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Nation-Building in the Penumbra: Notes from a Liminal State†

By MONICA EPPINGER*

I. Landscape Littered with Fallen Giants

The Soviet Union: Second World, workers' vanguard, Evil Empire, home. In the eyes of the West, the Soviet Union was decidedly "other," tragic, romantic, or threatening in its radical alterity. For Ukrainians, by its end, the Soviet Union was the taken-for-granted setting of everyday life. The Ukrainian S.S.R. was one of the core Soviet republics, in on the Revolution from inception to stagnation, birthplace of Trotsky and Brezhnev. Part of the Soviet heartland, it was separated from the West by an Iron Curtain and an entire Warsaw Pact of buffer states: Poland, Czechoslovakia, Hungary, and East Germany.

These Cold War structures, seemingly stable as late as 1989, proved otherwise over the following fifteen years. Ukraine came to occupy an uncomfortable middle ground through a series of unexpected events. In 1991, the Soviet Union dissolved with remarkable tranquility when elites from Ukraine and other republics

† Remarks from *The West and the Rest in Comparative Law*, 2008 Annual Meeting of the American Society of Comparative Law, University of California, Hastings College of the Law (Oct. 2-4, 2008). Presented in the panel, *What do the Rest Think of the West?*

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created independent states by agreement with Moscow. By 2001, both the North Atlantic Treaty Organization ("NATO") and the European Union ("EU") encompassed the former Warsaw Pact up to Ukraine's western border. In 2004, the Ukrainian populace astonished the world (and itself) by staging a peaceful uprising against rigged elections and a leadership hand-picked by the Kremlin. This "Orange Revolution" eschewed the red of the past and aligned Ukraine neither with the red of the Russian flag to the East nor with the blue of the NATO or EU flags to the West. The Orange Revolution, while marking a milestone in the widening gap separating Ukraine from its Soviet past, did not expunge surviving Soviet habits, assumptions, buildings, and personnel. At the same time, although still separated by a slim border from encroaching Western military and economic organizations, foreign institutions – multiparty democracy, private property ownership, a market economy – have advanced across Ukraine, apparently inexorably, to occupy the present. In this uncomfortable shifted ground, legal reform has become a primary technology for sorting out the present and charting a path to the future.

The emergence of post-Socialist legal orders is reshaping some of the familiar terrain of comparative legal studies. This new context calls into question the topography of comparison and a problematic legacy of naming and framing. Vast re-codification efforts stand at the center of nation-building projects that seem more of a late nineteenth-century Europe than an early twenty-first-century East. Such changes, and the rupture from which they emerge, challenge essentialist or static notions of identity, correlations of territory and culture, and assumptions of where the West is or where the Rest begin. Based on fourteen months of fieldwork in Ukraine, this paper reports on how Ukrainians comprehend "the West." Concepts from anthropology, "liminality" and "deixis," aid in understanding Ukrainians' ideas of what or where "the West" is. Examples from Ukrainian legal reform and observations by Ukrainian legal actors lead us to reconsider hegemony, integration, mimesis, and agency.

II. Locating the West

The question, "What do the Rest think of the West?" presumes the salience of some categories that my fieldwork in Ukraine flagged as suspect. This suspicion was borne out by the immediate reactions

of Ukrainian interlocutors to the question. "What do we think of 'the West?'" You know we don't think in those old categories anymore,"¹ was a typical reaction. Ukrainian elites were eager to demonstrate that even ordinary citizens no longer think of "the West" as a monolith, a view discredited as unsophisticated Cold War thinking. Even the most unworldly Ukrainians, I was assured, now distinguish between Europe and "America."

This differentiation came about, in part, when opinions of the United States fell precipitously after the onset of the U.S. war in Iraq. Those who had doubted Soviet information about the U.S. now doubted their doubts. How many of the preposterous-sounding old accounts of U.S. human rights violations, class oppression, and international adventurism were actually to be believed? Others who had doubted altruism as a motive for the NATO bombing of parts of the former Yugoslavia in the 1990s found their suspicions of U.S. warmongering confirmed by the war in Iraq. "The West," previously identified within the geography of Soviet teleology as an area enmeshed in a certain stage of bourgeois capitalism, was no longer a monolith at which Ukrainians directed revile or envy. The U.S. emerged as an object of Ukrainian disregard and sank in public consciousness.

By contrast, Europe ("Evropa") is a constant referent in contemporary Ukraine. A most common use is the expression "Evroremont," which is contemporary slang for renovating (say, one's apartment) to a level of comfort and aesthetic appeal that would pass in Europe. Another compound word, a common form in which indexing shows up, is "Evrostandardti," a term of art for legal, regulatory, or ethical standards either borrowed from Europe or perceived to be up to European snuff. Factories are retooled to "Evrostandardti," foods are processed to meet "Evrostandardti," auditing processes adapted so that companies comply with the "Evrostandardti" of potential investors prior to an initial public offering ("IPO"). The lousy food stand across the street from my apartment selling tough chicken billed itself as the "Evrogrill." While the Western press stereotypes Eastern Ukraine as "pro-

1. Telephone interview with Ihor Pryamoyevych, Member of Parliament of Ukraine 1994-2002 (Sept. 7, 2008). (N.B.: Per common practice in anthropology, throughout this article pseudonyms are used to protect the identities of interlocutors. Interviews did happen in date, location, and format noted. The author keeps on file the original recording or manuscript of each interview.)

Russian" and Western Ukraine as "pro-Western," Ukrainians regardless of region, age, or social class were keen to explain that all aspired to a European standard of living for Ukraine. Despite divergent views on geopolitical tactics or strategic alliances, Ukrainians find consensus on that. While we could inquire into what this pervasive referent of popular culture means, perhaps the more interesting question is what does its pervasiveness mean?

