

## Review Essays

AD 2014

**A Review of Eve Darian-Smith, *Laws and Societies in Global Contexts—Contemporary Approaches*  
(Cambridge University Press, 2013)**

**Desmond Manderson\***

*Laws and Societies in Global Contexts* attempts a risky balance. There is a place, of course, for a monograph clearly setting out a scholarly agenda, a set of questions, or a framework for analysis. There is likewise a place for a source book—a collection of classic works in a field, suitable both for reference and pedagogy. But Eve Darian-Smith attempts both at once. Starting from the assumption that even major texts in socio-legal studies are not as well known outside their specialisation as they should be, and similarly believing that works on globalisation, identity, human rights, race, space and epistemology touch on a much broader range of legal issues than is commonly understood, she rightly decided to include excerpts from several key texts across these themes. At the same time each of the book's six substantive chapters is preceded by a synoptic essay which both surveys recent literature in the field and stakes out a claim for its importance in thinking about law in the twenty-first century. The decision to combine these genres is largely successful. In its scope, ambition and passion the result is one of the best books to emerge from this field in recent years. It will remain a reference point in years to come.

Darian-Smith insists that we need to understand and research and teach law—whether we are talking about local, national, international or transnational law—constantly alive to its global, pluralist and sociological complexities (12–15). All this stands, of course, against the orthodox framework of law throughout the developed world, which is relentlessly monist, statist and positivist. Globalisation in particular is a kind of social fact that constantly contaminates the illusory purity of our models of national legality:

\* Future Fellow, ANU College of Law, and Research School of Humanities and the Arts, Australian National University. Email: [desmond.manderson@anu.edu.au](mailto:desmond.manderson@anu.edu.au).

it affects how laws are made and to what end, but also how they are applied or enforced, and with what, often far-reaching, sometimes unexpected, consequences.

Neither is globalisation simply a new imperialism—a force for legal and economic homogeneity. Instead we need to understand it as a way of seeing how law interacts with social forces and normative orders. Certainly, global forces such as capital markets or multinational corporations limit the theoretical sovereignty of the nation state, and develop new patterns of legal integration across jurisdictions.<sup>1</sup> On the other hand, sovereignty itself can sometimes be a justification for action and sometimes an excuse for inaction;<sup>2</sup> sometimes the rhetoric of sovereignty is a fig leaf that *conceals* government action, such as when countries use the fiction of independent contractors or private enterprise to deny their legal responsibility for military conduct that they wish both to engage in and to repudiate.<sup>3</sup> The reality of globalisation and the myth of sovereignty are complexly intertwined. Yet globalisation is not only working in the interests of the powerful. It also creates new alliances between social and political forces in far-flung locations—for example, communities committed to indigenous law or environmental protection on opposite sides of the world, connected in ways that are simultaneously genuine and virtual.<sup>4</sup> In all these ways then, ‘globalisation’ describes complex and layered legal phenomena, bringing legal structures and legal issues into entirely new constellations.

If globalisation names Darian-Smith’s epistemology, pluralism names her methodology. Indeed, the book’s title is a federation of plurals—the book is about ‘laws’ not law, ‘societies’ not society, ‘contexts’ not context, ‘approaches’ not approach. One wonders at times whether it was one Eve or several that wrote the book. For Darian-Smith, drawing here on a range of scholars including Boaventura de Sousa Santos,<sup>5</sup> we simply cannot understand, let alone meaningfully respond to, *any* legal problem—be it an industrial dispute in Ontario, an oil contract in Nigeria, security law in the United States, migration law in Italy, the flights of the drones in Afghanistan, or institution-building in Burma—without understanding ‘inter-legality’. ‘Law on the books’ is continually inflected and deflected by local laws and norms (whether based on legal traditions, cultures, or practices), by international alliances and conventions, and by the forces of globalisation in all their dimensions.

At times Darian-Smith makes too strong a normative argument for pluralism, appealing as a matter of justice and human rights to the multiplicity of legal orders and the established legal traditions of local communities (eg 40–55). But for every example

1 Terence Halliday and Pavel Osinsky, ‘Globalization of Law’ [2006] *Annual Review of Sociology* 447.

2 David Chandler, ‘New Rights for Old? Cosmopolitan Citizenship and the Critique of State Sovereignty’ (2003) 51(2) *Political Studies* 332.

