructing its development."[25] Hardt and

a modular expansion and operation over a literally unbounded, hence infinite, expanse. Both are forms of openness and unboundedness, but one is the continual incorporation of the new rather than the lack of limits.

23. In recent historical studies, too, Wilson appears the man of the new global order. *See, e.g.*, TONY SMITH, AMERICA'S MISSION: THE UNITED STATES AND THE WORLDWIDE STRUGGLE FOR DEMOCRACY IN THE TWENTIETH CENTURY (1994).

24. HARDT & NEGRI, *supra* note 8, at 175.

25. *Id.* at 327.

Negri argue that we are in the passage from capital dependent on sovereignty to capital globalized beyond the reach of national sovereignty.[26]

Resistance to Empire

Empire draws a bleak portrait of the current global order as radically opposed to human values and collective priorities. But Hardt and Negri seek not only to describe Empire but also to uncover the liberatory possibilities of globalization. They argue that while we are driven to "globalization," we are not driven to this particular form of it. Rather, we inhabit one of many possible globalisms—an insight often missed in the discussion on "globalization." Their target is not globalization but this form of it: "[The] enemy . . . is a specific regime of global relations that we call Empire."[27] A general stance against globalization "obscures and even negates the real alternatives and the potentials for liberation that exist *within* Empire."[28]

However, it remains unclear what room they leave for anti-imperial action, or even for independent human agency, since Empire proceeds according to decentered logics independently of any unique set of global actors. They argue that Empire generates its own resistance: imperial advance emiserates and reconstitutes people in new forms of subjectivity, and the restlessness of this "multitude" is itself a form of resistance. Hardt and Negri celebrate the circulation of people and ideas around the globe, praising hybridity, nomadism, desertion, and miscegenation.[29] This circulation constitutes the new global sociality on which Empire tenuously rests, seeking to cultivate for its own ends and yet always needing to check its expansion beyond the bounds of the imperial hierarchy.

Unfortunately, Hardt and Negri never explain how this restlessness translates into effective counter-imperial action. We may affirm the new forms of sociality, production, and subjectivity accompanying the transition to Empire, and even see them in significant tension with the dominant order; but nevertheless, we may also think that a meaningful challenge to Empire will require more than restless creativity alone.

Towards Counter-Empire

Hardt and Negri offer few concrete proposals for what they call

26. Of course, any observer of the recent international financial crises understands the independence of global capital from national controls. *See. e.g.*, GIDDENS, *supra* note 3.

27. HARDT & NEGRI, *supra* note 8, at 45-46.

28. *Id.* at 46.

29. *Id.* at 361-364.

"Counter-Empire," declaring that imagining alternatives to Empire can fall into an entrapping metaphysics, denying the power of people to craft their own future: "Only the multitude through its practical experimentation will offer the models and determine when and how the possible becomes real."[30] Yet, they do suggest the broad outlines on which initial struggles may take place, identifying three aims of the struggle against Empire: global citizenship, a global basic income, and the right of reappropriation of the new sources of productivity—the electronic networks and knowledge industries. The right to global citizenship allows the multitude to control its own movement, enfranchising people in an age of massive, transnational migrations. The right to a guaranteed basic income generalizes the idea of a "living wage" beyond wage labor to include all productivity, all forms of work, whether formally remunerative or not.[31] Finally, Hardt and Negri consider the right of reappropriation to mean free access and public control of the new communicative media—the information and knowledge industries.

What are we to make of this picture of Counter-Empire? The concrete proposals appear to be a global projection and strengthening of existing social democratic restraints on capitalism already operative in many advanced industrial countries. This is not a criticism but a puzzle. If the first steps toward Counter-Empire are an expansion of citizenship, a guaranteed income, and the public appropriation of the knowledge industries (public goods perhaps worthy of public ownership in any event), is Counter-Empire anything other than a deepened social democracy operative on a global stage? And if so, why do Hardt and Negri insist on their revolutionary and emancipatory Marxist rhetoric?[32] Would not an approach that directs piecemeal social change towards radical ends—"revolutionary reform"[33]—better comport both with Hardt and Negri's call for global social democracy and their respect for the indeterminacy of counter-imperial action?

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30. *Id.* at 411.