While the U.S. lies outside of the domain of Ukrainian self-identification, Europe is firmly in Ukrainian sites. Reorienting our line of inquiry accordingly, we acknowledge that addressing the question of "How does the Rest see the West?" from a Ukrainian point of view requires that first we consider the prior question of where those in Ukraine locate themselves. That informs how Ukrainian legal elites see the West, and how the West and its forms are reshaping the legal landscape in Ukraine. The present study follows Edward Said,² who attuned us to the work that "the Orient" has done in the internal construction of "Europe," and Laura Nader, who alerted us to methodological implications of comparison.³ Inquiry into what Ukrainians think of "the West" allows us to look at ourselves from the viewpoint of those whose state and sovereignty are emergent. The fact that Ukraine is a work in progress, an object in motion, allows us in the West some insight into stable forms in our own context. The Ukrainian position also exposes for further scrutiny some of the power relations presumed, or replicated, in the concepts of "the West" and "the Rest."

III. Over there: Ukraine as Outside of the West

In order to understand how Ukrainians regard the West, the concept of deixis is a useful starting point. From linguistic anthropology, deixis concerns the way languages encode or grammaticalize features of the context of utterance or speech event.⁴ Some philosophers refer to deictics as "indexical expressions."

2. EDWARD SAID, *ORIENTALISM* (Random House 1978).

3. Laura Nader, *Comparative Consciousness, in ASSESSING CULTURAL ANTHROPOLOGY* 84-96 (R. Borofsky, ed., McGraw Hill 1994).

4. WILLIAM F. HANKS, *REFERENTIAL PRACTICE: LANGUAGE AND LIVED SPACE AMONG THE MAYA* (University of Chicago Press 1990) [hereinafter HANKS, *REFERENTIAL PRACTICE*]. See also WILLIAM F. HANKS, *LANGUAGE AND COMMUNICATIVE PRACTICES* 161-62 (Westview Press 1996).

Peirce calls them "indexical signs"⁵ and Russell, "egocentric particulars"⁶ (which Hanks helpfully amends to "sociocentric").⁷ Traditional categories of deixis in Western linguistic scholarship are person, place, and time. Personal deictics encode the speaker's reference to self, others, or third persons neither speaker nor addressee, as in the pronouns "I," "you," "they." Place deictics encode spatial location relative to the location of the speech event. Time deictics encode temporal points relative to when an utterance was spoken, as in adverbs of time like "now," "then," "yesterday," or "this year," and in verb tense.⁸

An investigation into "here," "now," and "us" reveals the succinctness with which langue captures and conveys complex understandings. The "here and now" proximal zone has the appearance of concreteness, but as Hanks demonstrates, that is a false appearance. Our ways of understanding and inhabiting the proximal zone are far from being simple or natural; an immense stock of social knowledge orients action and provides the categories in which we delimit the here and now.⁹

Other categories of deixis elaborated by later scholars are also relevant to our inquiry.¹⁰ Discursive deixis refers to portions of the unfolding discourse in which the addressee is located. The sentence, "Puff, puff, puff: *that* is what it sounded like," is one example. Forms of reference to precedent in judicial decisions or legislative history are others. Social markers indicate distinctions relative to participant-roles, particularly those between speaker and addressee or speaker and some referent. Examples are titles of address, forms of vocatives, or second-person familiar versus formal pronouns, such as the Ukrainian ти and ви.

Deixis, then, is intimately associated with discourses of inclusion and exclusion, the definition of "we" and "they," whether

5. C.S. PEIRCE, *PHILOSOPHICAL WRITINGS OF PEIRCE: SELECTED WRITINGS* 107 (J. Buchler ed., Dover 1955) (1940).

6. BERTRAND RUSSELL, *AN INQUIRY INTO MEANING AND TRUTH* (Routledge 1940).

7. HANKS, *REFERENTIAL PRACTICE*, *supra* note 4, at 7-8.

8. *Id.* at 4-5.

9. *Id.* at 7.

10. See J. Lyons, *Deixis and Subjectivity: Loquor, Ergo Sum?*, in *SPEECH, PLACE, AND ACTION: STUDIES IN DEIXIS AND RELATED TOPICS*, 101 (R. Javella and W. Klein eds., Wiley 1982) and C. Fillmore, *Towards a Descriptive Framework for Spatial Deixis*, in *SPEECH, PLACE, AND ACTION: STUDIES IN DEIXIS AND RELATED TOPICS* 31 (R. Javella and W. Klein eds., Wiley 1982).

"you" are one of "us." It encodes social distance. Likewise, it signals the context-dependent sense of spatial terms, "here" (where we think "we" are) and "there" (where "they" start) and temporal terms, "now" (the time of us and our contemporaries) and "then" (the time of future and past selves). Some temporal deictics are more specific in Ukrainian than in English. Two words translate into English as "then," one meaning the past [тоді, "todi"] and other, the future [потім, "potim"]. For Ukrainians, the meaning of "we" and "they," or "here" and "there," may shift depending on the frame of reference, the "then" of the past or of the future. The meaning of these deictics has become problematic because of the peculiar situation of the present.

IV. Time and Place: Liminality and Penumbra

Decoding deictics in contemporary Ukraine is complicated by a historical peculiarity: the context upon which deictics depend for meaning has been profoundly disrupted. For Ukrainians considering collective identity, part of the problem with locating the referent for "here" or "there," or "us" or "them," lies in the very fact that the frame of reference became unmoored with the passing of the Soviet Union. To understand the kinds of forces exerted on that context, anthropological work on forms of change offers the useful concept of liminality. The liminal space: this is where Ukrainians recognize themselves.

