Enchantment, Aesthetics, and the Superficial Powers of Modern Law

Paul A. Passavant

Eve Darian-Smith, *Bridging Divides: The Channel Tunnel and English Legal Identity in the New Europe.* Berkeley and Los Angeles: University of California Press, 1999. xvii + 256 pages. $50.00 cloth; $19.95 paper.

Ronen Shamir, *The Colonies of Law: Colonialism, Zionism, and Law in Early Mandate Palestine.* Cambridge, UK: Cambridge University Press, 2000. xvi + 216 pages. $64.95 cloth.

Myth, community identity, tradition. Scholars across theoretical and political divides characterize modern law as abstract, rational, and universalizing—in other words, modern law supercedes and is at war with those enchanting aspects of premodern life. And legal liberalism, that archetype of modern law, is either celebrated or condemned for being antagonistic toward the value of solidarity. In light of their focus on the abstract, rights-bearing individual, liberals argue that legal rights should protect the autonomous individual against the potentially suffocating effects of community. Critics, in turn, lament the fact that liberal legal rights function as "trumps" for individuals against the community, thereby fraying the bonds that hold society together. It is interesting to note that liberalism's critics share a conception of law and its relation to society that liberalism claims for its form of law—liberal legal rights are theorized as instruments that derive from elsewhere, intrude upon society, and then create and preserve an island of sovereignty for an isolated individual. By acting as a barrier for the individual against society, liberal rights abstract the individual from the real social relations that define and sustain the individual's life and cause fragmentation where once there was community. Through all of this, law remains seemingly unaffected by social forces. Thus, there is common ground between liberals and their critics at the level of describing modern law's characteristics even if there is no evaluative agreement to be had.

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The scholarship of many identified with the Law and Society movement challenges this theory of legal rights and the relationship of law to society. Stuart Scheingold (1974), for instance, suggests in *The Politics of Rights* that the promise of legal rights may very well be mythical, but if their mythological status is as deeply and as widely held as it seems to be in the United States, then using a discourse of rights to pursue one's claim to justice might not be as deluded as Critical Legal Studies (CLS) or, more recently, Communitarians have claimed (Glendon 1991). Legal rights might have purchasing power in the United States precisely because legal decisionmakers and the American public believe rights are real and act on this basis to protect "rights" despite the best efforts of theorists to demystify rights as figments of a collective imagination (Scheingold 1974:143; Tushnet 1984). Scheingold (1974:58) argues that to "claim a right is thus to invoke symbols of legitimacy that transcend your personal problems. At the same time, you tacitly commit yourself to accept obligations which inhere in the existing system—that is to say, the pattern of mutual and reciprocal commitments that defines the fabric of the society." Law, from this perspective, is not completely Other to society—it is one of the discursive registers within a social formation, albeit an especially significant one that articulates with other signifiers of social standing and political legitimacy. As such, legal mobilization wields not only divisive potential but interpellative possibilities that can produce forms of association and affiliation (Scheingold 1974:147; McCann 1994; Passavant 2000; Passavant & Dean 2001).

In this essay, I echo Peter Fitzpatrick (1992b) and ask whether the abstraction of modern law is in fact its greatest myth. That is, generations of liberalism's critics have condemned it for putting a disembodied individual at the center of the legal universe—for excessive *abstraction*. Then, critics condemn liberal law on *substantive* grounds for being patriarchal or racist. Well, which is it to be? The time has come, I suggest, for scholars to be honest about the benefits of a properly superficial study of modern law. Rather than positing a deeper structure for law, I argue that we should simply take law at its enchanting word (Bennett 1997). This means that we should give due weight to the particular forms of subjectivity law authorizes and uses when we are interpellated by it rather than dismissing these elements in order to preserve the coherence of the narrative of abstraction. I argue that both of the books under consideration here go some distance toward a proper appreciation of law's aesthetics,[1] although both studies remain moored to this primary principle of critical

[1] My use of the term "aesthetic" here has little to do with the philosophical project of defining formal criteria of beauty or goodness. Instead, I mean a habituated practice of appeal, aversion, and differentiation (Bourdieu 1984; Douzinas & Nead 1999; Ferguson 1999; Gearey 2001; Haldar 1999).

scholarship since Marx: that modern law's significance lies in its valorization of the disembodied subject. In what follows, I suggest that the authors can be more faithful to their insightful empirical observations and more theoretically consistent if they just cut loose once and for all from this traditional mechanism for understanding modern law.

The Books

Eve Darian-Smith's *Bridging Divides* is an ethnography of globalization that focuses on the process of building the Channel Tunnel. Darian-Smith studies the reactions and adjustments produced by this linking of Kent to Calais at multiple levels of social practices, including the local, the national, the transnational, and the legal. The normative relationship of law, politics, and society in modernity is defined by a certain paradigmatic form of linkages—a unified territory that is inhabited by one unified nation, which is governed under a unified state, which in turn governs through a singular and unified law. Darian-Smith studies how the relations between the constituent terms of this modernist paradigm are reconfigured by the European Union (EU) generally and the Channel Tunnel particularly. If, under conditions of modernity, "to create a legal order has been to write into law a sense of national unity and purpose," then Darian-Smith examines how the legal order is changed with the emergence of transnational sociopolitical life, and how, finally, these macrolevel institutional changes affect structures of feeling on the ground, as it were (1999:15, internal citation removed). Darian-Smith finds that the Channel Tunnel disarticulates the one-to-one set of relations between territory, nation, state, and law, and disaggregates the seeming unity of the constituent terms as multiple forms of law cover the "same" geographic space and a new legal jurisdiction is created—the "Transmanche" Euroregion encompassing Kent and Calais. Moreover, if Kent is an example of the "local," Darian-Smith finds that Kent's identity has become ambiguous under conditions of globalization such that it is far from clear which center defines Kent as its "local," and which center Kent uses to define itself as "local" (ch. 7).