3 Paul Verkuil, *Outsourcing Sovereignty* (Cambridge University Press, 2007).

4 Jackie Smith and Hank Johnston (eds), *Globalization and Resistance: Transnational Dimensions of Social Movements* (Rowman & Littlefield, 2002); Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Routledge, 1995).

5 de Sousa Santos, *ibid.*

in favour of the richness and wisdom of local customs, one could find an example of their cruelty or ignorance. The point is not, I think, fundamentally normative except to the extent that diversity is itself a virtue in law as in biology. The point is that our plural legal world is a fact and, unless we seriously engage with it, it will scupper or pervert our goals, *whatever* the values we hope to advance.

We are never faced with a simple choice between ‘the traditional’ and ‘the modern’, the ‘local’ and the ‘global’. All communities are an uneven mix of both. In the global South in particular, modernity is refracted through established practices and familiar discourses, just as globalisation is refracted through familiar forms and established interests. The metaphor of refraction is, I think, a good one; light literally bends as it passes through a physical medium of variable density. That is what happens when abstract laws meet the various materialities of the world: they do not either continue on their path or simply disappear; their trajectory is bent.

Take a road, a big new modern road, sealed and straight, recently completed in Sri Lanka.<sup>6</sup> A perfect example of modernisation, a perfect metaphor for the power of modern law. Some decry the loss of traditional street stalls in favour of fast food joints cropping up in shopping malls. Some exploit the quicker access to cities and markets. Some bemoan the number of deaths on the road caused by excessive speed. Some applaud the way the road allows sick villagers to get to hospital faster, saving lives. But a simple dichotomy between old and new misses the point of how they interact. Road accidents, for example, are not simply a by-product of modern traffic. Here we have a classic example of partial modernisation. There is no infrastructure; no signage, street lights, or cats-eyes: at night the road is a death-trap. Neither are there any drivers’ education programs or licensing requirements. The solutions to those problems are not either global or inevitable. They require local responses to local conditions, which will modify the one-size-fits-all notion of modernity. In short, the question does not pose a choice between the modern and the traditional, but rather explores the circumstances of their *relationship*. Every modernisation is different and discloses a tension between different levels of analysis. If we ignore this complexity, this interaction between different levels, we are not making a stand ‘for’ or ‘against’ the values of community life; for or against the conveniences of modern living. On the contrary, our ignorance leaves us unable to intelligently advance any of those things at all. *Mutatis mutandis*, that is Darian-Smith’s argument for a pluralist and sociological approach to law. To close one’s eyes only consigns one to an idealistic or ideological dream world.

The risk of this argument is that it is blindingly obvious. Who in their right minds would deny it? A fair point, except many do. These perspectives are routinely ignored or marginalised in legal analysis, legal policy and legal education, where a relatively unreconstructed positivism still rules the roost. To take one example—the current debate on asylum seekers and refugees, in a place like Australia. Now this is clearly a global issue,

<sup>6</sup> A Kapur, ‘Rush’ *The New Yorker*, 14 October 2013; National Museum of Australia, *Yiwarra Kuku: The Canning Stock Route* (National Museum of Australia, 2010).

whose ebbs and flows are determined almost entirely by global forces and instabilities.<sup>7</sup> Yet the debate goes on as if Australia was an entirely independent legal actor capable of understanding and resolving regional problems by reference to nothing but Australian law; and as if the legitimacy of those legal actions had nothing to do with their eventual efficacy. This mind-set is not only fracturing the international legal regime and regional legal cooperation. It has generated a whole raft of unintended consequences, caused by our ignorance of the plural, global and sociological dimensions of legality.<sup>8</sup> So we pass laws to crack down on ‘people smugglers’ that will make boat smuggling more profitable and more dangerous. We pass laws that prevent asylum seekers from ever accessing Australia’s family reunion policy, with the direct result that more women and children are put in leaky boats; and then when more children drown at sea we wring our hands and beat our breasts, and make the laws still harsher. We pass laws that prohibit asylum seekers from working in Australia, thus creating a new underclass ripe for blackmail, criminal activity and exploitation. And so on and so forth. Our legal dogmatism, blind to the forces that act on it and blind even to its own blindness, gropes its way from one disaster to another.

