"YOU WILL NEVER FINISH PAYING": CONTRACT AND REGULATION, GLOBALIZATION AND CONTROL

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INTRODUCTION

In Claire Denis' 2005 film L'Intrus,[1] *a man who has been very physically fit and who has led an active life begins to recognize his own physical vulnerability, as he ages and becomes ill with a weak heart. He decides to buy a new heart. Drawing from a sequence of scenes, we surmise that this is to be achieved through the purchase of a heart (and operation) from a clandestine international market in organs and organ transplants. He travels to Switzerland to take money from a bank account to pay for the transaction. He meets a woman in a hotel room, to whom he gives his order for a "young" heart. Scenes of him moving with ease through a number of countries in order to accomplish his project are intercut with scenes of attempts at illicit border crossings, both by people engaged in contraband smuggling and workers* sans papiers.

The film does not operate only at the level of the story of the purchase of a heart: the transaction stands as a metaphor for the practices and effects of globalization, most obviously in the extensive inequalities that exist in a global marketplace through which the privileged can move with ease and benefit. Denis is subtly challenging us to think about the cost to ourselves, the privileged, of globalization. This ethical (and political) challenge to think about what it means to take from others (at such a high cost to them), for our own benefit, is posed in the film through two tropes. Firstly, Denis presents this issue through the metaphor of the heart as "an intruder" in the host body. Does the "new" heart, such a dominant organ, change the "old" person? Is identity, the sense of self, changed? Will the "new" heart prove willing to operate as part of the "old" body? Will the "old" body refuse the

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1. L'INTRUS (Ognon Pictures 2005). The film was inspired by Jean-Luc Nancy's meditation on his own heart transplant, also entitled *L'Intrus*. In 2002, Denis shot a ten-minute film of Nancy conversing with one of his students, entitled *Vers Nancy*. Judith Mayne, *Foreign Bodies in the Films of Claire Denis*, CHRON. HIGHER EDUC. (Wash., D.C.), July 1, 2005, at B10.

"new" heart? Secondly, Denis presents the cost of such a transaction through the metaphor of the contract for the new heart. Having paid the full price demanded for the heart, the protagonist is disconcerted to realize that the woman to whom he paid the money keeps reappearing at different locations: it seems that she is following him. When he confronts her, reminding her that he has already paid the price for the heart, she tells him, "You will never finish paying." She has become not only a continual reminder of his transaction, but also his "own" memory of that which he can never escape: she is now as much a part of him as his transplanted heart. In the final moments of the film, when the credits roll on the screen, her role is named as "the angel of death."[2]

We were asked to give a paper on contracts law for a conference entitled "Teaching from the Left." This task was more than a little daunting. First, the focus on teaching: a good focus, but a problematic one. "Teaching" suggests that we should be thinking primarily about what actually happens in the classroom—the interface with the students. What do we bring to that encounter, and why? And what do we expect of that encounter? For many of us in the United Kingdom, it is increasingly a limited and incremental experience. We face students who want and expect to be "given" information for examination success and who have no wish to receive any evaluative or "critique" material that might discomfort them or disrupt their focus on educational success and career mobility.[3] Students' decreased openness to new and challenging ideas is matched by a clear movement away from any interest in political engagement or "social justice," beyond the expression of platitudes about the importance of "helping" people as a case lawyer, or calls to reform a particular area of law (most often voiced as responses to examination questions). The concept of "from the left" is also rather problematic. As Joanne Conaghan so aptly argues, "the left" can mean many things.[4] And, increasingly for many of the contemporary generation of students, not only is "the left" something with which they have no experience, but it is also often seen through the lens of popular culture, which presents it as a historical matter (and not very positively, at that).[5]

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2. A major theme in many of Denis' previous films has been the detrimental effect on a society and its people of its history as a colonial power. She has explored the cost, at so many levels, of the failure (i.e., the refusal) to deal (collectively and individually) with the consequences of that history as part of a present reality. *See* MARTINE BEUGNET, CLAIRE DENIS 20 (2004).

3. This phenomenon is partly due to factors such as the changing educational profile of students entering universities and the increased financial pressures they face, but may also be explained, we believe, by broader structural changes in patterns of education and the role of universities. Zygmunt Bauman has analyzed these trends from a perspective similar to our own. *See* ZYGMUNT BAUMAN, *Education: Under, For and in Spite of Postmodernity*, *in* THE INDIVIDUALIZED SOCIETY 123, 123–38 (2001).

4. Joanne Conaghan, *The Left: In Memoriam?*, 31 N.Y.U. REV. L. & SOC. CHANGE 455 (2007).

5. *See id.* at 459–61 (discussing the left in popular culture); Zanita E. Fenton, *The Paradox of*

Our project might then be taken as: "How may we try to bring (back) into the classroom of today a more radical agenda, a more critical take on law and lawyering, one that contemporary students may be(come) open to?" But, in our opinion, that is not the right question to ask. Instead, we want to approach the issue from a different perspective. Our basic position is that it is our responsibility, as teachers, to think more carefully and constructively about the areas that we teach. Too often, the presentation of a radical agenda has been thought of as a gloss on, a critique of, and in that sense, an addition to the standard curriculum. In the classroom and at conferences, we still present ourselves as working within given legal subjects: contracts, property, etc. Further, generations of critical legal scholars have (with some very good and notable exceptions) vacated the basic subjects and invested themselves and their work in more overtly interesting subject areas (for example, labor law), or have vacated substantive law entirely to become legal theorists or socio-legal scholars. As a result, there have been critical legal responses neither to recent shifts in legal regulation nor to the ways in which the substantive subject areas (contracts and property in particular) are but being reconstituted and reconfigured in relation to each other.

Our point is very simple, but easily misunderstood: as teachers, we should be critically aware of emerging patterns of law that run counter to traditional legal subject areas, and that may be obscured by our continued allegiance to working within traditional subject areas. Historically, the way legal subject areas were organized and understood helped constitute and secure "the rule of law" and the juridical form upon which the liberal sovereign state depended. In an emerging world order led and constituted by market globalization, we argue that a continued focus on traditional modes of legal understanding both distracts from and secures the emergence of quite different patterns of legal regulation.[6] However, it may well be the case (and we are inclined at this point to think that it is) that continuing to present law—that is, to teach law—in terms of the traditional legal subject areas *can* be a vehicle for a radical agenda capable of critically examining contemporary trends. This trend can occur only if we raise our heads above the parapets of our particular subject areas and think more incisively (and collectively) about the ways in which law is being restructured and redeployed. There is a need to develop a much better "back story" to our subject areas than is, at present, being developed within and through them. This "back story" is not one which we need to present to our students—that is not the issue. Instead, it is the one that should inform the *way* we teach as much as *what* we teach.

Hierarchy—Or Why We Always Choose the Tools of the Master's House, 31 N.Y.U. REV. L. & SOC. CHANGE 627 (2007) (same).

6. This regulation is achieved primarily through incidents of legal validation, as well as through the extenuation of traditional legal forms to the point of their being emptied of any force of "law," as traditionally understood.