31. For more on the basic income, see ARGUING FOR A BASIC INCOME: ETHICAL FOUNDATIONS FOR A RADICAL REFORM (Philippe van Parijs ed., 1992); ANDRE GORZ, A CRITIQUE OF ECONOMIC REASON (1989); MARKET SOCIALISM: THE CURRENT DEBATE (Pranab Bardhan & John E. Roemer eds., 1993); PHILIPPE VAN PARIJS, REAL FREEDOM FOR ALL: WHAT (IF ANYTHING) CAN JUSTIFY CAPITALISM? (1995).

32. That is, given that there would be an overlapping consensus among liberals, radicals and communists about their proposed move towards a more just form of globalization, why do they employ a language that is bound to inhibit such a consensus?

33. For one approach to "revolutionary reform," see Roberto Mangabeira Unger's three-volume work *Politics*, which presents a radical political theory that seeks to moderate the distinction between context-preserving conflict and revolutionary conflict in the idea of revolutionary reform. For these themes, see in particular ROBERTO MANGABEIRA UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK 163-64 (1987).

Clearly, Hardt and Negri are weaker when it comes to proscription. That said, *Empire* offers a provocative and theoretically sophisticated description of globalization, a needed corrective to the anodyne versions flooding the mainstream media. No wonder the diverse cast of anti-globalization protestors have trouble locating a coherent core to oppose when the struggle is rather to conceptualize alternatives to Empire, especially when such alternatives must be open in their scope and more, not less, attractive on that same global scale.

The Canon Has a History

Legal Canons, J. M. Balkin & Sanford Levinson, eds. New York: New York University Press, 2000. Pp. xi, 443. $50.00.

Richard Primus*

Legal Canons, edited by J. M. Balkin and Sanford Levinson, is a collection of fourteen essays on subjects related to canonicity in law and legal education.[1] Balkin and Levinson have two principal aims. One is to expand the category of things that can be canonical: not just texts, they say, but also arguments, problems, narrative frameworks, and examples invoked in conversation or teaching. In their view, what makes something canonical is its ability to reproduce itself in the minds of successive generations.[2] If generation after generation of legal academics argues about the countermajoritarian difficulty, then the countermajoritarian difficulty is a canonical problem, and the argumentative moves that are made from generation to generation—assuming they are common from one to the next—are canonical arguments. Balkin and Levinson's second aim is to argue for a more practical kind of expansion, specifically the expansion of the canon that defines what is taught to introductory students of constitutional law. According to the editors, the present pedagogic canon[3] is too focused on a few clauses of the Constitution and on

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1. LEGAL CANONS (J.M. Balkin & Sanford Levinson eds., 2000).

2. There are points of contact between this view of canonicity and Balkin's other work on "memes," *i.e.*, units of cultural knowledge or practice that are transmitted from one generation to the next. *See* J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 42-90 (1998).

3. I use the term "pedagogic canon" to refer to the canon that structures what students must be taught in constitutional law courses. As Balkin and Levinson point out, this is only one of several types of legal canons. There is a "legal authority" canon composed of those texts and doctrines that bind courts and with which practicing lawyers must therefore be conversant, but there is also a "cultural literacy" canon composed of things that anyone who wishes to participate in serious discussions about the relevant field must know, as well as an "academic theory" canon that defines the world in which law professors conduct contemporary scholarship LEGAL CANONS, *supra* note 1, at 5. These canons overlap: a case like *United States v. Lopez*, 514 U.S. 549 (1995), probably belongs in all three. But the canons also diverge. No lawyer

opinions of the United States Supreme Court. They urge more attention to the development of American constitutionalism outside the courtroom. Balkin and Levinson's view of constitutional development is historically oriented and radically democratic: they wish the canon to include materials that will show how all Americans, not just judges or even officeholders, have affected the meaning of the Constitution.

Two of the book's essays are jointly written by Balkin and Levinson themselves, and the remaining twelve essays are by other scholars. The success of the twelve other essays is uneven. A handful, however, do throw light upon what is most provocative in Balkin and Levinson's ideas. For example, Carol Rose's essay on the canons of "property talk" provides excellent illustrations of how patterns of argument can be canonical, shaping a field of law just as pervasively as any court decision or other written text.[4] Daniel Farber contributes a thoughtful piece arguing that professors who believe law and economics to be unhelpful nonsense must nonetheless acquaint their students with the field, because law and economics structures the thinking of many legal professionals and learning what other legal professionals take seriously is essential to becoming an educated lawyer.[5] (Education is in part the study and critique of canonical nonsense.) Katherine Franke's essay "Homosexuals, Torts, and Dangerous Things" provides an interesting sketch of how the recent emergence of gay and lesbian law as a distinct field with its own canonical structure in some ways recapitulated and in some ways diverged from the pattern by which older legal fields like torts came to assume familiar and eventually canonical shapes.[6] And Randall Kennedy offers a crisp, affirmative program for the integration of race relations topics into the pedagogic canon, engaging and critiquing the way in which Balkin and Levinson propose to incorporate certain kinds of historical materials.[7]