Or to take an example from my own legal education. In my very first class on constitutional law I was told that when Captain Phillip planted a British flag at Port Jackson on Australia Day 1788, the whole of Australia was instantly subject to British law. This legal principle, I was reliably informed, was affirmed by the *Colonial Laws Validity Act 1865*. To which aboriginal people, some of whom did not see a white man for another 150 years, would have been within their rights to say, ‘could have fooled me’. The claim was pluralistically and sociologically impossible.<sup>9</sup> It was a myth; a founding narrative whose force was essentially ideological, dressed up as ‘legal fact’.<sup>10</sup> But even to challenge this most preposterous of claims was described as ‘bringing politics into the classroom.’ Heaven forbid.

Alternative models of legal education do a better job at attempting to capture not only the complex layered reality of law, but how to make it relevant in the twenty-first century. At McGill University, for example, they teach a model of trans-systemic law in which legal concepts are never taught as belonging either to the ‘common law’ or the ‘civil law’, but always in dialogue between them.<sup>11</sup> Such a model of ‘law as *métissage*’<sup>12</sup> is not only symptomatic of the very particular mix of legal traditions that has characterised the province of Québec since 1759. It is also faithful to a wider vision of law, in which this

7 Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008).

8 Desmond Manderson, ‘From Zero Tolerance to Harm Reduction: “The Asylum Problem Problem”’ (2013) 32(4) *Refugee Survey Quarterly* 1; DOI:10.1093/rsq/hdt019.

9 Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (New South Publishing, 2006).

10 Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, 2002).

11 Peter Strauss, ‘Transsystemia—Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?’ (2006) 56 *Journal of Legal Education* 161.

12 Nicholas Kasirer, ‘Legal Education as *métissage*’ (2003) 78 *Tulane Law Review* 481.

mixture is endemic and increasing throughout the world. To be a lawyer in a global world one must be fluent in not one but *many* legal traditions, discourses and frameworks. As de Sousa Santos points out,<sup>13</sup> each of these languages has its own scale, its own symbolism, and its own characteristic projection. And all are dialogic, fragmented and interactive..

That said, I think there is a slippage within *Laws and Societies in Global Contexts* between streams of legal scholarship that I think it important to distinguish. The social sciences, by far Darian-Smith's main interest, are not the same as the humanities. Indeed, thinking of the law as a discipline in the humanities is by far the oldest approach in Western jurisprudence, dating as it does to the first degrees in Bologna and Paris in the eleventh century. By contrast 'legal science' only gained currency with the development of ideas of legal formalism and the casebook method in the latter part of the nineteenth century;<sup>14</sup> and the methodologies of the social sciences are, by and large, even more recent.<sup>15</sup> Darian-Smith does an admirable job of expanding her remit to encompass a range of humanistic perspectives in her survey, including the aesthetic, hermeneutic and affective turns in legal scholarship (101–7). Incorporating insights into legal knowledge from critical race theory and legal geography is central to her project.

The social sciences and humanities are equally opposed to legal science and the dogma of positivism. Darian-Smith clearly acknowledges the importance of both, and indeed her book takes a refreshingly ecumenical approach to legal scholarship. But *Laws and Societies in Global Contexts* is targeted mainly at socio-legal research and, as a result, gravitates towards a more instrumental and institutional analysis of law, and towards a more prescriptive teleology. I would not wish this observation to be taken as criticism, since like her I enthusiastically agree that both approaches to legal research are needed at the present time. But I do take this review as an opportunity to make some claims for the distinctiveness and importance of law and the humanities scholarship, a distinctiveness that is sometimes blurred in this book.

Research in law and the humanities is more interested in discourse than in institutions, in representations than in effects, and in diagnosing the condition of law in our societies than in prescribing reforms. What constitutes the humanities is of course a vexed question, and I am now venturing into the territory of dangerous generalisation.<sup>16</sup> But I am prepared to stick my neck out. If the sciences seek to find universals (laws, processes, structures) and the social sciences to apply probabilities (communities, general effects, demographics), the humanities has for its focus *singularities*: a specific

13 Boaventura de Sousa Santos, 'Law: A Map of Misreading—Toward a Postmodern Conception of Law' (1978) 14 *Journal of Law and Society* 279.

14 Gary Minda, 'One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag' (1994) 28 *Indiana Law Review* 353; Hans Kelsen, 'The Pure Theory of Law—Its Method and Fundamental Concepts' (1934) 50 *Law Quarterly Review* 474.