While Darian-Smith's book confronts the nation and its law at the point where globalization puts the taken-for-grantedness of established national life into question, Ronen Shamir's (2000) book, *The Colonies of Law*, takes up the problem of establishing national life in the first place through his study of British Mandate Palestine. He focuses upon the Hebrew Law of Peace as a road not taken for Israel. The Hebrew Law of Peace is a legal formation that valorizes how Jews retained their law in exile as a manifestation of Jewish national unity and sought to use this resource to build a Jewish nation in Palestine. Advocates of the He-

brew Law of Peace, according to Shamir, conceptualized their law as a cultural mechanism by which to promote Jewish national identity (ch. 2). This identity, however, is secular and nonstatist. Therefore, Shamir describes how the Hebrew Law of Peace came into conflict with the rabbinical courts on one hand, and the statist aspirations of Zionism on the other, as competing sites of legal authority. Because different discursive formations imply different subject positions for those who participate in them, if one treats law as a form of discourse (12), then one recognizes how different legal formations imply different modes of subjectification. Thus, Shamir's study brings forward a possible though ultimately defeated future for Israel from the perspective of pre-1948 Palestine—a Jewish national identity that might have been secular and nonstatist.

Legal Pluralism

The works of both Eve Darian-Smith and Ronen Shamir are informed by the field of legal pluralism. Hence they make a given state or legal formation into a problem to be explained rather than a reality to be presumed. If sociolegal relations do not inherently work according to the modernist map, but rather have been made to work in that way (we shall leave the question of how successfully the modernist map has been made to work in any given instance to one side), then the possibility exists, which both authors take up, that things might work differently. Scholars often celebrate pluralism as if an increase in pluralism were the same thing as an increase in democracy or freedom. Contemporary conditions of globalization, I suggest, require a more delicate hand. That is, we must mix an ethos of pluralization that desediments congealed identities and landscapes with a recognition that democracy itself depends upon creating chains of equivalences that articulate different sites of oppression as a common front to challenge hegemonic forms of domination (Connolly 1995; Laclau & Mouffe 1985). While Darian-Smith is sensitive to both the possibilities and the dangers of increased legal pluralism within globalized conditions, I suggest that the parameters within which Shamir works must be further pluralized if life is to become less violent for Jews and non-Jews in the territories controlled by Israeli, Palestinian, and other governments today. Both scholars, however, recognizing the mutually constitutive relation of law and society that follows from a sensitivity to law's enchanting nature, engage the insight that new and different legal regimes will imply new and different forms of subjectivity.

We can distinguish at least two forms of legal pluralism (Passavant & Dean 2001). In the first, one form of law may be subject to multiple and competing interpretations. In the second, one territory or individual may be subject to multiple legal orders.

Robert Cover, in an influential *Harvard Law Review* Foreword that is concerned with multiple communities and their *nomoi*, evokes the first form of legal pluralism when he cites Alexander Hamilton's defense of the Supreme Court and the function it would fulfill for the United States in the *Federalist Papers* (Cover 1983:40–41). Because equally reasonable judges or courts might come to different or competing interpretations of the "same" law, one court is necessary to choose among competing legal interpretations for national state sovereignty to continue to exist (see also *Martin v. Hunter's Lessee* 1816). In light of the reality of proliferating legal meaning, the role of a court—a state institution—is not to give law, but to suppress it. In other words, according to Cover, judges don't make law, they kill it in order to maintain the hegemonic unity of one particular law. There is a particularly well-developed scholarly tradition that works according to the second form of legal pluralism in the context of research on colonialism. This scholarship examines attempts to impose Western forms of law upon preexisting social orders in the process of colonization. Scholars working in the context of Euro-America (Darian-Smith is part of this tradition) are also attending to struggles among competing legal orders—what Boaventura de Sousa Santos (1987) calls interlegality (Merry 1988).

Shamir evokes both moments of legal pluralism. The multiple forms of law in conflict and competition in British Mandate Palestine included that of the Hebrew Courts of Peace, the rabbinical courts, and the law of the British colonial state. Both the Hebrew Law of Peace and the rabbinical courts interacted with the British colonial state in complex ways. For example, under the Ottoman system, religious courts would deal with matters of personal status for various religious communities, but the power and prestige of the Jewish rabbinical courts deteriorated immediately after the British occupation of Palestine. These courts were ill-suited to the needs of secular Zionists, and moderate orthodox Jews wanted to assert their own leadership on religious matters. The Jewish population of Palestine, divided as it was between Zionists and non-Zionists, secular and religious communities, Ashkenazi and Sephardic Jews, orthodox and ultra-orthodox groups, could not agree on a representative religious body. Hence the responsibility for reform was left to the British.