Without this form of engagement, radical teachers are left with two increasingly limited forms of expression. The first takes the promise of the rule of law at face value and demands that it deliver (just as the promise of equality and democracy can also be called to account). The second—actually a variation on the first—is to offer radical engagement to students through a narrative that describes "what it's really like out there": usually a story about a lack of rights or lawyers, melded with an implicit (or explicit) promise that rights and lawyers will somehow protect the disadvantaged in an increasingly stratified social order. It is not that there is not some inherent value in either of these moves; it is simply that they are very limited, and increasingly so. If we think more carefully about *how* our subjects were/are constituted, and with what effect, and then move into thinking more carefully about *how* we select and teach the material, we make it possible for our students not only to be trained in the traditions of legal thinking, but also to be made aware of how those traditions were formed and how they are being reformed in our contemporary, global world. We might then, in some small and modest way, make our students, as well as ourselves, a little more aware of the emerging contours of the future, and begin to open up the issue of political engagement within changing patterns of legal regulation.

THE IMAGE OF CONTRACT

In his book examining the systematic organization of private law, Stephen Waddams argues that any analysis of a substantive area of law requires that it be rationalized through processes that stabilize that area.[7] Specifically, the processes use a "core" idea, an essence around which the subject material coalesces, and which, in his terms, comes to operate as a "universal idea."[8] This stable core is preserved through its utilization as a means of policing or determining the boundaries of the subject, but "[t]here is a danger that the universal idea may be used to excise or to marginalize aspects of the past that do not conform to it . . . ."[9] The subject area is, then, stabilized by three techniques: (1) the presentation of a universal core; (2) the exclusion of any aspect that might not conform to this core; and (3) the utilization of history to legitimate the narrative of the universal idea's "success." In practice, we might say that a successful "subject area" of law will be grounded in an ontology of "what it is," an abstract trope, reinforced with an account of its evolution, a historical trope.

Waddams is interested in the ways in which arguments are constructed in order to reconceptualize a subject area around an alternative "universal idea." He posits that such arguments follow a basic pattern: (1) a rational legal scheme is proposed, based on selected historical materials; (2) the proposed scheme is supported by an argument that it will have desirable consequences if applied in

7. STEPHEN WADDAMS, DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS IN ANGLO-AMERICAN LEGAL REASONING 222 (2003).

8. *Id.*

9. *Id.*

the future (in terms of juridical coherence); and (3) material that does not fit into the scheme, and which therefore threatens to destabilize it, is presented as simply anomalous or wrong.[10] In Waddams' view, such an approach unnecessarily simplifies and distorts: instead, the "anomalous" case is often a consequence of the law's being utilized across a heterogeneity of private law subjects (most notably, contract, tort, property, and unjust enrichment), rather than an exception to the proposed scheme. In other words, the seemingly tight and impervious subject areas are, in practice, porous; much development in the law takes place in the interstices between subject areas. It is also worth noting, as Waddams does,[11] that the very proliferation of seemingly distinct legal areas provides a useful means by which to marginalize and exclude topics that would be problematic or paradoxical within what might be thought of as the "original site."

Waddams draws our attention to the amount of energy employed in continuing to try to stabilize the core subject areas. Attempts to maintain internal coherence and to justify the existence of a discrete subject area are particularly apparent in contemporary work on contracts and property. We have been interested not only in the strategies that Waddams identifies, but also in how often in textbooks, monographs, scholarly articles, and course materials authors refer to other authorities that seem to provide stability to a subject area. In particular, and importantly, authors often appeal to "philosophical justifications"[12] and, simply, to "common sense," suggesting that (*if all else fails!*) we all "know" what a contractual relationship is, or will recognize property when we see it. There is, obviously, a great deal invested in perpetuating these tropes.

THE CLASSICAL MODEL (AND ITS REFINEMENTS)

The classical model of contract is well-known. For our purposes, suffice it to say, as Hugh Collins does, that it is a "doctrinal system of thought" dependent upon a "relatively small set of fundamental principles."[13] Collins goes on to say that "[t]he unity and simple analytical framework of the law of contract . . . established a closed system of thought which necessarily excluded inconsistent rules and doctrines."[14] Equally well-known are the ideas of liberal individualism that helped to formulate and rationalize the model. The classical model remains a fundamental legal model for thinking through problems of law and, for this

10. *Id.* at 222–23. It will be evident to the reader that this pattern parallels the use of doctrinal analysis in legal argument and in the presentation of judicial decision-making.

11. *Id.* at 224–25.

12. Typically authors include a reference to well-worn "social contract" theorists such as Hobbes or "property" theorists such as Locke and Hegel, with little consideration of the times in which these theorists wrote or the context of "private law" references within their larger works on state and government.

13. HUGH COLLINS, THE LAW OF CONTRACT 3 (4th ed. 2003).

14. *Id.* at 7.

reason, also influences our thinking about legal actors: the actions of the ubiquitous "reasonable person" establish a benchmark for when it is appropriate to recognize, enforce, and protect privately created legal rights.

Many writers have commented upon the inaccuracy of the classical model in actual practice. Collins himself writes:

> Whilst the legal presentations of the law of contract may have stalled, the market system and the content of legal regulation have altered dramatically. The classical concept of contract law now prevents us from understanding the significance of these developments by treating them as irrelevant or distorting their implications.[15]

Limitations imposed by the classical model account for the increasing interest in developing, for instance, "relational contracts theory."[16] However, we question whether such developments really "destabilize" classical contracts theory, or whether they attempt to achieve a more modern (and more open) version of classical theory. Further, the manner in which a contract should be defined or described precisely, and how such definitions and descriptions fare in practice, assumes that there is a correct model (or at least that some models are to be preferred over others), which may be referred to when determining the legitimacy of an individual instance of contracting. Whether one favors the classical model, relational theory, or some other formulation, the basic process remains juridical and doctrinal: reasoning by analogy, or the combination of the universal core of contract law with differentiation on the facts. It still tends to be limited to an account of what most conventional contracts lawyers would recognize as the "proper" territory of contracts (private law) and still presumes to offer an internally rationalized account with well-policed (if modified) boundaries.

If scholars such as Hugh Collins recognize directly and incisively the limitations of the classical model, we need to ask how far, and with what efficacy, the idea of "contract" can be extended. Collins describes "the law of contract" as "those rules, standards, and doctrines which serve to channel, control, and regulate the social practices which we can loosely describe as market transactions."[17] Collins makes clear that he is not concerned with "social practices" so much as he is with "market transactions," but within this context he recognizes that "[b]y emphasizing how modern ideals of social justice channel market transactions into approved patterns, this conception of contract removes the assumption that the law provides an open-ended facility for making binding commitments."[18] Two points can be drawn from this. First, Collins recognizes that crucial issues such as inequality in bargaining power and ongoing

15. *Id.*

16. *See, e.g.*, IAN MACNEIL, THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL (David Campbell ed., 2001); IMPLICIT DIMENSIONS OF CONTRACT (David Campbell, Hugh Collins & John Wightman eds., 2003).

17. COLLINS, *supra* note 13, at 9.

18. *Id.*

social/market relations may be policy factors that call for not only modification but also regulation of the "private" nature of contractual relations. Second, by implication, modern contracts law must operate within a terrain that is informed and constructed by imperatives other than "internal" doctrinal coherence.