15 Joseph Schlegel, *American Legal Realism and Empirical Social Science* (UNC Press, 1995); Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12.

16 For similar recent reflections see Martha Nussbaum, *Not for Profit: Why Democracy Needs the Humanities* (Princeton University Press, 2012); Geoffrey Harpman, 'Beneath and Beyond the Crisis in the Humanities' (2005) 36 *New Literary History* 21.

image, metaphor, text or work of art. The humanities are interested in these things as creations of human minds and cultures, and above all as *representations*. Law and the humanities sets out to examine a wide variety of singular representations of law as they have appeared in various cultures, societies and histories, with the aim of exploring the insights these unique artefacts might offer us into questions of legal consciousness, ideology, norms or assumptions. Philosophy, of a particular strain, colours a great deal of the work in law and humanities because this writing has sought to ask these questions and probe these connections.<sup>17</sup> Social science tends to treat law as an object, a lived reality ('law in action') whose effects can be measured, often through empirical methods. The humanities in contrast tend to treat law as a subject that constitutes us through discursive practices that can be examined, essentially through hermeneutic methods. There is therefore a more strongly anti-instrumentalist and constitutive dimension to humanities scholarship in law. The social sciences tend to study outcomes and to treat laws as causes; the humanities tend to study inputs and to treat laws as symptoms.

Another way of generalising these orientations in an exceedingly rough way is to speak of their different relationship to time (see 168–74). The ideal model of a scientific law is located above time; the ideal model of law in the social sciences is located in time; the ideal model of law in the humanities is as an argument across time.<sup>18</sup> For the social sciences, I think it is fair to say, what happened in the past is treated as data that might inform our efforts to understand the present.<sup>19</sup> Darian-Smith's book, for one, is deeply committed to the distinctiveness and urgency of the circumstances of law right now. It is not a book that could have been written about any other period, because it is about this period now. It insists simultaneously on the diversity of law's relationship to place, and the singularity of its relationship to time. Darian-Smith is by no means reluctant to acknowledge how important temporal perspectives are in understanding contemporary issues in law, and she shows a genuine sensitivity to the specific ways in which contingencies of both time and place matter to 'the geographies of law' (167–74). Yet it remains true that her orientation here is presentist. For the humanities, on the other hand, whether we are thinking of law in its relationship to history or philosophy, art, literature or culture, representations have a continuing existence in the *longue durée*. The past does not simply 'inform' present understandings; it continues to live. Indeed, Darian-Smith is entirely sensitive to the strengths and merits of this kind of deep context. Her previous book *Religion, Race, and Rights*<sup>20</sup> deals in a genuinely interdisciplinary way with a rich historical background as far back as the time of Martin Luther.

<sup>17</sup> eg Austin Sarat *et al* (eds), *Law and the Humanities: An Introduction* (Cambridge University Press, 2010); Costas Douzinas and Adam Gearey, *Critical Jurisprudence* (Hart Publishing, 2005).

<sup>18</sup> Michel Serres and Bruno Latour, *Conversations on Science, Culture, and Time* (University of Michigan Press, 1995).

<sup>19</sup> Brian Adam, *Time and Social Theory* (Polity Press, 1994).

<sup>20</sup> Eve Darian-Smith, *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law* (Hart Publishing, 2010).

Social sciences and humanities disciplines are methodologically and temperamentally distinct. It should go without saying (but of course in the humanities, as a matter of principle, *nothing* goes without saying) that this is not intended in any way to disparage the work that is done in either genre. The questions of globalism, pluralism and sociology are more commonly handled through the lens of social sciences, and Darian-Smith's book articulates, in an exceptionally persuasive manner, the outlines of this scholarship over recent years and their vital contribution to a real engagement with law in late modernity. But that is not to say that work in law and humanities simply ignores these aspects, as Darian-Smith would be the first to agree. Civil society, for example, is a key term in discussions around the rule of law in the global South—from highly instrumental and sometimes impoverished approaches taken by institutions such as the IMF or the World Bank<sup>21</sup> to more sophisticated and locally specific approaches advanced by communities themselves.<sup>22</sup> A great deal of this work draws on important research in socio-legal studies.<sup>23</sup> This work emphasises the way in which social practices themselves, from health clinics to chess clubs, are by no means epiphenomenal to the germination of a robust commitment to the rule of law in emerging societies. But much less attention has so far been paid to what might be called 'civil society and the humanities.' Such a research project would look at specific images or artefacts from particular communities in order to find traces and clues as to the ways in which the language of 'the rule of law' could be most effectively articulated and advanced in a place like, for example, Liberia.<sup>24</sup> What is at stake is not only a better understanding of the specific pathways of cultural and legal change, but of what allows people to really engage with and care about that change. Without this kind of reflection, legal reform will be just a kind of superficial change without roots; like an unlit road at night.

