The Constitution of Identity
New Modalities of Nationality, Citizenship, Belonging and Being

Eve Darian-Smith

> *If the* modern *"problem of identity" is how to construct an identity and keep it solid and stable, the* postmodern *"problem of identity" is primarily how to avoid fixation and keep the options open.*
>
> *Zygmunt Bauman,* From Pilgrim to Tourist; or A Short History of Identity *(1996: 18).*

Introduction

In recent decades there has emerged a large and diverse body of socio-legal literature engaging in identity politics, or what some theorists call the politics of difference (Taylor 1992: 38). Drawing on the theories and insights of scholars working in cultural studies, feminist studies, sociology, anthropology, geography, political science, history and law, this literature grew out of the civil rights movements of the 1960s and 1970s and gained momentum through the rise of new social movements and debates over multiculturalism in the 1980s and 1990s. More recently, socio-legal literature on the politics of identity has had to expand in scale and reach in seeking to analyze the complex relations between individuals and the nation-state in the context of globalization (Lacey 2004). This expansion speaks to the ways people conceptualize their legal subjectivity and relations to others in emerging sociopolitical contexts that include the mobilization of global social movements, an expanding international human rights regime, and mass migrations of people that make some people "illegal" and "stateless" and includes millions of refugees fleeing wars, poverty, and various natural and man-made disasters. This expansion in the socio-legal literature also reflects new sociopolitical contexts of a less obviously global nature

present in subnational regions, global cities, borderlands, prisons, immigration offices, hospitals and tribal reservations (Perry and Maurer 2003). These trans-state and sub-state contexts suggest a diverse range of legal relations brought about by new labor markets, new industries and commodities, new forms of secular and religious violence, new cultural and sexual politics, new reproductive technologies, new materialist understandings of agency, and a rethinking of the autonomous subject/ citizen with increasing attention being given to a blurring of conventional divides between the human and non-human.

In this chapter I seek to highlight some of the socio-legal scholarship engaged in the constitution of legal identities within state and non-state contexts, and point to some of the emerging challenges and new directions scholarly conversations are moving in. The chapter is not meant to present an exhaustive summary of the literature but rather an outlining of the analytical approaches in which notions of identity vis-à-vis the nation-state have been thought about in the past, how and in what ways these approaches may be shifting in the present, and what we may as socio-legal scholars need to be thinking about as we confront the future. Whether we think of ourselves as living in a post-national moment or not, what is clear is that the idea of a person's legal subjectivity and identity being constituted solely through the geopolitical boundaries of the nation-state is no longer a given. In other words, we can no longer pretend that the modernist concepts of "individual" and "state" are stable categories and share clearly demarcated relations that up until relatively recently have underscored the idea of state nationalism and a person's sense of personal and collective belonging vis-à-vis a national polity. In short, how people conceptualize themselves is now widely acknowledged as not reducible to simplified and essentialized individual and group identities recognized in law through state policies and institutions.

Rethinking the Social Contract amidst New Assemblages of Power

Related to the breaking down of "individual" and "state" as stable legal concepts is the breaking down of the notion of a social contract between citizens and nations. The idea of a social contract is a core principle of liberal theory. From the seventeenth century, social contract theory has dominated Western political theory with the writings of philosophers such as Thomas Hobbes, John Locke and Jean-Jacques Rousseau. Social contract theory presupposes an agreement between individuals and the state whereby people, through elected representatives, submit to a "general will" to live together as a collective community and abide by state laws. In return, people are granted certain civil and political rights and a limited voice in the running of the country.

Despite scholarly critics,[1] the idea of a social contract existing between governments and citizens has maintained popular legitimacy in most Western democracies, at least until recently. Now with the stark realities of neoliberal economic policies, the

dismantling of the middle class, and an ever-widening gap between the poor and the mega-rich, the concept of a social contract has come under mainstream attack. In the United States, popular disillusionment with the law as a vehicle for democracy has been expressed across the conservative and progressive political spectrum in the Tea Party and Occupy activist movements. It is now readily apparent that law can be massaged and manipulated to justify torture, deny workers a living wage, gather unlimited data on one's personal life, and protect oil companies whose irresponsible practices cause billions of dollars of damage from liability beyond a nominal capping. Outside the United States, there is similar disillusionment with law which is widely viewed as an instrumental mechanism of power and a technical apparatus that serves special group interests. In short, there is a looming crisis in the legitimacy of Western legality as the checks and balances envisioned by a system of representative governance are proving to be clearly inadequate.