There is another aspect to Collins' "picture" of modern social relations and contracts. Whilst some aspects of contracts have become subject to "external" regulation, other areas seem to have "opened up" to the utilization of contractual forms. In a chapter entitled "The Contractualization of Social Life," Collins examines the increased use (in England and Wales) of pre-nuptial contracts, as well as the potential for cohabitation contracts.[19] Domestic relations, in the English juridical tradition, have not been seen as amenable to a "contractual" approach, and few contracts books or courses would include such material within their purview. The presence of the chapter in Collins' work marks an interesting development in contracts law: not only that the "contract" might have applications outside of standard market relations, but also that this development might mark the emergence of a rather different pattern in the application of contractual relations. However, such a possibility would not be as apparent from Collins' perspective, which views this development in the context of classical contract theory, and which aims to refine the traditional model in light of "modern ideals of social justice."[20]

Collins is restricted not only by his entry point through classical contracts law, but also by his focus on "modern ideals of contemporary social justice."[21] His critique of classical contracts law remains grounded in a series of necessarily backward-looking assumptions about the relationships among the market, the state, and the law. He does not go far enough in considering what the implications of "contractualization" are, especially as this practice becomes enfolded in other regulatory regimes.[22] It is our contention that "contract" is being harnessed as a tool by a power that is concerned with much more than the limits of law, a power that has ceased to operate within the divisions that make distinctions such as private/public, freedom/coercion, individual/society, etc., particularly useful. This power can only be understood within the context of globalization and the consequent regimes of control that operate both through and beyond the nation-state.

STARTING IN A DIFFERENT PLACE

Zygmunt Bauman argues that "globalization" must also be understood as a

19. *Id.* at 94–113.

20. *Id.* at 9.

21. *Id.*

22. *See, e.g.*, LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006) (describing diverse approaches to problem-solving and governance in the U.S. and Europe).

process of "localization," a process of miniaturization and differentiation.[23] It is not just a question of supra-state forces and networks, but also how these play out within state territories: sovereignty is both subsumed and imploded. Linking this argument to Foucault's analysis of governmentality post-Panopticon[24] and to Deleuze's similar model of the development of "control" societies,[25] we gain a perspective from which to look at the changing role of law, moving from its classical juridical form into emerging regulatory practices.

There are many, often seemingly banal, practices that seem (in contemporary terms) to be on the margins of law, and hence hardly "of law." Therefore, they are not something to which lawyers give much consideration; yet, they indicate important shifts from traditional forms and practices of governance. Two examples will suffice at this point—we will return to them both in more detail. The first is the emergence of what Rick Abel, twenty years ago, exposed under the rubric of "informal law": processes outside the formality of courts, doctrinal argumentation, and rights. Despite their flaws, these processes were presented as suitable forms of adjudication for the dispossessed and most vulnerable sections of society, effectively excluding them from traditional juridical processes.[26] Donzelot, working within a frame similar to that of Foucault and Deleuze, argued that such developments should be seen as targeting certain groups within society and subjecting them to a specific form of governance in which they are constructed as subjects in need of tutelage, rather than as subjects in possession of rights.[27] The second example is the emergence in the United Kingdom of a discourse on "anti-social behavior." This behavior reaches beyond the traditional purview of criminal law to target and control behavior that has, in the language of the Crime and Disorder Act of 1998, "caused or is likely to cause harassment, alarm or distress" to someone who is not a member of the same household.[28] The Act allows for "anti-social behavior

23. Bauman reiterates this theme in several works. *See* ZYGMUNT BAUMAN, COMMUNITY: SEEKING SAFETY IN AN INSECURE WORLD (2001); ZYGMUNT BAUMAN, GLOBALIZATION: THE HUMAN CONSEQUENCES (1998); ZYGMUNT BAUMAN, IDENTITY: CONVERSATIONS WITH BENEDETTO VECCHI (2004).

24. *See* Michel Foucault, *Truth and Juridical Forms* (1974), *in* 3 POWER: ESSENTIAL WORKS OF FOUCAULT 1954–1984, at 1 (James D. Faubion ed., Robert Hurley trans., The New Press 2000) (1994) [hereinafter ESSENTIAL WORKS].

25. *See* Gilles Deleuze, *Postscript on Control Societies* [hereinafter *Postscript*], *in* NEGOTIATIONS, 1972–1990, at 177, 177–82 (Martin Joughin trans., Columbia Univ. Press 1995) (1990). In our opinion, Deleuze offers a much clearer model than Foucault for understanding the post-Panopticon form of regulation, as it sharply distinguishes the emerging pattern from disciplinary regimes.

26. Richard L. Abel, *The Contradictions of Informal Justice*, *in* 1 THE POLITICS OF INFORMAL JUSTICE 267, 277–79 (Richard L. Abel ed., 1982). *See generally* Richard Abel, *Introduction* to 1 THE POLITICS OF INFORMAL JUSTICE 1–13; Richard Abel, *Introduction* to 2 THE POLITICS OF INFORMAL JUSTICE, 1–13.

27. JACQUES DONZELOT, THE POLICING OF FAMILIES 93–94 (Robert Hurley trans., Random House 1979) (1977).

28. Crime and Disorder Act, 1998, c. 37, § 1(1)(a) (Eng.). *See also* The Anti-Social Behaviour Act, 2003, c. 38, § 36 (Eng.) (permitting dispersal of a person whose behavior "causes

orders" to be imposed by the courts, which can, for instance, order the "offender" not to enter a particular area, indulge in specified behavior, wear certain clothing, or meet specified people, for a period of time (which can be a number of years).[29] Breach of an order can result in imprisonment.[30] The orders themselves are set within a civil frame of law, with rules of civil procedure, but the breach of such orders is treated within a frame of criminal law.

Both informal law processes and anti-social behavior legislation have proven to be somewhat difficult for legal scholars to define and analyze. Is "informal law" an extension or a contraction of "law"? Is anti-social behavior law an extension or contraction of criminal law? In relation to both, sociologists and criminologists have begun to consider how practices of governance coalesce around two important axes: a rhetoric and practice of "partnership" between state agencies and non-state agencies (including the community), and a rhetoric and practice of encouraging or enforcing "individual responsibility."[31] This structure fits very neatly into Bauman's analysis of globalization, in its impact on the notions of community and individualization as central motifs of the changing practices of governance.[32]

Viewing "globalization" from this perspective, we argue that the most crucial and appropriate legal form for thinking through the many dimensions enfolded in that term is the contract. However, our conception of the contract is not one that has been derived from classical contract theory or its modifications. It is, rather, a form that bears some relationship to what we have been taught to think of as contracts, but that can be neither described nor understood as a concept that would attempt to enforce doctrinal clarity.

To properly ground our argument, we must locate "the contract" as a juridical form within a specific historical frame. Classical contract theory is the product of two tropes. The first is a political/philosophical theory that deployed the model of the "social contract" as a means of explaining the development of a state. The state's foundational myth is the collective agreement of each and every member of the populace to be governed by and to submit to the rule of law. The second is a knowledge-based discourse that required governance and

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or is likely to cause harassment, alarm or distress" to a member of the public).

The rapid growth in anti-social behavior law is also marked by the publication of the first textbook in the area: SCOTT COLLINS & REBECCA CATTERMOLE, ANTI-SOCIAL BEHAVIOUR: POWERS AND REMEDIES (2004). The authors tell us that the United Kingdom is "the world leader in anti-social behaviour law" with "an emerging body of case law." *Id.* at vii. They also note a "philosophical background" to this area of law; unsurprisingly, it is communitarian. *See id.* at 6.

29. *See* Crime and Disorder Act, 1998, c. 37, § 1.

30. Crime and Disorder Act, 1988, c. 37, § 1(10).

31. See, in particular, the extensive and groundbreaking work of Adam Crawford, particularly in relation to the most recent developments in policing and the discourse of anti-social behavior. ADAM CRAWFORD, THE LOCAL GOVERNANCE OF CRIME: APPEALS TO COMMUNITY AND PARTNERSHIPS (1997). *See generally* DEMOCRACY, SOCIETY AND THE GOVERNANCE OF SECURITY (Jennifer Wood & Benoît Dupont eds., 2006).