In a similar vein it might be said that the image of 'blind justice' is frequently deployed in a fairly uncritical way as an expression of the desirable neutrality of legal systems.<sup>25</sup> But in fact the most interesting recent work on this question has been done by theorists and historians in law and art.<sup>26</sup> This work has uncovered a remarkably complex

21 Jan Scholte, 'The IMF Meets Civil Society' (1998) 35 *Finance and Development* 42.

22 eg Lester Salomon *et al*, *Global Civil Society: An Overview* (Johns Hopkins University Press, 2003).

23 Martin Krygier, 'The Sources of Civil Society' (1996) 40(11) *Quadrant* 26; Martin Krygier, 'The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the Rule of Law' in Martin Krygier, *From and to Authoritarianism* (Kluwer, 2001); John and Jean Comaroff (eds), *Civil Society and the Political Imagination in Africa: Critical Perspectives* (University of Chicago Press, 1999).

24 Shane Chalmers, unpublished paper delivered at the Annual Conference of the Law Literature and Humanities Association of Australasia, Australian National University, 2013.

25 Stephan Haggard *et al*, 'The Rule of Law and Economic Development' (2008) 11 *Annual Review of Political Science* 205; June Tapp and Lawrence Kohlberg, 'Developing Senses of Law and Legal Justice' (1971) 27(2) *Journal of Social Issues* 65.

26 Martin Jay, 'Must Justice be Blind?' in Costas Douzinas and Lynda Nead (eds), *Law and the Image* (University of Chicago Press, 1999); I Bennett Capers, 'Blind Justice' (2012) 24 *Yale Journal of Law and Humanities* 179; Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale University Press, 2011) 62–74.

and ambivalent history in the use of the image since its first use, as recently (from the point of view of the humanities) as 1494. Our own histories, no less than those of other places, are ‘incurably plural’. Such histories allow us to develop a more complicated appreciation of our own assumptions about the relationship between justice and law, and a richer understanding of the ways in which certain images change their meaning over time, under the influence of different social contexts. The diversity of meanings that this one iconic image has sustained might lead us to be less confident about any isomorphic relationship between the images we deploy and the meanings we presume we are imparting through those images, in other societies. It might also lead us to pay better attention to the semiotic resources of other traditions in our efforts to find the right language to have a conversation about legal norms.

Darian-Smith’s book brought home to me the importance of her argument as to the contribution to be made by global, plural and sociological dimensions in the analysis of law, together with the contributions that law and humanities scholarship might also make to this endeavour. One sentence in particular caught my eye. It is unassuming but highly suggestive: ‘Unfortunately,’ she writes, ‘copyright fees were prohibitively expensive for articles I would have liked to include ...’ (20). There follows an impressive list of classic articles that the author *would* have liked to have made available to a wider readership—essays by Silbey, de Sousa Santos, Valverde and so on—but that could not, in the end, be included. How are we to think about these regrettable omissions? If ever there was an example of a globalised legal regime, it would be intellectual property, which under the influence in particular of United States history now holds sway over the whole world.<sup>27</sup> The power of this regime shows how connected legal structures are to quite specific philosophical debates: the law gives voice to a theory of the relationship between human identity and property, a theory of the nature of creativity, and an economic theory of profit, motivation and industry.<sup>28</sup> None of those theories are unproblematic, nor can they be explained without reference to a distinctively Western history of thought and power. What appears at first glance to be a relatively straightforward legal organisation rapidly dissolves on closer inspection into a highly contingent set of moral and social claims. A set of texts and ideas has come to exert a global authority which is often unexamined, and in which the sociology of their application needs to be coupled with the history of their origin.