What the current crisis of legitimacy in Western law and related challenges to the idea of a social contact suggest is that the constitution of a person's legal subjectivity and identity may not pivot or depend upon one's relationship to the state. Today personal identity may be forged through very different relational imaginaries with other peoples, places, and ideologies that may, in actuality, be opposed to state nationalist sentiment. Is this what we mean by living in a post-national moment? Below I will explore the concept of post-nationalism more fully, particularly as it relates to citizenship. At this stage I want to emphasize that I am not arguing that concepts of "individual," "state," "nationalism" and "democracy" are no longer relevant in contemporary political and legal thinking. But I am suggesting, as have many other commentators, that the taken-for-granted Western concepts of Enlightenment thinking are now being contested on a number of fronts that include critiques from the global South and East (Santos and Rodriguez-Gavarito 2005), and an increasing appreciation of the deeply embedded histories of oppression and inequity in our globalizing world (Comaroff and Comaroff 2006). Autonomous sovereign states, autonomous sovereign individuals living within those states, and the "imagined communities" that supposedly bind states to peoples through narratives of a monocultural society are increasingly being recognized amongst ordinary people as romanticized – albeit at times very powerful – modern secular mythologies.

What we are currently witnessing is the unfolding – alongside enduring state institutions – of alternative and competing configurations and assemblages of law, power, violence, justice and humanity (Sassen 2008). In tandem with a person's national identity as typically documented through passports and identity papers, alternative and competing ways of being in the world are presenting diverse modes of relating, loving, seeing, learning, and knowing that may not be officially acknowledged or condoned by state governments. In short, alternative forms of imagining how one may belong to a community are presenting profound challenges to modernist mythologies of state as affirmed through people's relations to a bounded national territory – despite the fact that the concept of state sovereignty still dominates national and international politics. These new imaginaries may be

re-emerging out of silenced and marginalized histories, as is the case with many indigenous peoples whose notions of personhood and community may be very different from that of Euro-Americans. In other instances, these new imaginaries may be emerging within Western epistemologies but perhaps articulated for the first time. As Thomas Franck wrote back in 1996, we are witnessing new "possibilities of layered and textured loyalties" such that it is conceivable that many people will "shed the drab single-hued identities deterministically front-loaded onto their lives by the accidents and myths of birth and blood" (Franck 1996: 359).

How will modern Western law manage and regulate people's subjective understanding of their place and role in these alternative possibilities of being? The answer – if there is one – remains elusive. How will nation-states maintain their legitimacy in societies whose members may no longer believe in a government's capacity or willingness to defend an individual's rights – let alone recognize such rights in the first place? Perhaps more profoundly still, how will nation-states respond if their subjects/citizens no longer want to entertain the notion of a social contract and participate in conventional models of liberal democracy? In the face of these looming concerns that challenge the conventional analytical frames of the social sciences and humanities, socio-legal scholars cannot afford to stand by passively watching and waiting. In practical terms, in order to remain relevant socio-legal scholars will need to think seriously about people's shifting social and political relations at state, sub-state and trans-state levels, and how these new relational connections may be affecting the constitution of a person's subjective notion of personhood and identity. As I will attempt to show below, scholars may also have to adjust their largely state-based and state-bound approaches, methods and theories accordingly.

Identity in Socio-legal Scholarship: Two Approaches

Identity, as anthropologist Richard Handler reminds us, is a concept "peculiar to the modern Western world" and should not be used "as a cross-culturally neutral conceptual tool" (Handler 1994: 27). Despite this warning, "identity" as commonly used in contemporary liberal discourse refers to how people conceptualize and imagine themselves as being in the world, as well as how they conceptualize themselves as sharing a social identity with a group or collective. A person's identity may be very individualistic, multilayered and fragmented, and change over time and according to specific contexts. That same person may also imagine that s/he shares qualities or characteristics that are common with others, such as birthplace, religion, ideology, language, sexuality, ethnicity, heritage, customs and institutions. Determining whether these shared qualities constitute a specific group that has legal standing on the basis of an acknowledged legal identity (e.g. "women" or "tribe") is one of the central elements of modern Western law. After all, law is applicable only to those who are seen as part of law's community. Law is used by those in power to define who is an insider and who is an outsider, who belongs and doesn't, and who qualifies

as lawful or is ultimately deemed unlawful, dangerous, alien, and non-human. This is not to say that legal identities are in any way static or fixed, but the normative implications of legal practice proceed as if they are.

In Euro-American socio-legal literature, there are two scholarly approaches to the concept of legal identity. Scholars in the first group tend to be loosely associated with postcolonial theories of law. These scholars are keen to explore legal identity as an expression of "civilization" and "statehood" within more expansive global/transnational/international contexts. Interpreting law as a site of symbolic cultural consciousness and reference, scholars in this first group are acutely aware that legal identity is constituted in deeply historical contexts that include centuries of oppression and conflict between European and non-European peoples. In contrast, scholars in the second group – which numerically is very much larger than the first – tend to be more restricted in their geopolitical and temporal reach, examining how people living within nation-states challenge, resist or demand recognition of their legal identity as rights-bearing subject/citizens. In much of this literature, the nation-state is a largely taken-for-granted unit of analysis framing the terms of legal negotiation. Below I present a brief discussion of these two broad bodies of scholarly engagement with the constitution of legal identity, at the same time conceding that a number of scholars straddle both the first and second approaches.