32. *See supra* note 23 and accompanying text.

law, as systems of knowledge, to be presented and exercised through rational (that is, reasoned and scientifically organized) practices. As a means of supporting the sovereignty of the liberal-democratic state and the capitalist market economy, the confluence of these two tropes worked sufficiently well. However, the changes in international capital that we refer to as globalization require and make possible a different understanding of contracts.

The contract is fast becoming the legal form used to describe the relationship between the citizen and the state, as well as the citizen's relationships with other citizens. But this conception of the contract is not derived from the traditional narrative of the "social contract." This contract, to the extent that it is an instrument of governance within globalization, no longer refers to any juridical grounding outside of itself. More straightforwardly, contract is itself becoming a "regulatory technique."[33] This conception of the contract displaces, but does not erase, the more traditional conception of the contract as a juridical model, grounded in and legitimated by a broader socio-legal context. Under globalization, contract no longer refers to anything except the *specific instance* of its deployment, and is legitimated on that basis alone. Contract is becoming "immanent," meaning that it is ceasing to have a context in which it is used. This puts contract at the forefront of globalization and its accompanying regime of "regulatory governance," which, following Deleuze, we refer to as "control."[34]

Within globalization and control there is no concern to delineate how the contractual form should be applied, or to determine whether it should be applied to a growing number of nonmarket relationships. Regimes of control are marked by the absence of those distinctions that characterized previous (sovereign and disciplinary) regimes. At this stage, it is perhaps easiest to say that contract has become *a matter of recognition*. By this, we do not mean, simply, that what two parties agree to do can be recognized as a contract. We mean, rather, that the parties concerned recognize themselves to be entering into a transaction, and, on that basis alone, are liable for the consequences that might follow. This does not mean that the consequences are actually borne by the intended party. Indeed, we can assume that in most cases, they are not. The important observation to make is that the recognition that liabilities may result is enough to legitimate their enforcement, if necessary.

The remarkable differentiation of the law itself makes visible the shift in modern understandings of contract. Most notably, consumer and employment issues have been detached from the main body of contract law, and are now

33. Our use of "regulation" must be distinguished from its usage among scholars investigating "regulation" as a pattern of "new governance," in which citizen participation is viewed as a major asset. *See, e.g.*, LAW AND NEW GOVERNANCE, *supra* note 22. Hence, "regulatory technique."

34. Deleuze, *supra* note 25, at 174–75.

treated as a distinct specialty.[35] However, excluding certain issues as no longer "properly" within the boundaries of contract law obscures the full extent and variety of its application. This differentiation of the law makes it difficult to ascertain the diverse ways in which contract law is deployed across various areas of social life. More importantly, it inhibits any consideration of the potential of contract, of what it *might* be. The continued preservation of the classical model of contract is at the heart of this obfuscation. A subset of transactions may be removed from contract law proper and given its own set of rules, but the classical model, even if modified, is, nevertheless, thereby sustained. We argue that control does not extend contractual application, but rather exercises a power that uses elements of the contractual form such that we have to think differently about the use and application of the classical model. To do this, we need to consider the way in which our understanding of substantive areas of law has been constructed.

THE IMAGE OF THOUGHT

To clarify these points, it is useful to turn to Deleuze's concept of "the image of thought."[36] The concept refers to that which must be presupposed (rendered axiomatic) in order for thought to be possible. Philosophy always encounters the non-philosophical, but in a way that is strictly philosophical, insofar as it must constantly readdress the question of what has been presupposed. The purpose is not to dismiss a system by revealing a central constitutive blindness that would irrevocably undermine the system in question, but rather to make the image of thought productive of the act of thinking itself. This is why philosophy must engage the non-philosophical—not to differentiate itself, but to constitute itself.

If the image of thought is not made an object of analysis, then any system that it grounds will tend towards dogmatism, what Deleuze refers to as "doxa." Deleuze writes of two specific problems (amongst others) created by the doxic: common sense and good sense. Common sense is that which "everybody knows," which does not require questioning or reconsideration because "everybody (already) knows" it to be the case. Good sense is "directional," meaning that it gives an unstated orientation to thought. The Platonic image of thought is the clearest example of this, in which knowledge is equated with truth and good will. Truth and knowledge are equated and, within their own terms, it is therefore good and best "to know."

Taking good sense and common sense together, Deleuze is not content to

35. Collins demonstrates the consequences of this shift in his excellent consideration of how one "classical" nineteenth-century case, *Carlill v. The Carbolic Smoke Ball Co.*, (1893) 1 Q.B. 256, still taught as foundational within the traditional curriculum, would be dealt with today. COLLINS, *supra* note 13, at 8.

36. *See* GILLES DELEUZE, DIFFERENCE AND REPETITION 129–67 (Paul Patton trans., Columbia Univ. 1994) (1968).

equate knowledge with recognition. Instead, he rejects an image of thought within which knowledge is equated to recognition. By this he means that the philosophical force of thought must be disengaged from simplistic and superficial repetitions, whereby something becomes an item of knowledge on the basis of its correspondence to accepted, pre-established images of thought. In such cases, knowledge is simply a matter of correctly recognizing a thought's proper place. For Deleuze, this is intolerable, as it reduces philosophy to a practice of bookkeeping, rather than allowing for the creative act of rendering new concepts, new subjectivities, and new modes of life.[37]

For Deleuze, the practice of philosophy is not to ground the proper origin of thought, but rather to destabilize it, thereby forcing it into creativity. Deleuze, as a philosopher, is thus uninterested in beginnings. For him, thought is always in the middle of something, always already becoming the in-between, and not striking out, teleologically, from a beginning to a satisfying conclusion. An event or phenomenon is not a matter of either/or, but of "becoming."[38]

From this perspective, there can be no claim premised upon originality or priority in time. There is only the present circumstance of these things and their potential capabilities. Therefore, for instance, to recognize oneself as being of a particular race or gender is of no interest or relevance to philosophy, if this is understood simply as a matter of either/or: either I am a man or a woman; either I am black or white; either I am Jewish or Muslim; etc. Such determinations hold no future for philosophy insofar as they presuppose a common sense or approve of a good sense that would impose limits on thought and life, rather than provide new ways to live.[39] Recognition presupposes a starting point, an undeniable right in origins, that settles and limits the potential of the present. We return to this issue of recognition later in the paper.

Within the context of law, how should law be thought of in relation to its own "image of thought"? In our view, Hans Kelsen provides the clearest analysis of this question.

THE VALIDITY AND EFFICACY OF NORMS

Hans Kelsen does not believe that thought—in this case, legal thought—is a matter of simply finding the right or most correct set of presuppositions from

37. GILLES DELEUZE & FÉLIX GUATTARI, WHAT IS PHILOSOPHY? 215–18 (Hugh Tomlinson & Graham Burchell trans., Columbia Univ. 1994) (1991).

38. GILLES DELEUZE & FÉLIX GUATTARI, A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA 232–309 (Brian Massumi trans., Univ. Minn. Press 1987) (1980) [hereinafter DELEUZE & GUATTARI, A THOUSAND PLEATEAUS].