A British commission was established, headed by Norman Bentwich. The Bentwich commission recommended the creation of a Chief Rabbinate that would be invested with the power to create a system of state-backed religious courts with a jurisdictional monopoly over matters of personal status for Jews. For the British, this system served colonial interests by preserving unity and order while keeping them out of the religious affairs of the native populations. For the orthodox, this setup allowed them a monopoly on personal status matters and put them in a position

to fix and impose by statist means "their version of tradition, their version of Jewish law, and their ideas concerning the desired composition and nature of Jewish tribunals. The ability to impose these versions was particularly salient given the challenge represented by the Hebrew Law of Peace." Thus, the rabbinical courts, which claimed merely to continue "the unbroken chain of Jewish tradition[,] had been in fact a formal administrative invention of the colonial state" (Shamir 2000:66).[2]

Interestingly, the Hebrew Law of Peace advocates, who were far more suspicious of the British colonial state than were the rabbinical courts, also received benefits from the colonial state. Although Shamir portrays the Hebrew Courts of Peace as having relied on the force of public opinion, they also relied upon a relationship with the colonial state for their power as a legal forum. While the Hebrew Courts processed an average of twelve hundred cases a year, only a handful were overruled by state courts. When a colonial district court overruled a Hebrew Court of Peace judgment on the grounds that it overstepped its authority by intruding upon authority that belonged exclusively to the courts of the government of Palestine, the colonial Court of Appeals overturned this decision and reaffirmed the status of the Hebrew Courts of Peace as permanent arbitration tribunals. Thus, the Hebrew Courts of Peace were accommodated by legal provisions allowing for arbitration forums, and their judgments could be ratified by state courts and enforced through state machinery (61–62).

One of the primary reasons Shamir gives for the demise of the Hebrew Courts of Peace was the role played by the legal profession. For example, Arthur Ruppin, a Zionist leader who had helped to create the Hebrew Courts of Peace, changed his attitude after the war, arguing that the courts of the state had improved: "[T]hey are not Turkish anymore, and they are now open to hear everyone without prejudice" (108–9). By and large, according to Shamir, Jewish lawyers perceived law as an instrument in the civilizing mission, but were suspicious of the Hebrew Law of Peace for its claims to cultural importance; the Hebrew Law of Peace, that is, was considered insufficiently law-like by state-oriented lawyers who relied upon positivist presuppositions (111). As litigants increasingly challenged the decisions of the Hebrew Courts of Peace in state courts, a reduction in the caseload in the Hebrew Courts of Peace resulted.

Not only is the legal pluralism represented by interlegal competition discussed by Shamir, but the legal pluralism of interpretive diversity is represented by Shamir as well. The Hebrew Law of Peace was self-consciously antipositivist, and its advocates ar-

[2] For a similar treatment of the role of the colonial state in constructing "native tradition" in the African context, see Mamdani (1996).

gued that the rabbinical courts had fossilized the law (36). Its advocates defended the Hebrew Law of Peace as law developed and shaped by the community as a whole, and its judges relied upon common sense and justice as much as written law for its rulings. Thus, for the adherents of the Hebrew Law of Peace, the loss of political sovereignty did not mean that the Jewish people had lost their law, which they argued was kept alive in exile (34). The legal autonomy of Jews, in this view, was important as a visible manifestation of Jewish national unity in exile—proof of Jewish national identity. By putting a community-based law at the center of national identity, and by valuing law in this way for secular and cultural reasons, the advocates of the Hebrew Law of Peace presented an alternative national project that challenged the religious orthodoxy of the rabbinical courts. Moreover, due to their "bottom-up"conception of law, they challenged the positivist and statist preconceptions of political Zionism.

Shamir describes, as well, the cultural pluralism of the Hebrew Law of Peace, which was influenced by free law jurisprudence inspired by the Swiss legal code, Roscoe Pound, legal realists, and Eugen Ehrlich, as well as German understandings of law as reflecting the spirit of a specific national culture (79–85). Therefore, Shamir describes the Hebrew Law of Peace as a "pastiche" (75), and celebrates it as an "anti-colonialist, non-statist popular form of justice" grounded in an "'authentic' and non-chauvinistic national past." He justifies his study of the Hebrew Law of Peace specifically as an attempt to "enrich . . . and problematiz[e] the hybridity of Zionism" (5), as well as to "inspire a new paradigm within which to interact with Palestinian Arabs" (172).

Darian-Smith's study eschews the celebratory rhetoric of Shamir, although her discussion of the legal struggles surrounding the Channel Tunnel includes a story about the benefits of legal pluralism. To implement the Channel Tunnel Treaty, the British government utilized a hybrid bill procedure that meant the public inquiry usually required for all major planning applications could be circumvented. This was perceived by the public as a shirking of responsibilities by the government to listen and pay heed to local objections. The residents of Kent attempted to voice their opposition to the Channel Tunnel Treaty through individual petitions to a House of Commons select committee, but the government ignored these objections, many of which were on environmental grounds. As a result, Kent considered itself to be "at war" with Prime Minister Margaret Thatcher (Darian-Smith 1999:125).

Under the authority of the Single European Act of 1986, the European Parliament promoted the establishment of the Consultative Council of Regional and Local Authorities in 1988. This enabled local governments to meet with the European Commis-

sion to discuss policy initiatives and general issues of regional concern. Additionally, the Committee of Regions, created as a consultative body under the Maastricht Treaty in 1992, represented a strengthening of European regionalism and a potential threat to the central dominance of national governments (170–71). In light of the inability of Kent's residents to get a fair hearing in London, the Kent County Council (KCC) decided it had to act for itself and established a European Operations Unit in 1987. The KCC officials signed an agreement in 1987 to create the Transmache Region, joining Kent and Nord-Pas de Calais, and they received a grant of £6 million from the European Union's Interreg Agency in 1989 for cross-border projects. In 1991, the Transmache Region was reconstituted to form a new Euroregion with the addition of three Belgian regions. Now qualified as an Economic Interest Group, this in turn provided the region with a legal status sanctioned by the EU that eases the problems involved with collaboration across multiple legal jurisdictions. The Euroregion authority is particularly concerned with environmental issues.