First approach: Colonial and postcolonial legal identities

Scholars in this camp tend to be more historically and culturally informed, drawing on legal history, anthropology, and postcolonial and subaltern studies to explore the ways legal identity has been used as an explicit marker in designating insider/outsider in the international politics of contact, discovery, colonialism and imperialism from the sixteenth century up to the present day (see Darian-Smith and Fitzpatrick 1999). These scholars are deeply aware of Europeans' historical fascination with the "exotic" peoples of foreign lands, and their rather obsessive focus as to whether such peoples had laws, rules, and a system of government equivalent to their own. Early conquistadores and sailors and later missionaries and merchants viewed the presence of law among those they encountered as a sign and symbol of civilization and a marker of their common humanity – or what Denise Ferreira da Silva calls "a marker of Anglo (Euro-American) uniqueness" (da Silva 2011: 275). As was commonly the case, indigenous societies were ultimately deemed to have no legal system and so to be unlawful or inhuman.[2] This determination in turn provided the rationale and excuse for their subjugation and extermination by conquering Europeans over the following centuries.

The degree to which a society is deemed to have law, and so a valid collective legal identity recognizable to other countries in the international community, was an underlying concern in the decolonizing process in the wake of World War II. Only those societies who could claim such a legal identity could then argue for

statehood, and in turn demand representation in the newly formed United Nations. For many communities across Africa and Asia, statehood was denied despite evidence of sophisticated systems of law, governance, and social and political institutions. This failure to recognize a range of plural legal identities other than those constituted through established Western principles of state territorial sovereignty and citizenship forced millions of people into a legal category that often had little meaning or relevance to their actual lives. To this day, the consequence of this artificial carving up into new nation-states and new legal identities in Africa, Asia and other former colonial regions hampers efforts to move past violent ethnic conflicts and regional wars. Many socio-legal scholars examining post-conflict and transitional justice mechanisms in places such as Rwanda and East Timor are engaged with deconstructing the international rule of law paradigm and its consequences (Rajagopol 2008).

Concerns with the postcolonial dimensions of legal engagement have been present in some academic circles for over three decades. However, the terms of the conversation have shifted over the years to more aptly apply to current global geopolitical realities (Merry 2004; Darian-Smith 2013b). Whereas the language of earlier postcolonial theorists was primarily framed by the parameters of nation-state histories and focused on the dialectic between colonizing nations and the colonized, contemporary scholars talk in terms of the relations between what are commonly referred to as the global North and the global South/East. This shift in terminology is important. It expands the lens of analysis from state-centered law in the context of specific national colonial enterprises to a more global post-Westphalian worldview that takes into account the postcolonial dimensions of a range of transnational, regional, state and local legal engagements. It opens up the conversation to include the oppression of all communities historically treated as racially and ethnically inferior to the colonizing society, whether or not these communities self-identify as "indigenous" or think of themselves as colonized. Moreover, it allows for rethinking contemporary legal subjectivities by moving beyond Western v. non-Western binaries and acknowledging new forms of colonialism, such as the colonizing of East Timor by Indonesia, Eritrea by Ethiopia, and the occupation of Palestinian territories by Israel. And finally it takes into account neocolonial activities by Western *and* non-Western nations who exert economic and political power or "soft imperialism" over sites of former colonial control. Hence today's neocolonial activities includes the soft imperialism of China's industrial activities in Africa as well as the range of "new wars" in regions such as the Congo that allow for an economy of extraction and exploitation by Northern capitalists over local communities, often in collusion with local elites.

While it is not a coherent intellectual field, what unites contemporary scholars of postcolonial law – irrespective of their focus or analytical framing – is that they all draw upon an intellectual legacy that emerged among non-Europeans in the decolonization movement post-World War II and subsequently filtered into the Western academy in the 1980s in the movement known as postcolonial studies.[3] Hence, underlying all postcolonial legal scholarship is a concern with the

endurance of historically structured racial and ethnic divides and correlative asymmetrical power relations between the global North and the global South, despite a growing appreciation of their respective regional interdependencies. In other words, postcolonial legal scholarship underscores that even when colonialism has officially ceased to exist and former colonies have gained independence, the injustices of material practices endure over time and in many ways frame emergent legalities and legal consciousness in these new states. As scholars are only too well aware, the endurance of colonial legal logics is present – albeit perhaps in new forms – in countries formerly colonized in Africa, Latin America and Asia, as well as within former colonial nations such as Britain, Australia, France, the Netherlands and the United States. How these logics impact the capacities of individuals and groups to claim legal recognition and an authorized legal identity, and how that legal identity is experienced in practice within both state and international/global legal orders, remain highly relevant to millions of people around the world.