French folklorist Arnold van Gennep introduced the concept of "liminality" in his 1909 analysis of *rites de passage*.¹¹ By this, he meant such ritual processes as initiations, investitures, weddings, funerals – in fact, all *rites* which accompany change of place, state, and social position. In *rites de passage*, Van Gennep identified three phases: separation, limen, and re-attachment to a stable or recurrent, culturally recognized condition.¹² The first and last phases "detach ritual subjects from their old places in society and return them, inwardly transformed and outwardly changed."¹³

11. ARNOLD VAN GENNEP, *THE RITES OF PASSAGE* (Routledge and Kegan Paul 1960) (1909).

12. VICTOR TURNER, *Variations on a Theme of Liminality*, in *BLAZING THE TRAIL* 48, 48 (University of Arizona Press 1992) [hereinafter TURNER, *Variations*]. For Turner's discussion of Van Gennep's work, see VICTOR TURNER, *Morality and Liminality*, in *BLAZING THE TRAIL* 132, 133 (University of Arizona Press 1992) [hereinafter TURNER, *Morality*].

13. TURNER, *Variations*, *supra* note 12, at 48-49.

The middle, or liminal, phase is categorically trickier. "Limen" literally means a "threshold," though in some protracted rites it is more like a corridor or a tunnel.¹⁴ Victor Turner, elaborating on Van Gennep's theme, identifies odd properties associated with this place of midtransition, liminality. First is being betwixt and between. The liminal state by definition is located between established states of politico-jural structure. Those occupying a space of liminality "evade ordinary cognitive classification, too, for they are not this or that, here or there, one thing or the other."¹⁵ They suffer a paradox characteristic of liminality, of being "*both this and that*."¹⁶ It is in the paradox of being two things at once, that as a result the liminal subject is culturally and socially recognized as neither. The novitiate is of both secular and sacred, and thus is neither parishoner nor priest.

A second odd property of liminality is that of existing in a state of potentiality. Let's start by comparing the "liminal state" with normal affairs in the world of productive forces (such as banks, parliaments, law firms, universities). Action to maintain the systems and personnel of control of this world takes place in a culture's "indicative mood."¹⁷ In this linguistic analogy, Turner suggests that normal sociocultural processes have to do with what most cultures would label as "actual," that is, "existing or happening 'in fact,' not merely seeming to be so - pretended, imagined, fictitious, or ostensible."¹⁸ By contrast, life may also be experienced in subjunctive or optative moods. Turner cites Webster's definition of "subjunctive": "'designating or of that mood of a verb used to express supposition, desire, hypothesis, possibility, etc., rather than to state an actual fact.'"¹⁹ (Similarly, the optative mood expresses wish or desire.) "The liminal or central phase of elaborate ritual," Turner concludes, "is clearly dominated by the subjunctive mood of culture."²⁰

Change does not automatically place one in a liminal state. To

14. *Id.* at 49.

15. *Id.*

16. *Id.*

17. TURNER, *Morality*, *supra* note 12, at 133-34.

18. *Id.*

19. *Id.*

20. *Id.*

understand the analogy to indicative or subjunctive moods, contrast characterizations of life in post-Soviet Ukraine with the perennial metaphorical space of American change, the frontier. Whether for pioneers in covered wagons, astronauts in spaceships, or scientists on the verge of a new discovery, life on the American frontier is emphatically in the indicative. This is real life, actual, exciting. Since the Soviet Union dissolved, Ukraine has been described as a state in "transition" or as an "emerging economy." Rather than occupying the defined space of a frontier, its limits are fuzzy. The point of departure is specified - Ukraine is "post-Soviet," "post-Socialist." Life in this transitional state is, if nothing else, life in the perpetual subjunctive.

Turner might not be surprised by the nostalgia for Soviet times that social scientists note surging through post-Soviet subjects,²¹ given their long stay in a liminal phase and its state of potentiality. "Actuality, in the liminal state, gives way to possibility, and aberrant possibilities reveal once more to luminaries the value of what has hitherto been regarded as the somewhat tedious daily round."²² The tedious daily round can also be considered the good old days; some Ukrainians labeled "pro-Russian" might be more aptly described as "nostalgically Soviet."

Even post-Soviet Ukrainians, who are decidedly not nostalgic for a Soviet past, express distaste for liminality. Ukrainian writer Yuri Andrukhovych's exchange with a Spanish interviewer is a telling example. From the start, Andrukhovych's attempt to make a straightforward statement about his European influences is tripped up by myriad changing forms, altered states and toponyms unavoidably tangling up a simple sentence. "[L]ike all intellectuals in his country," Andrukhovych is "crazy about everything European. 'My literary references are European. Paul Celan [a 'German' writer] was born in Chernivtsi, a town that was Romanian at the time and subsequently became Ukrainian. There are several towns that have changed state or name over the years.'"²³ Andrukhovych takes changing forms in stride. His own hometown

21. See, e.g., SVETLANA BOYM, *THE FUTURE OF NOSTALGIA* (Basic Books 2001).

22. TURNER, *Variations*, *supra* note 12, at 49.

23. Xavi Ayen, *The Europeanism of Ukrainian Writers*, LA VANGUARDIA, Oct. 18, 2006 [hereinafter Ayen, *Ukrainian Writers*]. On Chernivtsi, its variability, and its role in European sociology of law, see Monica Eppinger, *Governing in the Vernacular: Eugen Ehrlich and Late Habsburg Ethnography*, in LIVING LAW: RECONSIDERING EUGEN EHRLICH 21-48 (Marc Hertogh, ed., Hart Publishing Limited 2009).

changed from the Austro-Hungarian Stanyslaviv to the Soviet Ivano-Frankovsk and then to the Ukrainian Ivano-Frankivsk.²⁴ Similarly, nearby Austrian Lemberg became Soviet Lvov and is now Ukrainian Lviv. But even in this Cheshire-cat zoo of changing forms, Andrukhovych clearly objects to some categorizations of his world: "For us, it was dramatic that an author like Samuel Huntington should draw a categorical frontier between East and West. According to him, we are a border zone between what is and is not Europe, a sort of limbo land stretched between two worlds."²⁵