On the basis of Interreg funds and European regional development funds, the KCC and its mainland cooperative partners received over £35 million from the EU for transborder projects by the mid-1990s (170–73). Thus, on one hand, the residents of Kent believed they had been failed by London and that London had ceased to be representative of the concerns of the British as it sought to participate in transnational European politics and global economic activities, exemplified here by the Channel Tunnel Treaty (127). On the other hand, the KCC was able to represent their interests better and to receive a fairer hearing than they had gotten through "their" national government by utilizing the legal tools provided by the EU.

This story illustrates the possibilities and dangers of legal pluralism that are especially significant under conditions of globalization. The KCC demonstrates the hope that we place in legal pluralism: Faced with a deficit of due process or democracy in one legal jurisdiction, the KCC takes advantage of the multiplying forms of law to find an outlet through which it is able to advance its interests. This optimistic moment is also manifested in Shamir's admittedly romantic treatment of the Hebrew Law of Peace in order to pluralize Israel's legal histories. Yet Darian-Smith also discusses the darker sides of pluralism. The Channel Tunnel incites racial fears by bridging the gap between England and the European Continent, making the British feel vulnerable to a return of their colonial repressed (ch. 6). And London's reasoning for pursuing the Channel Tunnel appears to be linked to an emerging self-identity as a "global city" that is situated within circuits of social relations that exclude connection with Kent.

Darian-Smith's measured assessment of the conditions of legal pluralism seems more appropriate in light of the social conditions produced by global capitalism than Shamir's celebration of hybrity. Indeed, while challenges to national sovereignty may provide openings for the pursuit of human rights or environmental concerns that might be foreclosed at the level of the national state (see also Sassen 1996), transnational corporations also thrive on legal pluralism. Transnational global capital makes use of wage differentials, pluralism in tax laws, differential levels of environmental regulation, and practices U.S.-style "forum shopping" to dispute in a legal context most favorable to its quest for profit maximization (Hardt & Negri 2000; Greider 1997; Dezalay & Garth 1995:45, 56–57). Indeed, today the problems faced by democratic activists might be described by too much pluralism, resulting in an inability to counter hegemony.

Despite Shamir's celebration of legal pluralism, as represented by the Hebrew Law of Peace, I suggest that his study does not go far enough in its concern for *pluralization* (Connolly 1995). Shamir ends his book with the hope that the way he has problematized the unity of Zionism through his engagement with the Hebrew Law of Peace might "inspire a new paradigm within which to interact with Palestinian Arabs" (2000:172). Despite the commendable attention he pays to the problem of racism on the part of Zionists toward Palestinian Arabs during the Mandate period, it is unclear how his study is likely to contribute toward more peaceful social relations within the territorial space of Israel-Palestine. While a discussion of the Hebrew Law of Peace is useful as a challenge to the hegemonic status of rabbinical orthodoxy, the link between a "cultural" Jewish nationalism and justice toward non-Jewish Palestinian Arabs is opaque.

Indeed, Shamir describes how a substantial portion of the Hebrew Law of Peace caseload was constituted by "honor" cases in which one's reputation as a committed nationalist was put into question and those convicted were forced to pay a fine to the Jewish National Fund to acquire land for Zionist colonization (92). This indicates that the Hebrew Law of Peace would not be the most attractive forum in which a non-Jewish Palestinian Arab might litigate, and its improvement upon present conditions, in which a racial and national logic has produced two national identities competing for the same piece of land, is not obvious. In fact, Shamir states that he is "not suggesting that the Hebrew Law of Peace represented a potential—in law—for Arab-Jewish solidarity," and that there is "nothing in the deeds and ideas of the Hebrew law's advocates which suggest[s] that they had developed an alternative way of conceiving Arab-Jewish coexistence in Palestine" (170). Thus, as we return to the statement by which he ends his book, we can see that the parameters of pluralism his study allows is confined within the boundaries of Jewish nationalism,

and does not go further to challenge the biopolitical logic of identity that has produced a contradiction between Jewish Israelis and Palestinian Arabs that is impossible to solve without challenging its constituent terms or the very politics of identity itself. On this point, Darian-Smith's analysis, which examines the reconfiguration of identity following from the Channel Tunnel and the production of the European Union, while attending to the possibility that this could lead, in turn, to a new form of identitarian thinking that reproduces new forms of exclusion and racism, goes further in its willingness to pluralize congealed sociolegal relations.

Laws and Societies

The analyses of both Darian-Smith and Shamir reflect the insight that law and its social subjects are bound together in a mutually constitutive relationship, rather than conceiving of law and society as two distinct and hermetically sealed entities, or conceiving one of these terms as merely a function of the other. Darian-Smith's book may be productively read alongside of E. P. Thompson's *Whigs and Hunters*, especially the sections on the rule of law. Like Thompson, Darian-Smith approaches law as a social practice (1999:xiv). She consistently applies this insight throughout the book, from her linkage of Britain's changed legal relationship to Europe and the changed nature of its countryside—now yellow due to the production of rape for rapeseed oil—to her discussion of the "garden" as a significant symbol of British identity, to her discussion of the traditional practice in Kent of "beating the bounds" as a means of re-citing a legal boundary that also identifies a community.