Second approach: Legal identity within the nation-state

The second approach to analyzing the constitution of legal identity overlaps with the first. As mentioned above, this second body of socio-legal scholarship examines people's legal subjectivity and relationship to the law almost exclusively within the parameters of the nation-state. With its commitment to liberal principles of inclusion, this genre of scholarship has become widespread in mainstream Euro-American socio-legal scholarship in recent decades. It is primarily concerned with examining how politics of identity and difference play out in law and policy, and the "culture wars" waged over whether certain individuals and groups (such as blacks, Muslims, Native Americans, Chinese, women, children, disabled, transgendered) have legal recognition and standing equal to white males. Scholars examining the politics of identity are keen to point out the ways law is used to marginalize, discredit, and silence certain individuals and groups so as to exclude them from the same rights and protections afforded other citizens (Darian-Smith 2010).

The label "identity politics" first appeared in feminist and black social movements in the United States, Britain and other Western democracies calling for the recognition of minority political and civil rights throughout the 1960s (Harris 2001). Perhaps the most famous of these efforts occurred a decade earlier as activist organizations and the NAACP sought to attack Jim Crow laws. Victory was technically achieved with the finding in *Brown v. Board of Education* (1954) that called for the desegregation of public schools, and the passing of the Civil Rights Act (1964) and the Voting Rights Act (1965). In the early 1960s, as the labor force opened up to women, feminist issues became prominent in mainstream society and were often confrontational. Within academic circles, feminist scholars were at the forefront in showing how state governments have consistently denied

recognition to certain social, ethnic and religious minority groups – be these homosexual or indigenous – and so cut them out of the national polity on the grounds of non-qualification. As Nicola Lacey argues, scholars analyzing the construction and enactment of gendered identities have contributed significantly to critical socio-legal scholarship by focusing "on other axes of differentiation, domination, or injustice in social arrangements" such as race, class, religion and ethnicity (Lacey 2004: 473).

Throughout the 1990s, social theorists, and especially subaltern and feminist theorists such as Gayatri Chakravorty Spivak, Judith Butler, Iris Young and Gloria Anzaldúa, deepened the growing critique of identity politics by highlighting the need to think in terms of emergent and performative identities that do not presuppose a fixed and pre-given notion of self onto which is grafted a politics of exclusion and difference. These theorists spoke to issues of hybridity, simultaneous and overlapping identities, and relational and interdependent understandings of the self that are not reducible to political and legal categories (Nedlesky 2011). In various ways, all of these critics of identity politics were, and continue to be, concerned with the problems of essentialism and the distilling of complex notions of self that together ultimately negate the material and experiential consequences of intersectionality. Critics argue that people are not autonomous individuals, but rather members of integrated social and political systems. The degree to which these systems are defined or framed by the nation-state, or are linked to new, more radical forms of political space in which the state is decentered, is an ongoing socio-legal conversation.

Moreover, critics of identity politics are keen to point out that political mobilization and consciousness raising around specific axes of distinction undermine the capacity for change and for fulfilling democratic aspirations. This is because any one identity is defined in opposition to others and so perpetuates divisions and antagonisms within society. According to William Connolly, "Identity requires difference in order to be, and it converts difference into otherness in order to secure its own self-certainty" (Connolly 2002: 64). Thus, as people solidify into groups on the basis of a singular identity (e.g. Chicana), these groups in turn harden into bounded notions of "us" and "them" that preclude united mass mobilizations against such things as labor discrimination. Argues Sharon Smith, "The only organizational strategy identity politics offers is for different groups of oppressed people to each fight their own separate battles against their own separate enemies" (Smith 2008). In this way identity politics may ultimately affirm the status quo, prevent progressive transformations, and reinforce structural biases through state institutions such as the law, the police and the military.

Throughout the 1990s socio-legal scholars began to think more deeply about the complexities of cultural formations that in turn prompted a revision of thinking about legal identity and the politics of difference more generally. Critics argued that the conventions of identity politics "presuppose that collective identities are large-scale projections of individual affinity and character; that law is an expression of identity and a resource of socialization; that identities might become a fixed, coherent set of choices and standards over time" (Greenhouse 2003: 192–193). In

other words, these critics were critical of earlier scholarship that had a tendency "to obscure the differences among women, among gays, among blacks, and others, and to ignore the significance of multiple allegiances, communities, and experiences to the construction of these identities." Perhaps taking a cue from the rising prominence of postcolonial studies and concerns with cultural pluralism at the time, socio-legal scholars argued that attention should be given to the "role of law in the constitution of identities and the simultaneity of multiple identities and perspectives" (Danielsen and Engle 1995: xiii).