In referencing liminality, then, I do not side those who would conceptually place Ukraine in a limbo land, consign it to a border zone at the edge of Europe, or make of it a new "buffer state" between NATO and the East. Recall that liminality, though employing a spatial metaphor, is actually a temporal term: liminality refers to a time of mid-transition. It is not a space and its subjects are assumed to be in motion. In order to avoid confusion or offense, for a spatial locator, we could borrow a metaphor from American law, the penumbra. In U.S. Constitutional jurisprudence, certain freedoms or privileges are held to exist by virtue of a certain relationship to a Constitutional right or guarantee.²⁶ Put another way, certain Constitutional guarantees depend on the realization of other freedoms to give the guarantees "life and substance,"²⁷ or, in Turner's terms, actuality. These freedoms protected by virtue of their relation to core enumerated rights are said to exist "in the penumbra" of those rights. The penumbra, then, is a zone of permitted or enabled practices that exist by virtue of a relationship to rights, guarantees, or laws enumerated in written documents issued by the appropriate authoritative body.

Does Ukraine stand in the penumbra of Europe? An empirical investigation into whether this designation is apt might examine the jurisdiction of Europe. European integration may be understood in part as a project of harmonizing laws and behavior shaped by laws.²⁸ I propose that European integration in the domain of law

24. For treatment of this transposition of the local, see YURI ANDRUKHOVYCH, *DESORIENTATSIYA NA MISTSEVOSTI* [DISORIENTATION IN PLACE] (2006).

25. Ayen, *Ukrainian Writers*, *supra* note 23.

26. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

27. *Id.*

28. For a theoretical stance that might regard such projects or claims with

and law-abiding behavior is achieved, even beyond the formal bounds of the European Union, if EU regulation creates areas outside the formal boundaries of the Union in which behaviors harmonize themselves with the European. How far beyond the borders of the EU do EU regulations regulate? How much European integration is achieved by EU policy decisions beyond the jurisdiction of the EU?

One concrete example, biofuels policy, provides some insight. Consider the transformed landscape of north central Ukraine; in only one season it shifted from its traditional dull brownish palette of wheat to the almost fluorescent yellow of rapeseed. Neon yellow now stretches to the horizon. A manager in the Kyiv office of Monsanto, one of the leading international marketers of seed in Ukraine, explains that Ukrainians began to cultivate rapeseed primarily for EU biofuel use. Rapeseed cultivation on any scale only started in 2004 and by 2006, there were 600,000 hectares devoted to rapeseed (especially winter rape; but also some Canola spring rape).²⁹ What set off this change? New EU mandates required that member countries contribute a certain amount of raw material for biofuel. Consequently, the Lithuanian government purchased part of its quota directly from Ukrainian farmers; German farmers grew their own, but German oil presses then needed substitute oilseeds, which they purchased from Ukrainian growers.³⁰ The director of "Agrimatko," a seed franchise in Kherson, a small city deep in the southern Ukraine wheat belt, told me in 2006,

[t]here's a boom this year in rapeseed and corn because of biodiesel. It's huge. Everyone switched this year. You (the U.S.) already have plants [kombinat] that convert corn to fuel. We may here, someday. But even before we do, biofuel in Europe is raising our prices. Prices for rapeseed and corn are up 100% from last year. If you could get \$50/ha from them last year, this year you get \$100.³¹

skepticism, *see* LAURA NADER, *HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A MOUNTAIN ZAPOTEC VILLAGE* (Stanford University Press 1990).

29. Interview with Nikolay Vidkritiy, Director of Ecological Permitting, Monsanto Ukraine, in Kyiv, Ukraine (Dec. 12, 2006).

30. Interview with Stephan Kresse, agricultural attaché, German Embassy, in Kyiv, Ukraine (Feb. 19, 2007).

31. Interview with Ihor Molodiy, Director of southern Ukraine distribution for agricultural supplier Agrimatko, in Kherson, Ukraine (June 7, 2006).

Where Westerners might take such interconnectedness for granted, this direct effect of European policies upon their landscape is, for Ukrainians, a startling and post-Iron-Curtain experience.

The concepts of liminality and penumbra give us some insight into the reference states of time and place in contemporary Ukraine. Let us reconsider the pervasiveness of the “evro” referent. In some respects, Ukrainians are living “as if” they were in Europe: undertaking Evroremont, buying eyeglass frames of Evrostyle, buying chicken from the Evrogrill. During life in a liminal state, even someone living in the subjunctive is living “as-if”... something. For most Ukrainians, the aspirational referent is Europe. In other respects, those very same Ukrainians are already undertaking projects, shaping practices, and internalizing regulations and standards framed in Europe. They are growing rapeseed to fulfill EU policies, and producing crops to European regulations and specifications. They already live by Evrostandardti. This is life in the indicative mood, the state of actuality instead of potentiality. In some respects, then, in the as-if and what-if life of the liminal phase, Europe is the aspirational referent.³² In other respects, Europe casts the shadow under which actual life in Ukraine already carries out its everyday performances. Data on some current practices support the proposition that Ukrainians already live in the penumbra of Europe.