39. These designations can have a positive effect, but only to the extent that they are understood as processes of individuation or becoming: one is caught up in a becoming-woman, becoming-Jew, etc., in which one is not quite sure if one is a man or a woman, a Jew or a Christian or a Muslim, and this ambiguity (this imperceptibility) means that the way is open to extract new arrangements for living from the current circumstance. *See id.*

which to construct the best system of law.[40] Not only is Kelsen clear that the application of a legal norm always presupposes the norm's validity; he also, in his rejection of natural law, refuses any notion that the law is, in itself, good and true.[41] Instead, Kelsen describes a dynamic process of production. Legal norms are produced and are valid as such, not because they inherently recognize truth, but because they pertain to the requirements of a particular circumstance. Kelsen says that "[l]aw regulates its own creation,"[42] which we may read through Deleuze as meaning that law is always in the middle, never at the start.[43] If this were not so, the law would never be able to begin, because it would never escape the absence of its own grounds.

A legal norm is therefore valid if it is produced in a manner that is properly acceptable within the context of a grounding (or basic) norm, which is presupposed. However, it should not be thought that a legal norm is therefore valid only insofar as it corresponds to a basic norm. If that were the case, validity would be a simple matter of recognition. Kelsen refers to this as a static system of law, because it presupposes that all legal norms could be reasoned out from the starting point of the basic norm, and that jurisprudence could discover the full extent of the law by simply deducing the particular from the general. Reading Kelsen through Deleuze, we find a concern in Kelsen's work for an image of legal thought that ungrounds the law—in other words, new and unforeseeable legal norms are always capable of being produced not as mere augmentation, but as transformative of certain aspects of the legal order. Kelsen writes, "The function of the basic norm is to make possible the normative interpretation of certain facts, and that means, the interpretation of facts as the creation and application of valid norms."[44] Considering the function of the presupposed in law, we can say that the law is not a static edifice that endures universally and eternally. Instead, it is a pragmatic working out, in a given circumstance, of what the law should be recognized as, given the restraints of a basic norm or image of thought in those circumstances. Therefore, Kelsen is not content simply to identify an image of thought in law, but also seeks to understand the productive capacities of this image. To this end, he draws a distinction between the "is" and the "ought."[45]

To understand the full force of Kelsen's analysis, it is necessary to trace backward. He writes that there is a distinction between efficacious law and valid law.[46] The question of efficacy does not relate to any given, individual norm, but rather applies to the system of norms as a whole. A system is efficacious if,

40. *See generally* HANS KELSEN, GENERAL THEORY OF LAW AND STATE (Anders Wedberg trans., 1973) (1945).

41. *Id.* at 115–16.

42. *Id.* at 124.

43. *See supra* notes 36–38 and accompanying text.

44. KELSEN, *supra* note 40, at 120.

45. *Id.*

46. *See id.* at 41–42.

on the whole, "men actually behave as, according to the legal norms, they ought to behave, [and] the norms are actually applied and obeyed."[47] Kelsen goes on to write that efficacy is not a quality of the law, but rather a characteristic of those who obey the law.[48] On the other hand, validity is a quality of the law, and depends upon the circumstances of the particular production of norms. Nevertheless, there is an important connection between validity and efficacy:

> A norm is considered to be valid only on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious. Thus, efficacy is a condition of validity . . . . A norm is not valid *because* it is efficacious; it is valid *if* the order to which it belongs is, on the whole, efficacious.[49]

Kelsen then relates the concepts of "is" and "ought" to the validity and efficacy of the law.[50] The "is" corresponds to the efficacy of the overall system, while the "ought" applies to individual norms in the sense that, because the norms are valid, they ought to be observed:

> Seeing that the validity of a legal order is thus dependent upon its efficacy, one may be misled into identifying the two phenomena, by defining the validity of law as its efficacy, by describing the law by "is" and not by "ought" statements. . . . For, if the validity of law is identified with any natural fact, it is impossible to comprehend the specific sense in which law is directed towards reality and thus stands over against reality.[51]

The law is valid if it is accepted within an efficacious basic norm, which is dependent upon the current circumstances of human behavior. Human behavior is therefore simultaneously what "is" and the subject of what "ought," understood as how one ought to behave. This reiterates the point that law is both self-productive and self-referencing. The image of legal thought is something that is both established and presupposed on the one hand, and ungrounded and in need of rethinking on the other. We can link Kelsen to Deleuze by saying that law must be understood as "a matter of becoming."[52]

Though we may read Hume as saying that the social contract is a fiction,[53] we can see from Kelsen that it is nevertheless a productive fiction, because it validates the production of secondary norms. The social contract is a presupposed image of thought that grounds the existence of law (the law "is" to

47. *Id.* at 39.

48. *Id.* at 39–40.

49. *Id.* at 42.

50. *Id.* at 120.

51. *Id.* at 120–21.

52. *See* DELEUZE & GUATTARI, A THOUSAND PLATEAUS, *supra* note 38, at 232–309.

53. DAVID HUME, A TREATISE OF HUMAN NATURE 317 (David Fate Norton & Mary J. Norton eds., Oxford 2000) (1739). Specifically, Hume rejects a "state of nature" prior to any social contract, and consequently rejects the "social contract" as well. *Id.*

the extent that human behavior complies with it) and the production of law (human behavior "ought" to comply with it).

Because Kelsen separates efficacy and validity, a law might be valid even though it is inefficient. That is, a law, if it has been produced in the accepted manner, is valid even though it might be broken. This gap between validity and efficacy signifies a gap between law and human behavior. Human behavior cannot be reduced to a matter of legal analysis; it goes beyond the law. This is not a refutation of the law but rather the necessary ground for its existence. As Kelsen says, "[A] certain antagonism between the normative order and the actual human behavior to which the norms of the order refer must be possible. Without such a possibility, a normative order would be completely meaningless."[54]

FROM LAW TO CONTROL

Law must have something that resists it, something on which it may be exercised. In this sense, the ground of law, the image of legal thought, acts to keep questions of efficacy distinct from those of validity. However, this ceases to be the case under a regime of control. Under a regime of control, the ground of law rises up to become nothing but a series of surface effects. Control, we might say, has not only become aware of the problem of what grounds it, but now seizes upon this problem as the very mode of its deployment. It would seem that law has become indistinguishable from Deleuze's "virtual philosophy."[55] This would be correct but for one important point: law, unlike philosophy, is an exercise of power. What is virtualized under a regime of control is not life, but the use of power.

Using Kelsen's analysis, we may see that under a regime of control, validity and efficacy become the same problem; "ought" becomes increasingly indistinguishable from "is."[56] In other words, a norm is valid not because it refers back to a basic norm functioning as a presupposition of efficacy for the overall system, but because the particular secondary norm is *directly* concerned with the question of efficacy: it is valid only to the extent that it is efficacious.[57] Similarly, the aim of a regime of control is not to make the overall system efficacious by achieving an acceptable degree of behavioral compliance. Rather, it is the *individual's* behavior that must now comply with legal norms. To the extent that an individual fails so to comply, he or she does not merely break the law but calls the very validity of that law into question.

In this development we can locate a path already travelled by Foucault. The collapse of validity and efficacy into each other corresponds to an increasing individualization in the deployment of law. Compliance with the law is part and

54. KELSEN, *supra* note 40, at 120.

55. For an example of Deleuze's concern with the virtual, see GILLES DELEUZE, BERGSONISM (Hugh Tomlinson & Barbara Habberjam trans., Zone Books 1988) (1966).

56. *See supra* notes 45–54 and accompanying text.