Today, socio-legal scholars appreciate that, even when national governments promote social diversity, policies of multiculturalism may hinder rather than help the achievement of widespread tolerance of existing minorities. In other words, a state's liberal multicultural policies and ethical commitments to embracing difference do not ensure equality amongst its socially and culturally diverse citizens (see Goldberg 2008). This is because multicultural policies, which formalize categories of cultural distinction, may work to shore up essentialized notions of identity and seek to fix them in time. This attempt to fix and manage categories of distinction in the name of building a united society and nation is highly problematic. As documented by Beth Povinelli in her book *The Cunning of Recognition* (2002), Australia's push toward achieving national unity by promoting social inclusion of aboriginal communities ultimately worked to obscure – if not erase – ethnic and cultural differences despite that government's best intentions. In other words, the limits of the Australian government's recognition of aboriginal rights were tied to its very desire to build a cohesive national society.

Povinelli's insight regarding the limitations of liberal multicultural polices has now been widely acknowledged both inside and outside academia. For instance, European Union political leaders such as Angela Merkel and David Cameron openly talk about the failures of multiculturalism and their respective countries' mistake in being too tolerant of diverse communities whose values run counter to those of Germans or Britons. Such public admissions have fueled xenophobic rhetoric and Islamophobic responses, helping swell membership in right-wing parties such as the British National Party, the Greek Golden Dawn Party, the Hungarian Jobbik Party, and the National Front in France. According to Gabriele Marranci, "Islamophobia is a 'phobia' of multiculturalism" and fear of transcultural processes (Marranci 2004: 116). But failed multicultural policies have also prompted new state attempts to create inclusive and culturally pluralist societies. For instance, in 2014 German public schools offered for the first time classes in Islam to primary school students in an effort to better integrate them into German society. Whether these new attempts to create a more cohesive society will be successful remains doubtful. As Iver Neumann notes in the context of the EU, the mushrooming within the EU of identities "which cannot easily be strung together in one overarching narrative of self" has prompted "a rush to defend the story of self that revolves around the nation …. Any advance of the processes of globalization as well as of European integration may also fuel counterdiscourses that celebrate and essentialize nations, regions, Europe" (Neuman 1999: 212).

Within socio-legal circles, scholars such as Brenna Bhandar remind us that state multicultural polices function as a mechanism for exerting control over non-conforming citizens. Bhandar (2009: 304) writes, "Differences that challenge the boundaries of the sovereign political subject are perceived as a threat to be contained and managed." One of the ways multicultural polices manage this perceived threat is to limit diversity by labeling certain peoples such as orthodox Jews or Islamic fundamentalists as risky, harmful, oppressive and "illiberal." In this process, illiberal minorities are denied the legal identity of a rights-bearing citizen (Kymlicka 1995). As noted by Davina Cooper in her ground-breaking book *Challenging Diversity: Rethinking Equality and the Value of Difference* (2004), a politics of diversity – as distinct from a politics of equality based on minority identity and entitlement – offers a more nuanced approach to understanding the structural power relations between different social and cultural constituencies. However, as Cooper would be probably the first to admit, engaging with a politics of diversity is messy, conceptually difficult, and faces numerous obstacles.

Despite widespread criticism of identity politics and related policies of multiculturalism, ways of ensuring greater tolerance of existing minorities and creating space for emergent forms of cultural and social diversity are not clear. As a result, the constitution of individual and group identities remains highly contested. What appears to be certain is that the "clash of civilizations" rhetoric espoused by scholars such as Samuel Huntington and right-wing populists such as Pat Buchanan over the past few decades is still being warmly embraced. In short, masses of people are buying into a fear of cultural heterogeneity and in many cases resort to blaming derogatory notions of non-European identity, be these identities Muslim, Native American, Asian, or African, which gloss over a vast range of hybrid ethnicities, loyalties and affiliations. As Wendy Brown dramatically reminds us in her book *Walled States, Waning Sovereignty* (2010), in many countries the fear of national identity being diluted by cultural and religious diversity is promoting a frenzied rebuilding of state boundaries and implementation of new strategies aimed to deny legal identity and related civil and political rights to various marginalized groups within state territories. In the early decades of the twenty-first century, perhaps more than in any other era, the specter of invading hordes of "undocumented immigrants" and "illegal aliens"[4] from Latin America, Eastern Europe, Africa and the Middle East looms large in the Euro-American imaginary. The "homecoming" of the postcolonial subject is not generally seen by those in Western democracies as an occasion for celebration.