Liminality is a space of open possibility, but that does not necessarily imply its burdens are lighter. In fact, it can be grinding. Ukrainians might nod knowingly at Turner’s description that those in the liminal space

may be said to be in a process of being ground down into a sort of homogenous social matter, in which possibilities of differentiation may still be glimpsed, then later positively refashioned into specific shapes compatible with their new postliminal duties and rights as incumbents of a new status and state. The grinding-down process is accomplished by ordeals: circumcision,

32. Perhaps a Ukrainian predisposition for a certain frame of reference for this imaginary was prefigured by the “imaginary West” familiar to the Soviet mentalscape. Certainly, my work on this post-Soviet imaginary is indebted to Alexei Yurchak’s research into the “imaginary West” of the late Soviet period. See ALEXEI YURCHAK, *EVERYTHING WAS FOREVER, UNTIL IT WAS NO MORE: THE LAST SOVIET GENERATION* (Princeton University Press 2006), especially chapter 5, *Imaginary West, the Elsewhere of Late Socialism*, 158-206.

subincision, clitoridectomy, hazing . . . and the like.³³

The ordeals of being "in transition," of being post-Soviet and pre-something else, seem to have come in successive waves, each one faithlessly promising the end is nigh. The promises, expressed implicitly and explicitly by Western governments and investors, read: if only you allow multiple parties; introduce a new currency; draft a new Constitution; end collective ownership; privatize property; and so forth and so on, then will you accomplish transition. It turns out each step is a necessary but not sufficient condition. The heterogenous group of those who have interested themselves in the reformation of post-Soviet Ukraine – Western donor governments, international financial institutions, legions of (sometimes merely hypothetical) foreign direct investors – have always had one more item on the to-do list. Referring to the series of ordeals as "transition" is not an empirical statement of fact. It is, rather, a performative speech act³⁴ whose felicity is as yet unconfirmed. Affixing the label "transition" does have several effects (that Austin would call "perlocutionary"³⁵). It induces Ukrainian parliamentarians and executive branch officials, and the academics who assist them, to take the next trudging step, and it reinforces to the average person that there is a narrative arc to this series of profound transformations, with its own internal logic, which will sometime lead to a conclusion.

Liminality is exhausting also because it is a locus of intense, sometimes relentless, training. The liminal subject is the target of instruction. Reduction, grinding down, is followed by reconstruction: "The rebuilding process is by instruction, partly in practical skills, partly in tribal esoterica, and proceeds by both verbal and nonverbal symbolic means."³⁶ This insight of Turner's takes us directly to Ukrainian legal reform and what Ukrainians think of that West so actively and directly involved.

V. Deixis, Liminality and Hegemony

A large body of data on hegemony and power emerges in my

33. TURNER, *Variations*, *supra* note 12, at 49-50.

34. For an explanation of performative speech acts and felicity conditions, see JOHN L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (Harvard University Press 1962).

35. See JOHN L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (Harvard University Press 1962).

36. TURNER, *Variations*, *supra* note 12, at 49-50.

research. We will look specifically at two examples: (1) land privatization, the act of creating private ownership in real property; and (2) drafting a Corporate Code, the overarching law regulating activities of new private-sector firms. Land privatization was accomplished in a new Land Code passed by the Ukrainian parliament in 2001.³⁷ In order to understand hegemony and the transplant of legal ideas, I investigated how land privatization, including this new law, came about. In brief, agricultural land was stripped from collective ownership and placed in private hands through a series of legal steps, including a landmark 1999 presidential decree.³⁸ Commenting on it, one expert told me, "The decisive stroke was *not* the privatization of land ownership. It was the outlawing of collective ownership."³⁹ According to the lead agricultural expert for the U.S. Agency for International Development ("USAID") Kyiv mission (himself a Canadian), the 1999 decree resulted from the work of several actors: the Iowa State Agricultural Project; a USAID contractor, Ronco; the U.S. Embassy; and the I.M.F. ("back when it still imposed detailed conditionalities"). The most important, consistent leading actor was the USAID Kyiv Mission itself. "We [USAID] weren't nothing in this – we wrote the thing [the decree]," he told me.⁴⁰ Other players included the International Finance Corporation ("IFC") in Donetsk and the British aid organization, "but," said the USAID agricultural expert, "AID pushed the hardest."⁴¹ Similarly, in regard to urban real estate, "the USAID Commercial Law Project wrote the Mortgage Law that passed in 2004."⁴² So goes the history to create

37. Land Code of Ukraine, 2001 Laws No. 2905-III (adopted Oct. 25, 2001, signed by President Kuchma Nov. 13, 2001, and published in *Uryadovy Kur'yer* [Government Courier, the official reporter of the Cabinet of Ministers of Ukraine] Nov. 15, 2001).

38. Pro Nevidkladni Zakhodi shchodo Priskorennia Reformuvannia Ahrarnoho Sektora Ekonomiki (Про Невідкладні Заходи щодо Прискорення Реформування Аграрного Сектора Економіки) (On the Uninvested Means concerning Accelerating Reform of the Agrarian Sector of the Economy) Decree of the President of Ukraine No. 1529/99 of Dec. 3, 1999 *reprinted in* ЗАКОНОДАВСТВО УКРАЇНИ ПРО ЗЕМЛЮ (LEGISLATION OF UKRAINE ON LAND), 85 (Kiev: Urinkom Inter, 2002).

39. Interview with Bohdan Nezgrabniy, Director of Agricultural Reforms, USAID Kyiv Mission (Apr. 16, 2007).

40. *Id.*

41. *Id.*

42. *Id.* The mortgage law referred to is Pro Ipoteku (Про Іпотеку) (On Mortgages), 2003 Law of Ukraine 898-IV (adopted June 5, 2003, entry into force Jan.

private property and a secondary market for real property, at least through the donors' telling.

These programs were part of a gargantuan effort to reform Ukraine. After the dissolution of the Soviet Union and because of its perceived geostrategic importance, Ukraine became the object of a massive amount of attention from enormously funded Western assistance projects.⁴³ By the late 1990s, Ukraine was the target of the largest amount of U.S. assistance in the world, following only Camp-David mandated assistance to Israel and Egypt.⁴⁴ In these projects, money flows from Western governments to Western organizations and Western personnel; assistance finally reaches Ukraine in the form of "advice" from "experts." We [in the West] helped them. Here, we had knowledge; there, they needed reforming. Here, we were the inheritors of stable forms; there, they were the unexpected recipients of rupture. It was up to the West to pass forms, and stability (in our image), on to them. To Ukrainians the grinding down and the instruction grind on.