57. *See supra* notes 50–54 and accompanying text.

parcel of an individualized "care of the self," in which the aim is to regulate the individual through "auto-normalization." Rather than consider the question of a norm's validity by reference to a basic norm, it is the validity of the individual that is in question, as judged by her ability to comply with legal (or, more accurately, regulatory) norms.[58]

From this perspective, failure to comply with a norm marks the individual as abnormal, while simultaneously calling the validity of the norm into question. However, because the norm is no longer related back to a broader contextual system for the creation of norms, the failure of a norm simply requires the production of a new norm to rectify it. In this way, control is just as self-producing as Kelsen's normative order, but in a much more intensive and interventionist way. Control is the attempt to bring an ever-increasing amount of human behavior under normative regulation. Rather than the resistance of human behavior providing the ground for law's intervention, that intervention is legitimated by the law's own failure, its own inefficacy.[59]

To clarify this development, it is useful to turn to Jacques Donzelot's work on the welfare state.[60]

CONTRACT AND SOLIDARITY

The attraction of Donzelot's work is his explicit consideration of the relationship between power and resistance (that is, between the state and society) as a regime of contractualization. The classic image of the social contract is that of a basic norm: an originary contract that legitimates all subsequent relations between state and society. There is, in this conception of the social contract, a fundamental paradox:

> 1. If right resides solely in the individual, the individual may always repudiate and paralyze the intervention of the state.
>
> 2. If the state is the embodiment of the general will, the active synthesis of individual sovereignties and powers, there is nothing left to oppose the state, and nothing can contest it.

This paradox points to the failure of a basic norm, i.e., the failure of a sovereignty that bases its legitimacy on a grounding moment to validate all

58. Foucault traces this development in his lectures at the Collège de France. *See* MICHEL FOUCAULT, ABNORMAL: LECTURES AT THE COLLÈGE DE FRANCE 1974–1975, at 25–26 (Valerio Marchetti & Antonella Salomoni eds., Graham Burchell trans., Picador 2003) (1999) [hereinafter LECTURES].

59. We find a correspondence here with the work of Hardt and Negri, who describe law under Empire as both exceptional and interventionist. *See generally* MICHAEL HARDT & ANTONIO NEGRI, EMPIRE (2000). The law is interventionist insofar as it seeks to regulate life in ever more miniscule detail, to the point of regulating the very affections and feelings of the human body; it is exceptional because it lacks any ground upon which such interventions can be justified. Therefore, the act of intervention becomes its own legitimation. *See id.* at 34–38.

60. *See generally* DONZELOT, *supra* note 27.

subsequent acts of state. Confronted with the growing inefficiency of a basic norm (the failure, over a period of time, to keep up with changes in "reality"), the state seeks legitimation in what Donzelot calls "solidarity."[61]

Solidarity is marked by two seemingly opposite trends. On the one hand, it refers to a kind of social cohesion: individuals form groups based upon particular similarities or identities. On the other hand, there is increasing individualization, expressed in terms of a responsibility for the self. The state is no longer legitimated through its correspondence to generalized human behavior, but rather by its adaptability in interfacing with a broad range of smaller "interest groups." At the same time, this interface is articulated through a modulatory power[62] over the individual, by making the individual responsible for her compliance with processes of normalization. The two aspects of solidarity meet in the sense that, when the individual assumes the responsibilities of care of the self, she has an array of choices as to which identity groups she will enter. Such groups potentially cover the whole of life, presenting a series of "lifestyle" options about employment, gender, religion, consumption, expressions of ethnicity, and so on. In such circumstances, the individual is subject to control to the extent that she exercises her choice about which identity groups she will enter. Furthermore, the mode of entering such groups is contractual.

The mode of contractualization here does not necessarily correspond to technical legal models. For example, it does not meet the requirements of the classical model inasmuch as the classical model requires that there be intention, offer and acceptance, consideration, and certainty.[63] However, we are justified in characterizing control as operating through contractualization if we recall the liberal underpinnings of the classical model: freedom of choice as to when and how contracts are entered into and pursuit of self-interest as the motivation for contracting.[64] Because one freely chooses to enter a contract as an individual, one becomes automatically responsible, as an individual, for the obligations that one has undertaken. To be clear: in this model, unlike the classical model, one is not obligated because one's behavior, along with that of the party one is transacting with, corresponds to a legitimating basic norm. Rather, one is obligated simply because one has chosen to be obligated. In a sense, this model could be traced back to the origins of common-law contract, insofar as it is based on *promise* rather than agreement.[65] What is specific to control, however, is the extent to which this contractual choice is deployed as a means of regulation.

Control creates a situation in which normalization is expressed through

61. *Id.* at 48.

62. On control as modulation, see Deleuze, *Postscript*, *supra* note 25, at 178–79. *See also* Brian Massumi, *Requiem for Our Prospective Dead*, *in* DELEUZE & GUATTARI: NEW MAPPINGS IN POLITICS, PHILOSOPHY, AND CULTURE 40, 56–58 (Eleanor Kaufman & Kevin Jon Heller eds., 1998).

63. *See supra* notes 13–15, 17–18 and accompanying text.

64. *Id.*

65. For an analysis of the distinction between promise and agreement, see GEOFFREY SAMUEL, UNDERSTANDING CONTRACTUAL AND TORTIOUS OBLIGATIONS 38–39 (2005).

contractualizations (that is, individual decisions to join identity groups), but also, and simultaneously, abnormality is expressed in terms of one's failure to meet all of the obligations one has assumed by choosing to join a particular identity group. In such circumstances, it is no surprise that such groups should serve as sites of excessive Puritanism: identity groups regularly attempt to purge themselves of those who are abnormal, while the abnormal branch off to form their own, new identity groups. The tendency of control is, in this sense, to be ever more specific in its regulation of individuals.

Overall, we can mark the change attendant to this notion of "solidarity" as a shift from a centralized, juridical model to a distributed, regulatory one. Such a shift goes hand in hand with changes in the deployment of norms: no longer confronted with a unified system premised upon a shared basic norm, rule of the people is displaced by the regulation of populations. A population is understood as an amalgam of individuals, perceived in terms of their productive capacities, as statistically determined through the modelling of identity groups.[66] Through the statistical modelling of a people as a population, the state is able to calculate the most efficacious means of intervening in that population, so as to extract from it the highest productive capacity.[67]

The noteworthy aspect of this development, as Donzelot's interest in the welfare state demonstrates, is that intervention in the affairs of the population is characterized as being "in the best interests" of those being regulated. This is essentially a utilitarian argument, albeit one in which the emphasis is not so much upon happiness as productive ability. The significance of the elision, here, of validity and efficacy must be appreciated as a matter of auto-normalization: to the extent that an individual does not operate at her full productive capacity, she is abnormal. State intervention is necessary to rectify this abnormality. The form of this state intervention is, invariably, the provision of more choices. The process of auto-normalization, though serving the interests of the state, is thus presented as a matter of individual choice:

> 1. Within the context of populations, any given individual is potentially abnormal.[68]
>
> 2. That abnormality finds expression by reference not only to the identity groups with which one chooses to transact, but also to one's relationship within that group to the statistical norm that characterizes

66. On the significance of statistical knowledge in this context, see generally IAN HACKING, THE TAMING OF CHANCE (1990). On the regulation of population, see generally Foucault, ESSENTIAL WORKS, *supra* note 24.

67. This trend culminates in consumption becoming the primary mode of production. Deleuze and Guattari analyze the trend in terms of anti-production. *See* Gilles Deleuze & Félix Guattari, *Savages, Barbarians, Civilized Men*, *in* ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA 139 (Robert Hurley, Mark Seem & Helen R. Lane trans., Univ. Minn. Press 1983) (1972).