New Modalities of Legal Identity in the Twenty-first Century

In the discussion above, I outlined two socio-legal approaches to examining the constitution of legal identity: postcolonial and democratic liberal. These approaches are not mutually exclusive and share many overlapping concepts, theories and

methods. Perhaps the greatest commonality is that both bodies of literature are deeply engaged with the concept of the nation-state and tend to ultimately affirm its normative and analytical centrality. In the first, postcolonial, approach, the nation-state is the primary actor on the international battlefield, over which legal identity is fought between states and groups of peoples demanding the same legal status as states. In the second, liberal, approach, the nation-state is the geopolitical container in which various peoples fight for self- and collective recognition of their legal identities. As we move through the first half of this century, both of these approaches will undoubtedly remain critical discursive terrains of legal and cultural conflict, tension, and negotiation. However, both will also have to contend with new political pressures being brought to bear on the constitution of legal identity that are attracting attention in socio-legal scholarship and more general intellectual conversations.

Below I briefly point to three emerging lines of inquiry that are forcing some law and society scholars to reassess their thinking regarding the constitution of legal identity. These are (1) the concepts of post-national and denational citizenship and related issues of statelessness being experienced by millions of refugees, many of whom cannot imagine, let alone claim, a national legal identity, (2) the prominence of human rights discourse and the degree to which international legal institutions are impacting the constitution of legal identities, and (3) emerging frontiers of technology and new materialist thinking which are forcing scholars to think differently about relations of sociability and the blurred divides between humans and non-humans and their respective relational legal identities.

Socio-legal scholars have long been interested in the idea of citizenship. However, to date only a small number of these scholars are engaging with what are being called **new geographies of citizenship**, which examine shifting citizenship formations in contexts of destabilized state sovereignty (Mitra 2013). As a result, the concepts of denationalization, post-nationalism and transnationalism with respect to legal identity have made as yet only a modest appearance in mainstream socio-legal literature, and even then typically amongst scholars examining immigration, asylum seekers, and refugees, who are often caught in what Susan Coutin calls the spaces of "legal nonexistence" (Coutin 2011). The terms **denationalization**, **post-nationalism** and **transnationalism** are more evident among scholars examining geopolitical regions such as the Middle East, Latin America and Africa, and organizations such as the African Union and European Union. These cases of interregional and supranational legality suggest new imaginaries of legal allegiance and the emergence of flexible modes of citizenship within and across state lines. In Europe for instance, independence movements in sub-states such as Scotland in the UK and Catalonia in Spain are constant reminders of the destabilizing of state politics and conventional notions of national identity. Scholars examining these movements are keen to point out that local identity activism is intimately linked to supranational and transnational legal, political, economic and cultural processes.

Related to rethinking citizenship and new forms of legal identity in the context of globalization are the increasing prominence and impact of **international human rights rhetoric and organizations** (Merry 2006). Nicola Lacey, in an essay on the constitution of identity written a decade ago, noted that international human rights campaigns were becoming the new forum through which women's identities – and many others besides – were being constituted (Lacey 2004: 480). Today, human rights discourse has escalated exponentially on a worldwide scale to create an emerging field of transnational human rights law (Klug 2005). A vast array of NGOs, civil society organizations and social movements are using a human rights framework to leverage pressure on state governments to implement a range of civil, political, cultural, social and economic rights pertaining to all peoples within their borders irrespective of their formally recognized citizenship.

However, as noted by Lacey, one of the concerns with this human rights discourse is that it reproduces on a global scale many of the problems associated with identity politics as it has played out within nation-states. The universalist aspirations of human rights implicitly affirm essentialized notions of "women," "indigenous peoples," "disabled", "children" and so on. Hence, argues Lacey, we are experiencing "a resurgence of a liberal normative framework" and commitment to "a set of normative commitments" which may not be applicable to the vast range of local contexts in which human rights are said to apply (Lacey 2004: 482). In other words, it could be argued that the critique of identity politics discussed above is being washed out in the haste to transform human rights into global citizenship accompanied by the enforcement capacities and institutional authority enjoyed by nation-states. Against this caution, it could also be argued that a global human rights framework is opening up new sites of legal engagement that may allow for "strategic essentialism" without negating non-Western modes of identity formation, and without denying the violence of state sovereignty with respect to culturally diverse communities as highlighted by scholars of postcolonialism (see Tsutsui, Whitlinger, and Lim 2012). Thinking about the complex and contradictory impact of global human rights within national contexts is still a nascent line of inquiry within mainstream socio-legal scholarship, but one which will no doubt garner increasing attention in the coming decades.

A third line of inquiry that socio-legal scholars are beginning to consider when thinking about legal identity is the impact of **new technologies**, **biopolitical power**, and **the divide between humans and non-humans**.[5] New technologies and new materialist thinking are forcing scholars to reflect upon relations of sociability and interconnection. Problematized are the concept of humanity and the processes determining if an entity – be it a fetus, genetic sample, seed, shark, ghost, document or tree– can become a subject capable of claiming rights and protections in national and international law. Through new theories engaging with posthumanism, biopolitics, performativity, aesthetics and actor-networks, socio-legal scholars are exploring the anthropocentric limitations of traditional humanist thought. Many of these conversations are informed by various indigenous perspectives which take into account legal relations to land, before- and afterlife, and non-human materials that are not

yet imaginable or recognized within the logics of Euro-American law (Dayan 2011; Goldberg-Hiller and Silva 2011).