Clearly, seen in this respect, paying attention to deictics and liminality attunes us to power differentials and power plays. Who has the questions, and who, the answers, are indicators of power structuring discourse. Likewise, analysis of discourses of inclusion and exclusion takes us to the ground of hegemony. Hegemony does not operate on autopilot, though. When we recognize it, we should not suspend inquiry by assuming too much about the trajectory of hegemonic practices after they are launched.

On one hand, as the USAID agricultural expert described, we see a heavy-handed intervention, a very direct version of legal transplanting, in which the West in various institutions is actually

1, 2004).

43. For an account of Western assistance in Eastern Europe, see JANINE WEDEL, *COLLISION AND COLLUSION: THE STRANGE CASE OF WESTERN AID TO EASTERN EUROPE* (Palgrave Macmillan 2001).

44. See, e.g., *Review of U.S. Assistance Programs to Russia, Ukraine, and the New Independent States: Hearing before the House Comm. on International Relations March 26, 1998, 105th Cong.* 49-337 (1998) (statements of Ambassador Richard Morningstar, Special Advisor to the President and Secretary of State on Assistance to the New Independent States and Coordinator of Assistance to the New Independent States, Department of State, and Don Pressley, Acting Assistant Administrator for Europe and the New Independent States, U.S. Agency for International Development) available at http://commdocs.house.gov/committees/intlrel/hfa49337.000/hfa49337_0f.htm.

drafting decrees and laws reshaping basic framework institutions. On the other hand, from other reports, we see power relations twisted in a different way. Another Western adviser, funded and sent by the U.S. government in response to Ukrainian government pleas for help after the Orange Revolution, recalls a series of long meetings he held with then-Prime Minister Yuri Yekhanurov. *Zerkalo Nedeli*, a well-regarded Ukrainian newspaper, had just run an article exposing an entity that "negotiated" Ukrainian purchases from Russia as essentially a non-transparent rent-collector. The Western adviser told the Prime Minister that the entity yielded no discernible value to Ukraine and existed for the sole purpose of skimming off Ukrainian taxpayer money destined for the Russian seller under contracts whose terms are never disclosed to the public. This arrangement, by the way, did not affect the U.S. directly. These were not, for example, funds that otherwise would have gone to U.S. vendors or contracts for goods which U.S. firms could have supplied. The advice in this case was rendered in a good-faith analysis of how to eliminate dead-weight loss from the strapped Ukrainian government budget. The adviser's primary advice was to cut the entity out of the process; the Prime Minister's response was smiling and nodding. This, the adviser later learned, occurred during precisely the same period Yekhanurov was meeting with principals of the disdained entity, in meetings that yielded prolongation of its involvement.⁴⁵

Hegemony? Who's gaming whom? I was reminded of this on a less grand scale when I interviewed the open and energetic director of an agricultural cooperative in Crimea. The co-op was a "recollectivization" of farmers who had received their land plots three years earlier. I asked him why they formed the co-op. He answered, "Because the UN had a program of providing advice [and perhaps credit] available only to ag coops; so we formed a co-op so we could get the advice. But the co-op's working ok, so maybe we'll keep it going."⁴⁶ These practices show a relation to "the West," the outsider, or the potential power that defies predictions based on a basic read of power asymmetries. What do we call the feint in the face of hegemony, a feint that might be constitutive?

45. Interview with Eric Mukden, adviser to the Ukrainian government (July 30, 2007).

46. Interview with Viktor Metushchenko, director of Armyan village cooperative (June 9, 2007).

Another set of data that defies expectations of hegemony as a frame for practices of submission or dominance can be analyzed under the heading of a Ukrainian perception of the West as a resource. My research shows Ukrainians using the West as a resource in a variety of interesting ways. For example, consider a property dispute over a 1,000-year-old church on the edge of Kyiv, home of the oldest intact icons in Russian Orthodoxy. Church leaders (Ukrainian but Russian Orthodox under the authority of the Moscow patriarchate) alleged that the frescoes and paintings were not iconic enough and intimated the correct course would be to paint over them.⁴⁷ In this dispute, Ukrainian preservationists relied on the West as a source of outrage, attention, and protection from internal sources of harm.⁴⁸

A Ukrainian parliamentarian described using the West during a particularly violent battle over checks and balances with the executive branch of the Ukrainian government. Then-President Kuchma had ordered a hit on a gadfly journalist by the security forces, which made the journalist's death look like the act of common criminals. The President then tried to intimidate and threaten any in the legislature who investigated the death or proposed accountability for executive-branch wrongdoing. During this incident, Ukrainian parliamentarians relied on the West, especially Europe, as a source of outrage, attention, and protection – as an audience in front of whom the Ukrainian elite were capable of feeling shame – from internal sources of harm. Parliamentarians report that statements by the Vienna Commission were particularly helpful in protecting opposition leaders and keeping safe those who would build a movement for accountability.⁴⁹

The West is also seen as a source of funding, record-keeping practices, and personnel for accomplishing basic goals of governance by cash-strapped government institutions. "Our experience in working on legislative drafting [with the Ministry of Justice and other executive-branch agencies] is any department you take has four people, maximum. That leads to the fact that they are

47. Interview with Father Dohlyadachniy, Russian Orthodox (Moscow Patriarchate) priest (Oct. 30, 2007).

48. Interview with Irina Spromozhna, Deputy Director for Scholarly Research at the St. Sophia National Museum complex (Nov. 26, 2007).