Darian-Smith argues, "[L]aw constitutes a platform and defense upon which a particular aesthetics, lifestyle, ideology, and interpretation of the self rest" (40). Here, law and society are conceived as mutually constitutive entities whereby a given legal formation is linked to a given subject position. Darian-Smith is at her best when she turns her anthropologist's eye upon cultural data to learn more about Great Britain's legal formations and the forms of subjectivity they imply—an analysis that is simultaneously legal and cultural. In one noteworthy instance, she attends to a portrait of a Mr. and Mrs. Andrews by Thomas Gainsborough (1748). The painting is of a man sitting with his rifle tucked casually under his arm, his hunting dog at his feet, and his wife at his side sitting on a wrought iron garden bench overlooking their land. The leisure and security of Mr. Andrews, to say nothing of the fact that the landscape in the background is vacant of other people, is enabled by the changes to property laws in Great Britain. As Darian-Smith notes, this "expansion and clarification of law touched on rules of inheritance, trespass,

rights of way, easements, and access to land with respect to woodcutting, fishing, hunting, and shooting—a feature of law illustrated by Mr. Andrews's gun" (60). The garden aestheticizes the form of legal ownership produced through the acts of enclosure. Insofar as the "English garden" is taken as an aesthetic norm that represents "Britishness," or is used as a standard of civility and cultivation by which various other populations are disciplined, the hierarchies of social power produced by this legal formation will be naturalized and reproduced hand in hand with the extension of this aesthetic imaginary. The portrait can be understood as citing both the laws that produced the new relations of property that excluded the variety of use rights that had previously existed and the images of social normality that animated them. The portrait represents a particular sociolegal moment, and in so doing, helps to materialize it as the normal sociolegal reality. Repeated citations make decisions into precedents that must be followed as the rule of law.

The English cottage garden, a product simultaneously of law and aesthetic norms regarding the environment, is celebrated by the British for symbolizing both liberty and civility (37, 61).[3] As a model, Darian-Smith describes how the garden cultivated British national unity across ethnic differences internally, and as an exported element of British empire-building, the garden was part of a strategy of colonization that sought to cultivate civilized subjects externally (45).

Thus, Darian-Smith highlights *landscape* as part of a practice of governmentality—a practice of training properly constituted subjects, governing populations, and "naturalizing" particular exercises of power—while recognizing law's role in this process (21–24).[4] Darian-Smith continues her analysis by showing how opponents of the Channel Tunnel invoked the gendered connotations of the English garden to inspire resistance to the Tunnel by describing the Tunnel as a "penetration" and "rape" of the "Garden of England" (65–66). This sexualized discourse of resistance also promoted a race-based opposition to the Tunnel through fears that the Tunnel could allow rabies and disease to contaminate the purity of the British nation once the latter had been penetrated (ch. 6). It is interesting that Darian-Smith also describes how the British used gardening practices to incorporate the Tunnel buildings and tracks into the local geography as an effort to submerge new innovations into "olde England" (37). Although gardening practices are located as a terrain of struggle, working both as a strategy of opposition to the Channel Tunnel

[3] For a discussion that explicitly links the question of civility with the practice of liberty, see Passavant (1999; 2000).

[4] On Michel Foucault's concept of governmentality, see Foucault (1991) and Barry et al. (1996). For a discussion of landscape as a strategy of governmentality, see Blomley (2000).

and as a mechanism of qualified reception, Darian-Smith presents how the landscape changed due to Great Britain's changed relations to the EU, thereby giving rise to a new structure of feeling for subjects on the ground. Due to the EU's agricultural policies, which include subsidies for oilseeds, a shared environment of yellow rapeseed fields has come to bridge Great Britain (and Kent) and the Continent. Darian-Smith thus shows how these changes in the landscape act as an indicator of law's material effects upon people in their socioeconomic life, their aesthetic experiences, and as a constant reminder of how legal authority has become reconfigured. By highlighting the shifts from feudalism to a liberal legal order and then the shifts from the modernist legal paradigm to transnational legal formations, while discussing the changes in subjectivity linked to these legal changes, Darian-Smith implements effectively her theoretical sensitivity to the mutually constitutive nature of law and society.

One does wish, however, that Darian-Smith had done a bit more with her discussion of "beating the bounds" in Kent. Beating the bounds is a traditional ritual in which members of the local community would walk around its limits, stopping to beat the white boundary stones with sticks of willow. Originating at a time when boundaries might be poorly documented in writing or not written down at all, the ceremony reproduces a mental boundary that defines property rights and community insiders who would enjoy various rights while demarcating the limits of these rights and constituting an outside. According to Darian-Smith, there has been a resurgence of interest in beating the bounds since 1989. She associates this renewed interest to a popular concern for the preservation of the landscape and support for a property regime that values the local common and "public" land against the utilitarian logic of Thatcherism (175–79).

Darian-Smith's eye for detail is keen in her descriptions of this ritual, relating to her reader the muddy Wellington boots or woolen sweaters worn by participants, and even noting that the main advocates of beating the bounds tend not to be natives of Kent but recent arrivals from London and other urban areas. While her readers must appreciate Darian-Smith's attention to popular legal practices such as beating the bounds as instances of claiming and contesting rights and identities, what the discussion lacks is a hermeneutic or subjective dimension that attempts to bring forward the understandings of these rituals on the part of their participants. This also might include a more-explicit effort by the author to link the meaning of these rituals to other structural changes that she discusses in this chapter, like the reconstitution of the Transmanche Region, the opportunities for local governments the EU presents, or the increased cultural exchanges for school children. Is beating the bounds a resurfacing of a premodern local ritual? An attempt to "reinstate a sense of

local community" (180)? Is it an effort to sever Kent's identity from London? Is it part of a process of reinscribing a more culturally hybrid Kent that would be more closely affiliated with France? Should the resurgence of beating the bounds be understood as a symbolic equivalent to an effort seeking to establish an interest-free form of currency with value only locally (183), or are these two distinct reactions to increased transnationalism?