But beneath a global legal structure lies their multiple refraction through plural laws and societies, and contexts. Globalisation is not seamless. In smaller countries, enforcement hardly exists and a book like this might have been distributed as a series of pirated or samizdat copies. Even in larger economies, under the influence of different philosophies—philosophies of public life and public creation—and different social

<sup>27</sup> John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000).

<sup>28</sup> Peter Drahos, ‘Intellectual Property and Human Rights’ [1999] *Intellectual Property Quarterly* 349; Lionel Bently and Brad Sherman, *The Making of Modern Intellectual Property Law* (Cambridge University Press, 2008, first edn 2002).

systems, the exceptions granted by copyright for educational purposes are drawn less narrowly. If Darian-Smith's book had been published in Spain, for example, it seems at least possible that the series of reprints she sought might have fallen within its more far-reaching exemptions for educational purposes. So to some extent, the limits that the author encountered are not strictly speaking global but variable, and a lot of the reason that she failed here lies in the fact that her book was being published by a large university press with a global presence and published in the United States. Darian-Smith is to some extent a victim of the global reach of her own publisher.

At the same time, the forces of globalisation appear to be pushing all publishers towards this increasingly limited and monetised system. Small publishers of books or journals are being squeezed out by large multinational operations with fingers in every pie. We all know what would have happened 20 or 30 years ago. Eve would have written to Susan or Boa and asked for permission to reprint; and they would have been happy to accede not only out of a sense of collegiality but because it would have been in their interests to have their ideas more widely distributed. Not any more. The economic consolidation of reprint rights has proceeded apace. Now it is very often vast corporations who hold the rights to hundreds of thousands of articles and essays, and for whom economic interests are the only ones that count. If the argument behind copyright is meant to be about protecting the interests of authors, it is hard to see why this now operates against the genuine interests and desires of authors themselves.<sup>29</sup> By converting interests into commodified economic terms, we have created a behemoth.

Not so fast. What we might have created, through this process of economic consolidation, is not so much a behemoth as a dinosaur. In practice, the notional abstract international legal regime is in free fall. It is too unwieldy to be adaptive to all the other forces of globalisation around it. Technological change is doing intellectual property in, as the current struggles over digital reproduction of music so clearly show; we might also note the expansion of digital resources, databases, and access points for books and articles on the web.<sup>30</sup> Globalisation is in this sense not centripetal but centrifugal. Indeed, the creaky nineteenth-century structure of copyright is grinding to a halt even in the area that Darian-Smith ran up against. There no longer appear to be sufficient resources to police the system any more—the greed of corporations seems to have created a monster of increasing inefficiency, like a sabre-toothed tiger whose teeth grew too large to eat properly. I have only anecdotal evidence to draw on. But whenever I have tried to contact copyright holders for journal articles I have increasingly observed their

<sup>29</sup> Stewart Sterk, 'Rhetoric and Reality in Copyright Law' (1996) 94 *Michigan Law Review* 1197.

<sup>30</sup> Michael Mills, 'New Technology and the Limitations of Copyright Law: An Argument for Finding Alternatives to Copyright Legislation in an Era of Rapid Technological Change' (1989) 65 *Chicago-Kent Law Review* 307; Raymond Ku, 'The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology' (2002) 69 *University of Chicago Law Review* 263; Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin, 2004); Lori Morea, 'The Future of Music in a Digital Age: The Ongoing Conflict between Copyright Law and Peer-to-Peer Technology' (2005) 28 *Campbell Law Review* 195.

incapacity to respond—sometimes for months at a time, sometimes ever. My impression is that the ‘permissions department’ of many journals is some overworked clerk in head office somewhere, snowed under by too many requests in relation to too many journals. Eventually, if you’re like me, you decide that you have made a bona fide effort to comply, and just go ahead anyway. Which means that to a considerable extent, abstract legal rights are unenforceable, throwing us back again on local and ‘informal law’.