Concluding Thoughts

The three new lines of inquiry outlined briefly above highlight plural and alternative understandings of personhood informed by a range of culturally diverse epistemologies, aesthetics, traditions and religions. As such, they underscore the modern mythologies of state nationalism upon which modern Euro-American law depends. Second, these inquiries speak to new material realities and new spatial and temporal relations informing contemporary legal subjectivity but which are not easily accommodated, adequately addressed, or contained within existing state systems. Finally, these three lines of inquiry together point to a "spatial turn" in socio-legal scholarship that explicitly problematizes statist perspectives and points to what Saskia Sassen argues is an emergence of "new types of political subjects" (Sassen 2003: 41; see also Darian-Smith 2013a; Braverman, Blomley, Delaney, and Kedar 2014).

There is no doubt that modalities of legal subjectivity, identity and citizenship are rapidly shifting in the context of contemporary globalization. While state-nationalism remains a strong force, there are concurrently in the world many other modes of legal connection shaping people's sense of personal and collective identities. My general argument in this chapter is that socio-legal scholars need to embrace different modes of being in the world and look beyond, through and within the nation-state rather than accept its limited analytical framing. In short, scholars will increasingly have to come to terms with different modes of legality and legal logics emerging in Western and non-Western regions of the world if they want to retain their relevance in the coming decades.

Notes

1   Social contract theory has its serious critics, most notably for its idealized premise that all people share the same legal standing in society and so can equally enter a social contract in the first place. As feminist and critical race scholars have compellingly argued, both in the past and today, women and minorities are not always recognized as having an equivalent legal identity in society and so do not start from the same base as white propertied males (see Pateman and Mills 2007).

2   This narrative of course glosses over centuries of complex historical exchange between Europeans and non-Europeans, and overlooks the fact that some Europeans recognized at particular moments in time that native peoples had sophisticated legal systems and social relations (see Anghie 2005).

3   The exact date at which postcolonial studies took off is hard to ascertain. Scholars such as W. E. B. Du Bois, Frantz Fanon, C. L. R. James and many others were writing decades before postcolonial studies was recognized in the Euro-American academy in the 1980s and 1990s as a distinct intellectual theory and body of literature.

4 In France undocumented people are called *sans papiers* ("without papers"), while in North African media they are called *harraga* ("those who burn" in Arabic), which refers to migrants seeking entry into Europe or European-controlled territories, who, if apprehended by authorities, often burn their immigration papers as a sign of protest and an effort to stall extradition processes.

5 For instance, "Law, Culture and Biopolitics" was the theme of the annual conference of the Association for the Study of Law, Culture and Humanities in 2013.

References

Anghie, Anthony (2005). *Imperialism, Sovereignty, and the Making of International Law*. Cambridge: Cambridge University Press.

Bhandar, Brenna (2009). The ties that bind: Multiculturalism and secularism reconsidered. *Journal of Law and Society* 36(3): 301–326.

Braverman, Irus, Blomley, Nicholas, Delaney, David P., and Kedar, Alexander (eds.) (2014). *The Expanding Spaces of Law: A Timely Legal Geography*. Stanford, CA: Stanford University Press.

Brown, Wendy (2010) *Walled States, Waning Sovereignty*. Brooklyn, NY: Zone Books.

Comaroff, Jean and Comaroff, John (eds.) (2006). *Law and Disorder in the Postcolony*. Chicago: University of Chicago Press.

Connolly, William (2002). *Identity/Difference: Democratic Negotiations of Political Paradox*. Minneapolis: University of Minnesota Press.

Cooper, Davina (2004). *Challenging Diversity: Rethinking Equality and the Value of Difference*. Cambridge Cultural Social Studies. Cambridge: Cambridge University Press.

Coutin, Susan Bibler (2011). The rights of noncitizens in the United States. *Annual Review of Law and Social Science* 7: 289–308.

da Silva, Denis Ferreira (2011). Roundtable on Eve Darian-Smith *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law*. *Feminist Legal Studies* 19: 274–277.

Danielson, Dan and Engle, Karen (eds.) (1995). *After Identity: A Reader in Law and Culture*. New York/London: Routledge.

Darian-Smith, Eve (2010). *Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law*. Oxford: Hart.

Darian-Smith, Eve (2013a). *Laws and Societies in Global Contexts: Contemporary Approaches*. Cambridge: Cambridge University Press.