Darian-Smith summarizes her discussion in this chapter by referring to an awareness on the part of participants regarding "issues of identity construction" (184), Britain's identity as an autonomous island nation being "seriously challenged" (188), and landscapes "shaping and being shaped by new forms of governmentality and spatial aesthetics" (188). While this is all undoubtedly true, Darian-Smith does not diagnose sufficiently the symptoms she discerns. She might have provided a window onto the incipient forms of subjectivity presently under construction that are nonidentical with a traditional British national identity, for instance, as she did so ably in her discussion of the hysteria surrounding rabies. While one suspects that the revival of beating the bounds is more than just mere localism, Darian-Smith is vague on what that something more might be, leaving it to her readers to make connections that her text only begins to construct. Michel de Certeau (1984), on whom Darian-Smith relies at other points in her book, analogizes the spatial practice of walking in the city to speech acts as users of the city encounter a preexisting system of meaning and seek to appropriate elements of this structure, albeit temporarily, as their own (ch. 7). One wishes Darian-Smith had carried further her analysis of these ambulatory acts of signification to consider the system of meaning being produced by those symbolically appropriating Kent's boundary stones, and what forms of social standing were being produced by these popular legal practices. That is, what are the consequences of these acts for rights, resources, and recognition?

Shamir's analyses are also informed by the insight that law and its social subjects exist in an articulated relationship. This is why it matters that the Hebrew Law of Peace lost the power struggle against political Zionism and the rabbinical courts. Shamir writes that the rabbinical establishment understood that at stake in the conflict with the Hebrew Courts of Peace was more than a mere jurisdictional dispute but "a struggle over the very meaning of Jewish identity at its nationalist moment in history" (2000:40). Forms of law imply their subjects by the modes of being they authorize or make interdict. For Shamir, the Hebrew Law of Peace is valuable for the Jewish subjectivity and the form of nationalism that it sought to promote and that were contrary to other forms of subjectivity and social relations enforced by its main competitors.

Other moments in Shamir's analysis, however, do not seem to hold onto this insight about the relationship of law to society, trading instead on either positivist conceptions of law or essentialist notions of community identity despite his celebration of the Hebrew Law of Peace on pluralistic grounds and his stated interest in "de-essentializ[ing] notions like nation and nationalism" (1). His portrayal of the Hebrew Courts of Peace as an example of community-based law or a popular form of justice against the orthodox rabbinical courts or the statist inclinations of Zionism merits discussion. Why does it count as a form of "popular" or "community" justice as opposed to a contending form of law that has not achieved hegemonic status? It certainly isn't popular from the perspective of orthodox Jewry who would sooner use the British colonial courts than the Hebrew Courts of Peace (66). And the Hebrew Courts of Peace don't seem to be very representative of "community" for those who called it a "foreign branch in the vineyard of Israel" (48). The justification also cannot proceed from a contrast between a law that relies on the state for enforcement and a law that does not since the Hebrew Courts of Peace were dependent on the colonial state for the latter's coercive powers (62).

Ironically, Shamir's case that the Hebrew Courts of Peace are instances of community or popular justice appears to rely on positivist preconceptions about law and criticisms made against the Hebrew Courts of Peace from those quarters: This is not law (111).[5] By erasing the gap between law and society, Shamir can buy support for the Hebrew Courts of Peace, but only at the price of erasing the violence immanent to any form of law and thus presuming that a community can be made identical to itself. Shamir states that most decisions of the Hebrew Courts of Peace at local and district levels had no "legal" flavor at all, relying on common sense. The High Court of Peace, according to Shamir, was not "fundamentally different from the lay-justice one employed at the lower-tier local and district Hebrew Courts of Peace" (74). These decisions were fact-oriented and did not focus on "abstract rules." The social background of most judges, according to Shamir, was as secular unprofessional peacemakers (74). For Shamir, while the coercive powers of state law presuppose an abstract society, a community-centered law is premised on the personal—personal interactions, and a high level of collective solidarity. "It is a law premised on the inter-human aspect of social life, conceiving of society not in terms of abstract individuals, but rather in terms of human networks in flux, constantly shaped and reshaped by face-to-face interactions," he states (96). In other words, the legitimacy of the Hebrew Law of Peace as a

[5] For similar criticisms of popular or informal justice to those presented here, see Norrie (1999); Fitzpatrick (1988; 1992a).

form of popular justice appears predicated on the way that Shamir represents it as being closer to community than other, more abstract, forms of governance through the former's preoccupation with facts, interpersonal relations, and its opposition to formalistic legal rules and abstract individualism. That is, the Hebrew Courts of Peace are "popular" only in comparison to a vision of community opposed to a positivist conception of law.[6]

Shamir's effort to use the Hebrew Courts of Peace as an illustration of popular or community-based justice can be seen to rely on the "metaphysics of presence" whereby these courts are found to be somehow "closer" to the "local" community than other legal fora.[7] He relies on a discourse of community and meaning that presumes one can be closer to *the community*, that proximity indicates truthful and accurate representation, and that this community really exists and so can be represented either accurately or inaccurately. Since representation—to say nothing of law as a mechanism of representation—is always suspect according to the logic of this theory of meaning and community, which would rather have *the community* speak for itself, Shamir purchases legitimacy for the Hebrew Courts of Peace by making them nothing other than the community. Shamir legitimizes the Hebrew Courts of Peace as instances of community justice by representing them as being less law-like than their competitors. Rather than falling back upon inadequate theoretical assumptions that Shamir rejects at other points in his analysis, we would do better to follow Alan Norrie's proposal that we resist the appellation of "informal" or "popular" justice and speak rather of "differently formed" laws (1999:270).