68. *See, e.g.*, FOUCAULT, LECTURES, *supra* note 58, at 304–5 (arguing that the situating of mental abnormality in childhood renders the entire population abnormal).

it.

> 3. Insofar as the individual wishes to be normalized, and to the extent that she is not, she is a "victim." The individual then chooses, apparently freely, to transact with those identity groups that, on the basis of statistical modelling, she hopes will normalize her. Self-interest thus becomes indistinguishable from "community interest."

The validity of interventionist law is not based on its correspondence to a basic norm, but on how efficaciously it "helps" the victim. Norms therefore proliferate with and through identity groups, and, in this manner, ever more refined and specific identities articulate the exercise of control. When regulatory interventions are presented as a matter of choice, they are automatically legitimated. For this reason, as Zygmunt Bauman appreciates, one is free to make any choice, save for the choice not to choose: this is the extent of one's autonomy.[69] Furthermore, one is free to choose, so long as one chooses in a manner that is responsible (i.e., efficacious); to do otherwise is "anti-social." Such responsibility is itself premised upon statistical knowledge: one acts rationally by choosing the most likely path to success. The great success of control is to make individuals want to be controlled.

One consequence of this is the ongoing fusion of the private and public realms. To express this in terms used by Kelsen, legal norms are increasingly dependent for their validity upon their efficacy, efficacy itself being dependent upon a statistical knowledge of populations.

GLOBALIZATION

If, following Donzelot, we view state power as increasingly a matter of solidarity rather than sovereignty, then we should recognize that "law" is in a process of de-emphasizing classical juridical images of law while creating and applying new, regulatory images of law. As a result, the courts, judges, and lawyers no longer enjoy the prominence they once did as key figures of law. Indeed, they are increasingly seen as "blocking" the efficacy of law, while the legislature and "police" replace them as the upholders of legal order.[70] As Prime Minister Blair constantly reminds us in the United Kingdom, the traditional juridical apparatus is failing in the face of new problems: terrorism and disorder.[71] What is disorder if not regulatory failure? What is "international"

69. BAUMAN, COMMUNITY, *supra* note 23, at 61–66.

70. But it is not necessarily the "state police" who take on this function. Indeed, policing is increasingly portrayed as a function that requires "partnership" between state and private agencies, as well as between those agencies and individual members of the community. *See* CRAWFORD, *supra* note 31, at 55–60. *See generally* DEMOCRACY, *supra* note 31.

71. *The Observer*, a British newspaper, recently published a particularly trenchant email exchange between Tony Blair and Henry Porter (a "liberal" journalist for *The Observer* and one of the leading media critics of the government's many attacks on civil liberties). *Focus: Freedom and the Law: Britain's Liberties*, THE OBSERVER (London), Apr. 23, 2006, at 20.

terrorism, the threat that is both within and outside our borders, if not yet another sign of globalization? Here we begin to see what the "global" dimension of law means: not so much the problem of global legal institutions, but rather the way in which the global is utilized in local interventions and regulation.[72]

In the United Kingdom, both terrorism and the terrorist mark the pure abstraction of regulatory intervention, inscribing a virtual threat that envelops the globe yet is able to actualize itself locally, seemingly at will. This presents us with a global threat that is utterly unforeseeable and inevitable—a matter not of "if" but of "when." It is a threat that legitimates intervention in the local activities of the population. Faced with a virtual, ever-present risk of terrorist attack, individuals, for their own good, should choose to comply with whatever regulatory measures the state deems necessary to counter the globally present, locally possible terrorist threat. To make the wrong choice is to be abnormal.[73]

However, terrorism is more than a smoke screen for the curtailment of civil liberties: there is also a specific logic at work. Global terrorism confronts state power with a knowledge failure. The suicide bomber is, in this sense, the perfect counterpoint to the larger, knowable population, because her behavior is not calculable within the terms of *any* population. Suicide bombers are non-productive, and do not seem to operate on the basis of self-interest. This makes them very difficult to include in a statistical model of the population.[74] Nevertheless, the regime of control has been able to seize upon the figure of the terrorist to perpetuate itself, because this figure stands as the ultimate indictment of the law. A terrorist does not merely flout the law but also calls the validity of the law into question. In this sense, the terrorist is a motor for the proliferation of regulation, her *possible* existence being sufficient to generate ever more invasive and individualized norms in an ongoing attempt to revalidate state power.

Accordingly, if state power is about solidarity and validation, then globalization entails the end of the welfare state. The individual can no longer expect the state to help her improve her lot in life. Rather, the state is concerned with preserving the most productive population possible. A regime of control expects the individual to be responsible for her own happiness and to pursue this by choosing from among lifestyle options. The state's primary function is now to act as an interface between the global and the local. This is yet another

72. At one extreme of this globalization stands the figure of the terrorist. *See infra* note 74 and accompanying text. However, there is another extreme, one which is apparently much more mundane and commonplace, but nevertheless serves an important function at many levels: that of the yob, or even delinquent. For more on this latter extreme, see Anne Bottomley & Nathan Moore, *From Walls to Membranes: Fortress Polis*, 18 LAW & CRITIQUE (forthcoming 2007).

73. For example, on the third anniversary of the second war in Iraq, British Secretary for Defense John Reid indicated that those who suggest that Iraq is in a state of civil war are choosing to side with the "terrorists." Jenifer Johnston, *Thousands Rally Over Iraq War . . . Reid Says They Back Terrorists*, SUNDAY HERALD (Glasgow, U.K.), Mar. 19, 2006.

74. One cannot help but suspect that the inability to include suicide bombers in a predictive model is what really angers and disorientates our leaders, even more than the atrocity of blasted human bodies.

important aspect of the "interface" function Zygmunt Bauman describes; he considers globalization to be a matter of local effects, rather than a rationalized global power.[75]

If a locality is considered a specific circumstance conducive to creative interactions between individuals, then globalization primarily eradicates and replaces such circumstance with a set of statistical tendencies that provide for (and demand as a responsibility) the exercise of individual choice. From the "global" perspective, capitalism seeks to free itself of any particular circumstance, and actualizes itself only in those localities that, statistically, offer the best current access to resources. Bauman argues that, being free of place, capital becomes free of responsibility insofar as its current locality is concerned, becoming responsible only to its shareholders and creditors, wherever they might be.[76] Globalization therefore marks an abstraction of power, one that is no longer confined to places, but has become virtual and free-floating to become more efficacious. The efficacy of capital is its own legitimation.[77]

In this light, and as Bauman appreciates, the nation-state has ceased to be efficacious, at least with regard to key economic issues. Capital transcends the state; it escapes local responsibility. The state is reduced to a policing function, charged with creating the best conditions for capital. The state, through policing (i.e., regulation), deterritorializes its people, creating and sustaining, in their place, a population that is conceptualized first and foremost by its (statistical) productive capacities. Economic inefficiency in the population demands further state regulation.

Because regulation is exercised when individuals make choices, globalization is, then, also a matter of individualized choice. We would suggest, following Bauman's analysis, that the individual exercises choice so as to minimize her liabilities. This is what it means to choose well: through choice, one maximizes one's self-interests, while minimizing one's responsibilities to others. This is why solidarity, even though it operates through identity groups, is essentially an atomizing process. The whole purpose of contracting with such groups is to get as much out of them as possible. This is why the figure of the victim is so appealing. By assuming the status of victim, one minimizes one's responsibilities to others (because one is abnormal and therefore not fit to assume responsibilities), while simultaneously claiming the right to receive aid. These are the benefits of holding shares in identity groups, or, more specifically, the benefits of stakeholding. Bauman captures the consequences of this stakeholding:

> [T]he support for the "we-feeling" tends to be sought in the illusion of equality, secured by the monotonous similarity of everyone within

75. *See generally* BAUMAN, GLOBALIZATION, *supra* note 23.