49. Telephone interview Ihor Pryamoyevych, *supra* note 1.

the least aware people in terms of keeping records or statistics.”⁵⁰ The Ministry of Justice used Western NGOs and USAID and EU contractors as a source of needed capacity to fulfill basic functions: to gather data, analyze statistics, and generate reports upon which the Ministry relied for making policy and struggling over resources. How many court cases are seen per week, per judge? These are the kinds of mundane details upon which budget requests rely, the tedious collection of which is outsourced at Western government-donors’ expense to Western organizations.

Similarly, the West is seen as a source of positive ideas, and the money to back them. The Ukrainian Legal Foundation (“U.L.F.”) began as a largely Canadian-funded think-tank headed by Serhiy Holovatiy, a parliamentarian who went on to become Ukraine’s Minister of Justice.⁵¹ The co-director of U.L.F. was Canadian Halyna Freeland. Freeland organized trainings for interested Ukrainian law-makers in topics germane to fundamental measures of desovietization: setting up laws on freedom of press, conscience, and association; government transparency and accountability; and multiparty elections. Through U.L.F., she provided research resources, fancy (Evroremonted!) office space, and a prestigious platform for reformers like Holovatiy. The chair of a highly regarded law school in Kyiv told me,

That’s the reason I’m in Kyiv, by the way. I was in Ivano-Frankivsk [a small city in Western Ukraine], teaching in the law school and seeing Holovatiy on t.v. [when they were writing civil liberties into the constitution]. I found myself thinking, ‘I should be working with him. He is doing what the country needs.’ So I came to Kyiv to work for the Ukrainian Legal Foundation.⁵²

The office space and the salary, basic enabling elements, for those who saw themselves working altruistically for the good of their new country was openly provided by the West.

Another Ukrainian law professor, presently working on a

50. Interview with Tanya Shchelepnava, Deputy Director of Rule of Law Programs, American Bar Association Central and Eastern European Law Initiative Kyiv office (June 21, 2007).

51. For information on the Ukrainian Legal Foundation, see *THE POST-SOVIET HANDBOOK: A GUIDE TO GRASSROOTS ORGANIZATIONS AND INTERNET RESOURCES* (University of Washington Press 1999) (1996). See also <http://www.civilsoc.org/nisorgs/ukraine/kyiv/lglfnd.htm>.

52. Interview with Myroslava Adamovych, Chair of Law Faculty, Kyiv Mohyla Academy (Apr. 13, 2007).

committee drafting a new Corporate Code, related his experience with Western legal advising. An American law professor, funded through Western government aid programs, came to help his committee. Several years ago, "he drafted us a beautiful Code, just beautiful. But he left it with us. Now that our committee has worked on it for five years, it's a total mess. Poor Professor X. We ruined his code. Now it's just a disaster."⁵³ Contrast this, and the USAID agricultural adviser's report, with the rapeseed revolution. If this is "hegemony," it involves something more complicated than easily stereotyped domination and resistance.

The West is seen as a resource in other ways, to balance the potentially heavy influence of Russia by Ukrainians who see independence as refutation of a colonial legacy that had come to Ukraine from the East, not the West. For these Ukrainians, Moscow is seen as former (and perhaps future) colonial master. One adviser to the Ukrainian President described the efforts of the Russian government "to turn imperial leanings into practical political measures." What is the antidote? In his words, "Evrostandarti." European standards, he suggested, offer alternate forms for social integration and action.⁵⁴

Another dimension of this complex dynamic was the subject of a presentation to an internal audience of policy professionals at a Kyiv institute. A Kyiv professor analyzed how Ukrainians are being formed by the outreach of others. Ukrainian airwaves are bombarded with commercials and dubbed foreign shows; Ukrainian ports are flooded with foreign goods; and Ukrainian consumers are created via the messages of Western companies' billboards, magazines, movie trailers. Ukrainians understand they are the target of a mass attempt from people outside to reach them. An almost Althusserian sense of interpellation, of being called, by projections of the Other across borders onto Ukrainian space, comes through in her analysis. "The Other presents itself to us in communications, through trade, via the internet, through advertisements." Unexpectedly, the professor expressed the perception that practices of mimesis may make the Other like us,

53. Interview with Anatoliy Spivrotbitniy, law professor and member of Corporate Code drafting committee under the parliament of Ukraine (Nov. 17, 2007).

54. Ivan Ivanchenko, Professor at Ukrainian Institute for Policy and adviser to President Yushchenko on Social Policy, Address on "Corporatized Society and Corruption," at Ukrainian Institute for Policy, Kyiv, Ukraine (July 17, 2007).

rather than vice versa. "If I consume this fast food, this good, they'll be like me," is how she put it. (Note how she framed it, "They'll be like me," not, "I'll be like them.") The ambivalence inherent in relationships with a West which may itself channel hegemonic power relations or provide resources for reshaping internal or regional power dynamics came through clearly in the wistful realism of her conclusion that, "A meeting with 'the Other' does not happen 'ne konfliktnyi,'" that is, "without conflict."⁵⁵

VI. Time and Transitions

Anthropologist Benjamin Whorf, discussing Edward Sapir's hypothesis on the relationship between language and cognition, suggests we recognize the influence language has on other activities, cultural and personal, in its constant ways of arranging data.⁵⁶ Whorf's paradigmatic example is European languages' use of spatial metaphors for non-spatial concepts like time. Time is conceived as running in a straight line. The future lies ahead of us; the past, behind. Language so organizes data through metaphor and categorization that we are not even aware of this as an organizational metaphor. It becomes the framing for our lived experience, part of our reality. Whorf's particular example about spatial metaphor organizing the experience of time led me to an insight about a contemporary Ukrainian experience of the West.

I propose that liminality is yet one more example of the elision Whorf points out. The limen, the threshold, a spatial term, becomes the name for a period of time. Ukrainians', and others', discourse on the post-Soviet experience presumes liminality. In other words, it presumes that there will be a stable state to reach at the end of this so-called transition period. Referring to the post-Soviet period as a transition, the economy as "emerging," uses imagery of moving through space, liminal space, as metaphor for moving through a certain period of time.