While the Hebrew Courts of Peace shed their legal characteristics to strengthen their claims to represent the Jewish community against the statist alternatives, on Shamir's analysis, they appear by comparison superior to political Zionism on legal grounds when Shamir describes this Zionism as creating spaces of decisionmaking that were "immune from legal scrutiny" (2000:134). Such spaces of sovereign decisionism evoke Giorgio Agamben's criticisms of modernity for producing zones of bare life where law becomes completely submerged in factual situations, making horrible abuses of human rights possible (1998).[8]

[6] Of course, which law is closer to the "community" is precisely what was at issue in Palestine during this period of history, as we learn from Shamir's scholarship: how properly to define the identity of a Jewish nation.

[7] For a discussion and critique of the "metaphysics of presence," see Derrida (1976). For a discussion of how community cannot escape law, see Fitzpatrick (1995). For a reading of U.S. obscenity law that finds positivist conceptions of "law" and "community" to be significantly incomplete and an argument that "law" always requires a community supplement while "community" is itself constituted by law, see Passavant (2001). See generally Fitzpatrick (2001a).

[8] For a discussion of Agamben's work, see Hussain & Ptacek (2000); Fitzpatrick (2001b).

Shamir argues that "the politics of building the nation involved . . . a non-legalistic orientation toward problem solving" (2000:134). In making this argument, Shamir again relies on a dichotomous relation between law and society, this time figured as an opposition between law and nationalism.

But how can sovereign power exist completely out of relation to law? Only in chaos can there be no law. Sovereignty is both a political *and* a juridical category. By arguing that Zionism involved a nonlegalistic orientation to problem-solving, Shamir does not live up to his own best insights regarding the relationship between law and society. A national subject cannot exist without its law to represent it for what it is and to distinguish it from an Other. Reciprocally, a nation's law cannot exist without national subjects who will recognize this claim as (their) law. Shamir recognizes these facts when he discusses how a form of law requires constituents who will recognize its principles as law (89),[9] and in the main story that his book tells, that the competition between forms of law in British Mandate Palestine was also a struggle to define the Jewish nation. Although Shamir's allegiances are clearly with the Hebrew Law of Peace, he should not characterize it as being more "authentic" or more "legal" than its less authentic and less legal competitors because these claims rely on conceiving law and society as separate, unconnected entities with mutually independent foundations of existence.

Law's Aesthetics

Critical theory has long been moored to a narrative of modern law as abstract, formalistic, and disembodied. Despite their commendable attention to the ways that law constitutes substantive identities, there are occasional passages where Darian-Smith and Shamir remain wedded to this element of faith within critical legal theory. In order to make a theoretical point, I will dwell, perhaps a bit unfairly as far as the authors are concerned, on these occasions.

As we have already seen, Shamir distinguishes the Hebrew Law of Peace from a form of law based on abstract individualism. Elsewhere, Shamir argues: "[T]he space Jewish lawyers occupied in the colonial legal field . . . effectively discount[ed] the national value of the Hebrew Law of Peace by articulating a competing, state-centered, version of nationalism based, as we have seen, on the idea of law's impartial calculability if not on an unabashed notion of state neutrality" (2000:123). He goes on to describe how the Hebrew Law of Peace challenged the conception of law grounded in an "institutional framework devoid of con-

[9] One way that the Hebrew Law of Peace tried to secure a constituency was by trying to place compulsory arbitration clauses in various contracts (98).

crete substance" (124). These descriptions are informed by a theoretical disposition to represent modern law as being particularly hostile to substance and as placing an abstract individual at its center. Darian-Smith similarly makes use of this model of modern law when she argues that law ignores space in part because "law is abstract," and "law needs to serve the ideals of universalism" (1999:13, n6). Darian-Smith also presents the shift from a feudal to a liberal legal order as a privileging of the "possessory rights of individuals over rights held by the collective community" (30). In other words, she describes the historical context of the changes in British property laws (changes inscribed within Gainsborough's portrait of Mr. and Mrs. Andrews) as a shift in valuation from community to the abstract individual; a process that is also manifested by a valorization of the masculine (57–58).

Although these sorts of claims have been staples of criticisms of modern law and liberal legalism for some time, there is a logical problem in the critique. If modern law or liberal legalism is so abstract, why do they further substantive values like patriarchy or racism? Why are practices of rights inherently masculine (Glendon 1991)? Indeed, Darian-Smith's discussion of the Gainsborough portrait indicates a *lack* of abstraction.[10] The portrait figures the substantive social identities around which the laws of property and contract were organized (the doctrine of couverture or "cover," for instance) and which they helped to constitute. As legal evidence, the portrait demonstrates quite clearly, as Darian-Smith points out, a promotion of the patriarchal nuclear family centered upon its homestead. Darian-Smith's theoretical insight is that a legal text's aesthetics may often be its most significant attribute. If this is so, then the substantive effects of legal practices may be due to those substantive qualities of the legal text that analysts so often read past in order to ascribe to modern law an abstraction it might not possess. That is, the patriarchal or racialized effects of legal practices might derive from the fact that the legal subject is figured in patriarchal or racial terms rather than the conventional narrative of modern law that an abstract legal subject is somehow inherently masculine or white (Passavant 2000).