76. *See id.* at 9–11.

77. We might suggest here that the only difference between global capital and global terrorism is that the former is acceptable on the grounds of efficacy.

> sight. The guarantee of security tends to be adumbrated in the absence of differently thinking, differently acting and differently looking neighbours. Uniformity breeds conformity, and conformity's other face is intolerance.[78]

Identity is the way in which local, specific, and real differences are managed, so as to bring them, as "community blocks," into conformity with the overall global vision of the individual, not in his or her own right, but as a statistical element of populations.

CONTRACT AND CONTROL

What is at stake here? From our perspective, primarily two things:

1. Continued attempts to rationalize contracts law through trying to achieve doctrinal coherency conform to a Platonic image of thought,[79] which results in the academic focus being blurred regarding changes in the development of contractual application.

2. To remain within this frame, as teachers, without appreciating more the development and deployment of classical contracts theory in the context of emerging patterns of globalization and control, stifles the potential for radical critique and political engagement.

The Platonic image of thought in legal rationalization and education goes hand in hand with the construction of the narrowest, most abstract conceptualization of the law of contract. To recall, the image of thought is that which is presupposed by philosophical thought—the common sense that "everybody knows" and does not therefore think to question. When addressed in this manner, it becomes clear that the problem is not to identify what might be the most essential and consistent description of a contract, but rather to consider what the setting of such a problem presupposes. The classical model is conceptualized as a harmonious model, in spite of the many exceptions to its "rules." What is paramount in contract law is not the definition of contract itself, but the assertion that contract law is (or should be) consistent and universally applicable.

The conceptualization of contract as consistent should be considered a process for distributing risk, whereby any contractual dispute ultimately decides which party can bear the loss most efficiently. However, to cast it in economic terms simply shifts the image of thought from one ground to another. If, instead of looking for features of a transaction that correspond to the model of contract, we look at contract as a kind of surface effect of transactions undertaken to regulate behavior *across a whole range of social phenomena* (*not* limited to legal or economic agreements), then it becomes apparent that contract need not be

78. BAUMAN, GLOBALIZATION, *supra* note 23, at 47.

79. *See supra* notes 36–40 and accompanying text.

bound by core doctrinal issues.

In the United Kingdom, a "contractual form" is now used to frame a number of processes of regulation and intervention.[80] Youths are offered an opportunity to agree to an "Acceptable Behaviour Contract" as an alternative to an Anti-Social Behaviour Order;[81] residents on mixed estates (meaning estates with social housing as well as rental and freehold properties) are "encouraged" to sign "Neighbourhood Contracts";[82] and released prisoners are offered extra services if they agree to sign "No Further Offending Contracts."[83] Certainly, traditional definitions of contracts law would not recognize any of these transactions. But to consider *why* they are framed as "contracts" tells us a great deal not only about emerging patterns of governance, but also about *how* these patterns evoke particular aspects of the image of classical contracts, opening to review important questions about the grounding of contracts doctrine per se.

Regulation of behavior is presented as individual choice and individual responsibility. The contract is presented as a document in which agreed terms are specified. Mechanisms for enforcement range from the potential threat of greater and more overtly penal regulation to a fear of loss of privileges. But what is most significant is that the contract is utilized as a pathway through which the individual undertakes specific responsibility for her actions. Like the therapeutic contract, regulation of behavior is about being taught to become responsible for one's own behavior. It is to conform to what is expected of the individual in a society which increasingly requires conformity to a model of "responsible citizenship," as policed by the community itself, in partnership with state agencies. Not only do traditional distinctions (public/private, civil law/criminal law) collapse, but what we see emerging is a dispersed and diffused pattern of regulation that utilizes techniques derived from traditional juridical forms in a technocratic manner in which a focus on efficacy displaces doctrinal purity. The point here, in terms of control, is not simply to discipline the individual (i.e., exercise power against her), but to make the individual recognize that she needs regulating. This makes the individual willing and able to choose to be regulated—indeed, to recognize the necessity of it.

CONCLUSION

Claire Denis' film portrays the increasing stratification between the privileged and the dispossessed in a global economy. Her protagonist crosses borders with ease because he possesses money and the necessary documents, whereas others are forced to cross illegally or to

80. Adam Crawford, *'Contractual Governance' of Deviant Behaviour*, 30 J.L. SOC'Y 479 (2003) (exploring the role of new forms of "contractual governance" in the regulation of deviant conduct and behavior).

81. *Id.* at 492.

82. *Id.* at 492–95.

83. *Id.* at 497–99.

remain excluded from the places in which wealth can be accumulated. Denis looks not only at the plight of the dispossessed but also at the dehumanizing effect that globalization has on the privileged. Her protagonist is a man who feels threatened: not only by the failure of his own body, but also by "intruders." Neither his money nor his new heart can deliver a life that connects him to other people. Just as his past is unknown, so is his future a precarious one. He comes to embody and to symbolize a social order that can, in the end, only be one of a continuous attempt to control fear and avoid loss. He is and remains, in a very real sense, "of" the walking dead. His angel of death speaks truthfully when she says that he will never stop paying.[84]

Claire Denis' films exemplify our contemporary condition. To refer to "our" contemporary condition will seem problematic to many readers. Contemporary politics, as well as contemporary academic work, is marked by an insistence on the specificity of difference. For some time, the most vibrant developments have been focused on identity politics and the demand for recognition of diversity, as well as on interest groups and single-issue campaigns. In many ways, these developments were and are an important counterpoint to the privileging of established patterns within political and juridical systems (and academic work), revealing the extent to which the model of the good citizen (or the good scholar) reproduces the norms of a dominant group within the social order. However, while recognizing the specificity of local conditions, our Article has been premised on the need to recognize what unites us, as much as what divides us. The impact of globalization and the development of governance through control are conditions that we share, even if the ways they impact us and the specific trajectories they take play out in substantially different ways.

Our purpose has been to argue that, as teachers of law, we have to consider our immediate conditions within the broader context of shifting regulatory patterns, which are repositioning and reforming the juridical discourse that has been our inheritance. In these terms, "teaching from the left" requires that we think more analytically about both our inheritance and the potential for a politics that can engage the emerging patterns of control. In an immediate sense, this does not mean that we are suggesting to teachers of contracts law that the traditional models should be abandoned. What we are suggesting is more modest, and yet equally challenging. We should teach this material with an awareness of its partiality and of the extent and impact of the ideological baggage that it carries, and give consideration to how traditional aspects of the contractual form are being put to new uses. In a sense, this requires no more

84. Denis' film-making envisions, we would argue, a philosophical approach that can be characterized as "Deleuzean," insofar as contemporary ethical and political imperatives are explored for potential futures, rather than constrained by the demands of the orthodoxies of the past. For an introduction to her work, see BEUGNET, *supra* note 2.

than what the critical law movement was understood to advocate: we should not be bound by the traditional doctrinal limitations; we should not be blind to the political and ideological messages enfolded within the presentation of a subject area; and we should not be closed to an engagement with new political forces. If the teaching of contract law (and, indeed, property law) seems to be less open to this form of critique than that of other areas of law, then, as an urgent scholastic and political issue, we should question why there is such a continued investment in these key legal forms.