This takes us back to deictics, those context-dependent linguistic expressions. In a time of rapid social change under

55. Oksana Ilyich, professor at Ukrainian Institute for Policy, Address on "The Strategic Stance towards The Other in Formation of Interests," at Ukrainian Institute for Policy, Kyiv, Ukraine (July 17, 2007).

56. Benjamin Whorf, *The Relation of Habitual Thought and Behavior to Language* [1947], in *LANGUAGE, CULTURE AND SOCIETY: A BOOK OF READINGS* 64, 64 (Ben E. Blount ed., Waveland Press 1995) (1974).

conditions of discursive rupture such as the transition in Ukraine, the use of deictics reveals some of the concepts and referents in motion. When I asked Ihor, the former parliamentarian, what Ukrainians think of the West, he answered through temporal framing. "What a Ukrainian thinks of 'Europe' depends on his or her strategic choice. Where do they see their future?"⁵⁷ In his answer, Europe is not only a place, it is the repository for a time. What Ukrainians think of "the West" has changed as their own locational referents and anticipated futures became untethered. Europe, in the Soviet mental geography and use of the word, used to be "over there." Now, for post-Soviet Ukrainians, "Europe" is "then" (*notim*, *potim*), a way of conceptualizing the future.⁵⁸ Here, the liminal space is a space of the subjunctive and not the indicative, the space of possibilities.

Ukrainians are exhausted with the post-Soviet "transition" in part because although it has a well-defined starting point, the end seems to recede in the distance the more "reforms" Ukrainians subject themselves to. Social changes initiated by legal transplants have been massive, fundamental, and relentless for the last two decades. Turner's words could be taken as a warning: "[P]assing from dynamics to statics, [liminality] may cease to be a mere transition and become a set way of life, a state, that of the anchorite or monk."⁵⁹ Has liminality ceased to be a transition and instead become its own way of life for post-Soviet Ukrainians? (Or, was "transition" a fiction by implying a non-existent endpoint in the first place?) Will there ever be a "new normal?" Where, oh where, is the Europe at the end of the rainbow?

VII. Whither Europe?

Ukraine is a country with a divided public; many are not "pro-Western." In their collective imagination of a future, "Europe" functions for some Ukrainians as a standard of material comfort to be achieved, but otherwise as an entity from which to differentiate.

57. Telephone interview with Ihor Pryamoyevych, (Dec. 26, 2008).

58. This distinguishes the orientation of Ukrainians from some other post-Socialist central Europeans for whom "Europe" is (or was) a destination of "return," a re-connection to a seemingly lost past. See, e.g., KATHERINE VERDERY *Civil Society or Nation? "Europe" in the Symbolism of PostSocialist Politics*, in *WHAT WAS SOCIALISM, AND WHAT COMES NEXT?* 104 (Princeton University Press 1996).

59. Turner, *Variations*, *supra* note 12, at 49.

However, for many others, Europe functions as the imaginary outer right bracket of this liminal space, as "the future," a comforting imaginary endpoint to the process of transition and a collective with which to identify in an unanticipated process of nation-building.

In the present, "Europe" is a frame for the performance of being European.⁶⁰ The concept of penumbra allows us to see and study effects of law and regulation without restricting our gaze to jurisdictional boundaries. For Ukrainian farmers planting rape seed, it is immaterial whether they stand in a shadow or at the heart of Europe. Their daily activities are formed by goals no longer Soviet, nor experimentally post-Soviet. They are European. For many Ukrainians, then, in the sense of everyday experience, Ukraine is already part of Europe. Even within this actuality, however, potentiality also moves. Europe becomes a goal, a point in the future towards which a messy and uncertain present is moving. And in this, too, it functions to structure performance and affect in the present.

The 2006 Prize for European Understanding of the Leipzig Book Fair went to Ukrainian novelist Yuri Andrukhovych. In his acceptance speech, he referred to the terrible cost borne by Ukraine in the last century in which it was the battered and bloodied frontier between mutually antagonistic West and East. Andrukhovych plead, "It is crucially important for me that you help this cursed country." He chastised the EU commissioner on record as opposing Ukraine's eventual entry into the EU and poignantly appealed to all Europeans, "[I]t wouldn't be so terribly difficult for you to help this country. It would simply be a matter of not saying anything that will kill our hope."⁶¹

Why is "Europe" such a pervasive referent in Ukraine? In large part because of anxiety over the detachment from the former stable cultural forms. Fixation with "Europe" gives an endpoint to the current indeterminate and difficult state; to use Turner's three-stage description, by postulating an end stage, a set of stable forms to which the reformed Ukraine will become attached, Ukrainians can imagine that they are in a middle stage, a liminal state, and that this

60. On performance and everyday life, see ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (Doubleday 1959).

61. Yuri Andrukhovych, Address on receiving the 2006 Prize for European Understanding at the Leipzig Book Fair, reprinted in *SÜDDEUTSCHE ZEITUNG*, Mar. 16, 2006.

condition is transitory. Becoming "European" is a teleological goal, a mappable geographical destination for life in the liminal subjunctive. It is a practical answer to everyday questions, prior answers to which disappeared with the Soviet system. In this sense, "Europe" is the converse of "Communism." Soviet Ukrainians worked, in the actuality of lived experience, in a well-established set of everyday tasks and performances towards a taken-for-granted future that existed (yet) nowhere, Communism. Post-Soviet Ukrainians move, through an as-if present continually subject to experimentation and change, towards a not-taken-for-granted future that does exist, just to the West, already. "Way over there" has come all the way up to the border and become the new future, the new "potim [потім]" the new "then." The mood is subjunctive more than optative; the affective structure could not be characterized as optimistic, but within one discerns a wary hope.