One important way to understand Balkin and Levinson's project is to read their book as a companion to the constitutional law casebook that they edit.[8] Certainly Balkin and Levinson conceive of the two

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would cite *Lochner v. New York*, 198 U.S. 45 (1905) in a brief, but nobody who does not know *Lochner* is an educated constitutional lawyer.

4. Carol M. Rose, *Canons of Property Talk, or Blackstone's Anxiety*, *in* LEGAL CANONS, *supra* note 1, at 66.

5. Daniel A. Farber, *Of Coase and the Canon: Reflections on Law and Economics*, *in* LEGAL CANONS, *supra* note 1, at 184.

6. Katherine M. Franke, *Homosexuals, Torts, and Dangerous Things*, *in* LEGAL CANONS, *supra* note 1, at 303.

7. Randall Kennedy, *Race Relations Law in the Canon of Legal Academia*, *in* LEGAL CANONS, *supra* note 1, at 211.

8. PROCESSES OF CONSTITUTIONAL DECISIONMAKING (Paul Brest, Sanford Levinson,

books as part of the same project. Casebooks are canon-creators, and the preface to this casebook is a six-page methodological essay—unique among casebooks[9]—laying out the editors' views about their attempt to construct a canon for constitutional law. Quite self-consciously, they want to emphasize different parts of the Constitution and different parts of American history from those that have generally been taught in constitutional law classes. The historical orientation of the casebook is a central feature, and much of the book is organized by historical period rather than doctrinal topic. Moreover, the history they propose to examine is not all sweetness and light. As they make clear in *Legal Canons*, Balkin and Levinson believe more attention should be paid to the role of slavery in shaping American constitutional development, and their casebook follows through with sections on the constitutional treatment of the interstate slave trade, the problem of fugitive slaves, the role of slavery in the secession crisis, and the role of slavery in nineteenth-century attitudes toward judicial supremacy. In the same vein, Balkin and Levinson's central example of a historical text that is not generally taught but should be is Frederick Douglass's 1860 Glasgow speech on the Constitution as an anti-slavery document.[10]

The commitment to teaching constitutional law as a historically-embedded phenomenon is welcome, as is the desire to expand the history to which law students are exposed. At the same time, the ways in which Balkin and Levinson (and their casebook co-editors, Paul Brest and Akhil Amar) choose to reconstruct the pedagogic canon raise questions about what kind of fidelity the pedagogic enterprise owes to the history of its subject and indeed to the history of constitutional pedagogy itself. Constitutional meaning has been shaped in part by the kinds of non-judicial material that Balkin and Levinson wish to add to the canon, but it has also been shaped by the way that constitutional law has been taught to American lawyers from decade to decade. Part of the reason why Balkin and Levinson want to reform the canon is that they want the next generation to use different intellectual tools when constructing constitutional meaning. By the same token, the intellectual tools available to previous generations have helped determine what the Constitution has meant in the past. Accordingly, a historically oriented curriculum must ad-

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J.M Balkin, & Akhil Reed Amar, eds., 4th ed. 2000) [hereinafter Brest, Levinson].

9. I have sampled the most recent editions of the nine other constitutional law casebooks on my office shelf and found that they have nineteen pages of preface combined. None of the prefaces is even a third as long as that in the most recent edition of Brest, Levinson.

10. Frederick Douglas, The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery? (1860), *reprinted in* Brest, Levinson, *supra* note 8, at 207; Balkin & Levinson, *Constitutional Canons and Constitutional Thought*, *in* LEGAL CANONS, *supra* note 1, at 400-02.

dress not only important historical subjects like slavery but also the history of the canon itself.