Darian-Smith, Eve (2013b). Postcolonial theories of law. In Reza Banakar and Max Travers (eds.), *An Introduction to Law and Social Theory*. 2nd ed. Oxford: Hart, pp. 247–264.

Darian-Smith, Eve and Fitzpatrick, Peter (eds.) (1999). *Laws of the Postcolonial*. Ann Arbor, MI: University of Michigan Press.

Dayan, Colin (2011). *The Law is a White Dog: How Legal Rituals Make and Unmake Persons*. Princeton, NJ, and Oxford: Princeton University Press.

Franck, Thomas M. (1996). Clan and superclan: Loyalty, identity and community in law and practice. *American Journal of International Law* 90(3): 359–383.

Goldberg, David Theo (2008). *The Threat of Race: Reflections on Racial Neoliberalism*. Oxford: Wiley-Blackwell.

Goldberg-Hiller, Jon and Silva, Noenoe K. (2011). Sharks and pigs: Animating Hawaiian sovereignty against the anthropological machine. *South Atlantic Quarterly* 110(2): 429–446.

Greenhouse, Carol (2003). Ethnography and democracy: Texts and contexts in the United States in the 1990s. In Austin Sarat and Jonathan Simon (eds.), *Cultural Analysis, Cultural Studies, and the Law*. Durham, NC, and London: Duke University Press, pp. 191–121.

Handler, Richard (1994). Is "identity" a useful cross-cultural concept? In John R. Gillis (ed.), *Commemorations: The Politics of National Identity*. Princeton, NJ: Princeton University Press, pp. 27–40.

Harris, Duchess (2001). From the Kennedy Commission to the Combahee Collective: Black feminist organizing, 1960–1980. In Bettye Collier-Thomas and V. P. Franlin (eds.), *Sisters in the Struggle: African American Women in the Civil Rights Black Power Movement*. New York: New York University Press.

Klug, Heinz (2005). Transnational human rights: Exploring the persistence and globalization of human rights. *Annual Review of Law and Social Science* 1: 85–103.

Kymlicka, W. (1995). *Multicultural Citizenship: A Liberal Theory of Minority Rights*. Oxford: Clarendon Press.

Lacey, Nicola (2004). The constitution of identity: Gender, feminist legal theory, and the law and society movement. In Austin Sarat (ed.), *The Blackwell Companion to Law and Society*. Oxford: Blackwell, pp. 471–486.

Marranci, Gabriele (2004). Multiculturalism, Islam and the clash of civilisations theory: Rethinking Islamophobia. *Culture and Religion: An Interdisciplinary Journal* 5(1): 105–117.

Merry, Sally Engle (2004). Colonial and postcolonial law. In Austin Sarat (ed.), *The Blackwell Companion to Law and Society*. Oxford: Wiley-Blackwell, pp. 569–588.

Merry, Sally Engle (2006). *Human Rights and Gender Violence: Translating International Law into Local Justice*. Chicago: University of Chicago Press.

Mitra, Subrata K. (ed.) (2013). *Citizenship as Cultural Flow: Structure, Agency, Power*. New York: Springer.

Nedlesky, Jennifer (2011). *Law's Relations: A Relational Theory of Self, Autonomy, and Law*. Oxford: Oxford University Press.

Neumann, Iver B. (1999). *Uses of the Other: "The East" in European Identity Formation*. Borderlines 9. Minneapolis: University of Minnesota Press.

Pateman, Carole and Mills, Charles (2007). *The Contract and Domination*. Cambridge: Cambridge University Press.

Perry, Richard Warren and Maurer, Bill (eds.) (2003). *Globalization Under Construction: Governmentality, Law, and Identity*. Minneapolis/London: University of Minnesota Press.

Rajagopal, Balakrishnan (2008). Invoking the rule of law in post-conflict rebuilding: A critical examination. *William and Mary Law Review* 49: 1347–1376.

Santos, Boaventura de Sousa and Rodriguez-Gavarito, Cezar (eds.). (2005). *Law and Counter-hegemonic Globalization: Towards a Cosmopolitan Legality*. Cambridge: Cambridge University Press.

Sassen, Saskia (2003). The repositioning of citizenship: Emergent subjects and spaces for politics. *CR: The New Centennial Review* 3(2): 41–66.

Sassen, Saskia (2008). Neither global nor national: Novel assemblages of territory, authority and rights. *Ethics & Global Politics* 1(1–2): 61–79.

Smith, Sharon (2008). The politics of identity. *International Socialist Review* 57, January–February.

Taylor, Charles (1992). *Sources of the Self: The Making of Modern Identity*. Cambridge: Cambridge University Press.

Tsutsui, Klyoteru, Whitlinger, Claire, and Lim, Alwyn (2012). International human rights law and social movements: States' resistance and civil society's insistence. *Annual Review of Law and Social Science* 8: 367–396.

UNCORRECTED PROOFS