Shamir's evidence also belies his claims about the abstraction of British and Zionist state-centered law. Indeed, the superiority of these forms of law seems, in light of the data Shamir presents, to be due to the way that they were coded culturally. Arthur Ruppin, to recall Shamir's discussion, praised the courts of the state for not being "Turkish" anymore (109) but Shamir also mentions a Tel Aviv lawyer who referred to state law as the "laws of Ot-

[10] Though the lack of abstraction could be attributed to the medium of legal representation in this instance. For an argument that the liberal legal subject embedded within U.S. First Amendment (U.S. Const.) jurisprudence is not disembodied, see Passavant (2000; forthcoming).

tomania" (133)—comments that make sense as criticisms within the context of an Orientalist discursive formation (Said 1978). Under the legal professionalization promoted by the colonial state, a full law degree hinged on an ability to speak English. The outcome of this Anglo-centered disciplinary process was an "aura" or "signals" of professional status (122). Shamir describes how Jewish lawyers "embraced the idea that law was a primary instrument at the service of the civilizing mission of colonialism" (2000:108). Excerpts from Hebrew Courts of Peace judgments also indicate their negotiation of an Orientalist discursive formation, though they sought to appropriate it to lend value to their legal decisions: In a 1925 case concerning excommunication, a Hebrew Court of Peace held that the Council of Kfar-Sava employed "illegal means that contradict *civilized* life" (60, italics added).

This cultural code of value—Western civilization versus Eastern barbarism—constitutes the terrain of sociolegal struggle, according to the evidence presented by Shamir. As such, some advocates of the Hebrew Law of Peace try to invoke it to serve their interests. Hence, in one controversy, Paltiel Dickstein argues that a priori "we cannot trust the decision of the Arab member of the [Palestinian High] court" (106). In quoting Dickstein's argument, Shamir emphasizes the cultural terms the former used to situate the problem, arguing that the advocates for the Hebrew Law of Peace sought to found the legitimacy for their law through a double movement of "cultural distancing from British colonizers and Arab colonized" (2000:106–7). As we have seen, however, the detractors of the Hebrew Law of Peace condemned it as "foreign." Thus, I suggest that the victory of state-centered law as the outcome to this legal struggle has a great deal to do with winning the interpretive struggle over Jewish identity and state law as the legal formation that most closely approximates civilized progress. The aesthetics of civility and the articulation of this value to state-centered law and its coincident national subject position are central factors in making one out of a plurality of legal competitors be perceived as *the* law. In other words, from the available evidence, it seems that the Hebrew Law of Peace did not lose out for challenging the conception of law based on impartiality, neutrality, and being devoid of concrete substance, since Shamir shows how state-centered legal practices were not particularly abstract or neutral. Therefore, it appears that state-centered law carried out a more successful performance of the substantive value of civility, and this may very well have been critical in its success. By highlighting the performance of civility, Shamir could have emphasized evidence more consistent with his theoretical framework than his decision to emphasize the issue of impartiality, neutrality, and abstraction as he did.

Conclusion

Both *Bridging Divides* and *The Colonies of Law* push the envelop as cutting-edge examples of law and society research (indeed, *Bridging Divides* won the Law and Society 2000 Jacob Book Prize). In this essay, however, I have tried to push the fine research of these scholars one step further. Law is a cultural code of conduct, and it does an injustice to Darian-Smith's and Shamir's thorough research to expel these cultural elements at various points from their analyses in order to pay homage to the traditions of critical theory that describe modern law as abstract and the liberal legal subject as disembodied. Darian-Smith argues that law should be analyzed as a social practice, and she does a masterful job of showing how changes in the legal terrain of Europe changed the landscape of making legal claims, necessitating adjustments on the part of Kent County to have its voice heard and its needs met. In order to gain legal standing under these changed conditions, Kent County pursued its interests as a Euroregion before the EU. She also demonstrates the social relations that became sedimented within British liberal law. It undervalues the wealth of her evidence, then, to suggest that modern law enthrones an abstract individual as its legal subject (Darian-Smith 1999:30, 57). Stating that modern law constitutes an abstract individual as its legal subject is in tension with her other arguments that state law operates as a marker of national identity (20), or that creating a legal order has meant writing into law a sense of national unity and purpose (15). If law were so abstract then it could hardly be productive of substantive identities and we would hardly need to appreciate Darian-Smith's concern, following Peter Goodrich, for a focus on law's aesthetics (14).

Analogously, it undervalues the richness of Shamir's evidence and his perceptiveness as a researcher to underplay the cultural components that empowered the interpellative capacity of state law, especially in light of the fact that his major argument is that the formal law one recognizes as "valid" incorporates the validity of a national identity as well. The time has come, then, for law and society research to own up more completely to the benefits of a properly superficial study of law by taking law at its own tainted word. This is what we must do if we are to follow seriously Darian-Smith's injunction to study law as a social practice. We must not ignore "precisely that dimension of the text and its context which performs the labour of signification and so gives the text its effect" (Darian-Smith 1999:14, citing Goodrich 1991).

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