Consider again the example of Douglass's Glasgow speech. In their casebook, Balkin, Levinson, and company reproduce the speech as a counterpart to the Supreme Court's decision in *Dred Scott*,[11] one document interpreting the Constitution as supporting slavery and the other interpreting the Constitution as hostile to slavery. Teaching Douglass's speech alongside *Dred Scott* is a terrific idea in the service of several pedagogic aims, such as asking students (a) how one chooses among conflicting interpretations of the Constitution, and perhaps (b) when, if ever, one should intentionally misread the Constitution. But historically minded teachers must be cautious about how Douglass is presented. Between 1876 and 1995, Douglass's speech was not widely known among lawyers or law teachers. That piece of history implies that the speech had relatively little impact on how people thought about the Constitution during those years. Offering a canon that presents Chief Justice Taney and Douglass as a yoked pair of opposing constitutional interpreters may suggest, somewhat misleadingly, that both interpretive traditions have been present in American law down through the ages. Precisely because Balkin and Levinson are correct that Douglass's speech has not been widely taught, the teacher who now offers Douglass as an alternative to Taney must take care to convey that this material was not taught to prior generations of law students. Otherwise, students who try to understand the struggles over race and the Constitution in 1896 or 1964 may misapprehend the conceptual landscape that presented itself to the people who shaped constitutional meanings at those times. The history of the canon is itself a key part of constitutional development, and historically oriented scholars must integrate that history into whatever new pedagogic canon they promote.

11. *Scott v. Sanford*, 60 U.S. 393 (1856).

Chinese Justice: The Fiction, the Facts, the Favoritism

Jeffrey C. Kinkley, *Chinese Justice, The Fiction: Law and Literature in Modern China.* Stanford: Stanford University Press, 2000. Pp. xi, 497. $70.50.

Rebecca Weiner

Jeffrey Kinkley's *Chinese Justice, The Fiction* is an ambitious book. He seeks to summarize China's rich history of largely untranslated detective fiction, while describing China's evolving legal system and drawing parallels between them. Further, Kinkley claims "theoretical aspirations":

> Through crime fiction, I hope to illuminate China's new legal culture (the thought and habits affecting legal behavior) and the predicament of all modern Chinese literature. Relevant to the latter are its historical and social contexts, modes of genre formation, and social levels; buffeting by party, state and patriotic norms; and relations to other institutions and ideas.[1]

It's a tall order.

Kinkley delivers on several fronts, not least by sharing his encyclopedic knowledge of the genre. Though not described in linear fashion, a story emerges with all the plot twists of a good detective novel. China was one of the birthplaces of crime writing, through casebooks and annotated law codes of the Yuan (1271-1368) and Ming (1368-1644) Dynasties, and through poems, operas (and later, novels) lionizing the exploits of investigator-judges like Lord Bao. Collectively (though, as Kinkley says, somewhat inaccurately), these

1. JEFFREY KINKLEY, CHINESE JUSTICE, THE FICTION: LAW AND LITERATURE IN MODERN CHINA 4 (2000).

early writings are often referred to as *gongan,* "court case" literature.[2]

The late nineteenth century saw rich cross-fertilization, as Conan Doyle was translated into Chinese, and French crime writers like Emile Gaboriau may have read translated *gongan.* This encounter created the "Golden Age" of Chinese detective fiction (roughly 1900-1949). At least two top Golden Age writers—Cheng Xiaoqing and Sun Liaohong—deliberately recreated Western detective icons. Cheng's Huo Sang was "China's Sherlock Holmes,"[3] while Sun's burglar-detective Lu Ping honored the French anti-Holmes Arsène Lupin.

After the 1949 revolution bringing the Chinese Communist Party (CCP) to power, detective fiction was banned in favor of militaristic tales about "class enemies," because in New China, both "popular genres and the very subject of crime were taboo."[4] Only when political and economic reforms began in 1979 did crime fiction return—from republication of old *gongan* and of translated foreign stories, to new detective works by Chinese authors, many of them offshoots of post-Cultural Revolution "scar literature." Kinkley discusses "scar literature" whose hero-investigators have often been unfairly imprisoned—and in which the bad guys are usually linked to the Gang of Four.