What Darian-Smith might have done was to use contemporary technology to circumvent the system entirely, placing links in the book or on her website to an online database which would allow readers to access the relevant material without reproducing it herself.<sup>31</sup> This is the future, it seems to me, for a source book like Darian-Smith’s: a virtual network of hyperlinks embedded in the very text of the monograph itself. That would be one example of copyright’s ‘global contexts’ and ‘contemporary approaches’. There are ways in which Ronald Coase’s controversial thesis in ‘The Problem of Social Cost’<sup>32</sup> remains relevant—the market washes over the law like an ocean, perhaps even (evoking Foucault) washing it away ‘like a face drawn in the sand at the edge of the sea.’<sup>33</sup>

So the law that operates in this case, while global, is also more multiple, fluid and unstable—more bound up, in short, with pluralism and with sociology—than the language of State regulation might imply. It also formed part of a set of discourses—that is, of claims not of facts—that participate in constructing and deconstructing the ‘reality’ of legal regulation through assertions about power, philosophy, justice and the like. In its own understated way, Darian-Smith’s own sentence participates in legal discourses. The melancholy utopian tone her sentence employs, gestures towards another and more perfect source book, of which *Laws and Societies in Global Contexts* is but an imperfect copy. Such allusions to the *doppelgänger*, the shadow text that law could not be permit and that Cambridge would not publish, subtly critique the global copyright regime. Indeed, inasmuch as Darian-Smith’s book will now make it easier to cite the material included within it, and less easy to cite the material excluded from it, she will have participated not only in the ongoing legal discourse around pluralism and globalisation but in the legal discourse around the fate of copyright in the twenty-first century too. Her participation in that discourse, while slight, is not fundamentally different from a regulation or a judge’s ruling. As Robert Cover remarked with characteristic elegance, ‘Judges are like the rest of us. They interpret and they make law.’<sup>34</sup>

All these problems, including the instability of legal structures in a changing world and the relationship between technological change and individual action, are not new. They go back at least to the time of Albrecht Dürer.<sup>35</sup> There too the development of new

31 Glynn Lunney, Jr, ‘The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act’ (2001) 87 *Virginia Law Review* 813.

32 Ronald Coase, ‘The Problem of Social Cost’ (1960) 3 *Journal of Law and Economics* 1.

33 Michel Foucault, *The Order of Things*, Allan Sheridan (trans) (Vintage, 1973) 387.

34 Robert Cover, ‘Foreword: Nomos and Narrative’ (1983) 97 *Harvard Law Review* 4, 67.

35 Erwin Panofsky, *Albrecht Dürer, Vol 1* (Princeton University Press, 1948).

technology—the printing press—transformed the economic mode of production of books and art.<sup>36</sup> Dürer quickly perceived the potential afforded by this new technology, but also its pitfalls. That is why he developed for himself a trademark, a stylised signature block that guaranteed readers that the etching they were looking at was not an imitation but a ‘real copy’, the product of Dürer’s own mind and workshop. Modern ideas of intellectual property emerge at the crossroads of modern technology, modern art, and modern law.<sup>37</sup> Dürer was himself surely aware of that; his signature block, a stylised ‘AD’, was itself a bold statement about his own relationship to modern time: Albrecht Dürer—*Anno Domini*. Dürer’s problem was very much the problem of modern law itself. Its power—law’s ability to reproduce and disseminate texts and images multiple times and across vast reaches of time and space—was at the same time its weakness—how to authenticate that dissemination and reproduction, and how to control its interpretation once the text was let loose in the world.<sup>38</sup> The spread of the text gave new power to the author: writer, artist, or legislator. But the more these texts spread, the correspondingly weaker was their control over it. That was Dürer’s problem and it was no less the problem of the King and the law. This conjunction between art and law as symptoms of modernity at the dawn of the modern era goes some way to explaining why Dürer was interested in the representation of law.

Between AD 1494 and AD 2014, there are both productive similarities and differences. New technology is once again creating new potentials, crossroads and opportunities, and new problems for the question of social and legal control in particular. We cannot understand these global pressures and local manifestations, new alliances and new discourses, without learning more about where we came from and how we got to where we are. And we cannot understand them without timely interventions such as *Laws and Societies in Global Contexts*.

<sup>36</sup> Marshall McLuhan, *Gutenberg Galaxy* (University of Toronto Press, 2011).

<sup>37</sup> Giulia Bartrum (ed), *Albrecht Durer and his Legacy* (Princeton University Press, 2002).

<sup>38</sup> Desmond Manderson, ‘Fission and Fusion: From Improvisation to Formalism in Law and Music’ (2010) 6(1) *Critical Studies in Improvisation/Études critiques en improvisation* 1.