With China's 1983 campaign against "spiritual pollution," hard-boiled "political" crime writing was banned. Other forms proliferated—from "literary crime" to "science-fiction mysteries" (would you believe a cloned agent's brain being frozen with a "miracle knife" to extract secret formulae?). In an Orwellian twist, China's Public Security Bureaus (PSBs) also joined the fray, commissioning and publishing what increasingly was called "legal system literature,"[5] featuring PSB heroes. After 1989, such "police literature" came for a time to be the only authorized crime literature in China. There Kinkley ends his historical survey: "Since Communism originally banished both law and literature as we know them, it is ironic that it later wedded them in an official genre."[6]

Along the way he explores the interplay of legal literature and law. He plays with inter-textual commentaries by Chinese literati on both literature and law. He muses on how casebooks (which took the place of law codes in much of ancient China) were read as litera-

2. *Id.* at 28.
3. *Id.* at 170.
4. *Id.* at 244.
5. *Id.* at 296.
6. *Id.* at 315.

ture—while modern "legal system literature" helped educate judges, cops, and lawyers—literature thus shaping law. Reviewing political interference in both literature and law, Kinkley concludes that both represent "incontestable and non-adversarial moral truth that serves the sovereign—today, the CCP."[7]

With all that, this book makes worthwhile reading, even if the style is at times overwrought. Kinkley's avoidance of linear chronology, for instance, was perhaps intended to deconstruct hegemonic narrative norms, but his taxonomy is confusing. His division of the book into chapters on Origins, Traditions, Shadows, and so on requires frequent circling back through historical periods and topics: at least four subsections deal with "high" versus "low" fiction, three are titled "Law in Literature," two "Law as Literature," and one "Law into Literature."

Kinkley clearly favors narratives that are Western, logical, and law-based, featuring individual heroes as opposed to Eastern, emotional tales that are morality-based, and feature idealized teams. Even "the Westernized delights of Cheng Xiaoqing's [imitation Sherlock Holmes] stories do not preclude Chinese touches, including outright didacticism,"[8] Kinkley opines. He quotes Edward Said, but nevertheless indulges in *orientalisme*: Western is "we," Chinese always "they"—the Other. Kinkley denigrates as "traditionally Chinese" the tendency to copy narratives, "insouciantly changing details or not as the spirit moved them, in the absence of the concept of plagiarism,"[9] as if Western writers from Shakespeare down have not retold old tales.

Kinkley also comments often and at length, on "melodramatic" Chinese plots. But he never deals with the issue outright, exploring the roots of Chinese love of melodrama (historic lack of a middle class to popularize "refined" tastes comes to mind, as does Confucian reverence for moral lessons). Instead, he simply denigrates story after story. An accused counter-revolutionary getting saved by the fall of the Gang of Four "seems a cheap political coup de theatre."[10] Corruption by children of senior officials is "hackneyed" and "formulaic."[11] A heroic cop's tale is "primitive and propagandistic."[12] The publication of Wang Yaping's *Sacred Duty* in 1980, just at the start of the reform era, imposed significant risks to both author and pub-

7. *Id.* at 103.
8. *Id.* at 193.
9. *Id.* at 179-80.
10. *Id.* at 8.
11. *Id.* at 65.
12. *Id.* at 88.

lishers, as Kinkley notes. It was (by his own description) the first scar literature involving penal law, and the first to depict prison camps and torture. Yet Kinkley calls *Sacred Duty* "melodramatic" eight times in four pages.[13]

Kinkley's disparagement of stories as melodrama is biased according to content, not merely style. For instance, the Li Dong/Wang Yungao story *The Trial* involves a trial for negligent homicide, conducted by an upright prosecutor, of a cadre who had saved the prosecutor's life in the Cultural Revolution. The cadre comes to repent his sin when it transpires that one of those killed by his negligence was an old man who had saved the cadre's life in the Civil War. Melodrama? Not a peep.[14] Again, with stories he does not like, Kinkley infantilizes the titles *lao* and *xiao* ("Old" and "Little") as "Ole'" and "Li'l" in his translations. But these are common honorifics across China, not hick local idioms as Kinkley implies. Notably, in describing adversarial stories such as *The Trial*, and the "Westernized delights" of Cheng Xiaoqing, he refrains.

More serious is Kinkley's one-sided commentary on the complexities of adversarial versus Confucian/paternal law. Many have written on the strengths of China's traditional view of justice as centered in individual/family responsibility/morality, with law a second-best to values-based education. Kinkley has clearly read some of this discussion. He quotes from William Alford, for instance,[15] without mentioning Alford's dictum that many in the West could learn from China's ranking of *fa* ("law") lower in the hierarchy of forces supporting justice than *tian* ("heaven" or "nature"), *li* ("rites" or "ritual/worship"), *qing* ("traditional morality") and *jiao* ("education").[16]

Many legal actors have come to the same conclusion. U.S. District Judge Helen Ginger Berrigan wrote glowingly after her judicial tour of China and co-hosting of a reciprocal delegation of Chinese judges organized by the National Committee on U.S.-China Relations.[17] "For thousands of years," Judge Berrigan observes, "China stressed communal harmony and relied upon village elders to pass down wise decisions on disputes, which villagers have accepted to avoid discord. In our legal system, we call that arbitration or mediation, and are

13. *Id.* at 88-92.

14. *See id.* at 118-26.

15. *Id.* at 14.

16. WILLIAM ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE 14 (1995).

17. Helen Ginger Berrigan, *China Judicial Exchange: "I Think This Is the Start of a Beautiful Friendship,"* NCUSCR NEWSLETTER (National Committee on U.S.-China Relations, New York, NY), Spring/Summer 2001, at 4.

only now developing it as an alternative to the often overly adversarial and individualistic system we use."[18]

Of course China's Confucian/paternalistic justice has been and is abused. The *New York Times* has covered China's most recent "Strike Hard" campaign, with its cases of suspects denied lawyers until police extracted confessions, sometimes via torture.[19] But American adversarialism has also been abused: Chinese papers routinely cover U.S. criminals who get off on technicalities and go on to commit further crimes. Mutual finger-pointing has little effect. More useful are legal exchange initiatives that help bring out the best, and blunt the roughest edges, in both systems.

Perhaps few legal thinkers familiar with today's China would be as eager as Kinkley to throw out baby with bathwater. He equates *qing* and *li* with CCP dictums (as if no non-party morality remains in China).[20] He despises "the pernicious idea of natural law"[21] and "the paternalistic party,"[22] while calling adversarial justice both "Western" and "modern" (terms he uses largely interchangeably), praising "stirrings of the adversarial spirit"[23] in Wang Yaping's and other stories. To be sure, "adversarialism means tolerance of variant versions of the truth,"[24] a virtue China could use more of. But it is perhaps not always true that "in setting precedents, adversarial lawyers serve collective interests."[25] What grates is Kinkley's simplistic equation of Adversarial with Western with Modern with Always Best.

This is especially true given his broad-brush negatives about Chinese legal practice. He ends his fiction survey in 1989, but makes more sweeping claims about Chinese justice. For instance: "By all accounts, Chinese judicial organs are rubber stamps today."[26] Kinkley supports this with footnotes dating to 1979. The situation "today" (for a book published in 2000) is significantly different, by many accounts. Professor Yang Yuguan at the Chinese University of Politics and Law agrees that "China's court system is different from its American counterpart. Judges in China may discuss some cases with their colleagues or consult with their seniors."[27] But then, Yang

18. *Id.*

19. *See. e.g.,* Craig Smith, *Chinese Fight Crime with Torture and Executions,* N.Y. TIMES, Sept. 9, 2001, at 1.

20. KINKLEY, *supra* note 1, at 125.

21. *Id.* at 126.

22. *Id.* at 331.

23. *Id.* at 99.

24. *Id.* at 13.

25. *Id.*

26. *Id.* at 76.

27. E-mail from Yang Yuguan, Professor, Chinese University of Politics and Law, to

writes, China's court brief is also broader, including not just criminal and civil justice, but also "economic dispute settlement" and "social stability."[28] Yang calls it "illogical to conclude that a country with China's population could exist with "rubber stamp" judicial organs."[29]

Again, this is not to minimize the problems. Having reopened law schools in 1979 and passed a lawyer's law in 1996, China's rule of law remains an evolving, two-steps-forward, one-step-back dance. No one would claim China has already fully achieved rule-of-law, but few deny that progress has been made. Yet Kinkley's broad-brush statements seem to ignore those hard-won gains and all the struggles that created them. Once more, I turn to Judge Berrigan for balance: "Everywhere our group traveled in China, we found men and women trying to do the "just" thing, regardless of historic and philosophical differences, just as I see people in America doing."[30]

Jeffrey Kinkley has brought encyclopedic knowledge and impressive intellectual tools to an under-studied field rich with interpretive potential. His flea-hopping between topics and periods, even his one-sided views on traditional values and recent progress, do not diminish that achievement. This is an important new book in critical studies of Chinese law and literature. I believe, however, it would have been a more enjoyable and ultimately more enduring book, had Kinkley approached his splendidly rich topic with slightly less jumpy erudition and a bit more balance.

Rebecca Weiner (Nov. 15, 2001) (on file with author).

28. *Id.* at 2.

29. *Id.*

30. Berrigan, *supra* note 17, at 5.