
LAW'S HORIZONS

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ABSTRACT

Recent deglobalizing trends have brought various tensions between the legal self and the legal other. Bloc mentality, fueled by deglobalization narratives, discourages the exploration of shared legal grounds, risking a legal community unable or unwilling to compare. The new legal parochialism calls for a conscious effort of serious self-reflection among legal scholars. Given the current U.S. constitutional controversies on sensitive issues such as abortion, this Article lends credence to the pragmatic contribution of comparative law in testing serious candidates for proper legal solutions. Facing this challenge, this Article seeks a deeper, philosophical foundation in the study of comparative law through “philosophical hermeneutics.” Genuine understanding of a foreign legal system begins with an awareness of one’s own finitude, which is so deeply entrenched and remains unnoticed until it collides with the other’s horizon. The practical consequence of the “fusion” of horizons in a hermeneutic circle is an opportunity to transform a comparativist’s original horizon. Out of this “critical self-consciousness” emerges the ethics of comparative law: the readiness to accept that our own law might not be the only prudential solution to the same challenges shared by other legal jurisdictions. These empathetic ethics, this Article concludes, can provide a therapeutic response to regressive legal essentialism evoked by deglobalization.

INTRODUCTION

Globalization may have driven the coexistence of multiple legal systems that look quite alike within the same legal universe. There is a strong tailwind of convergence among those legal systems. Indeed, international law functions as a main conduit for such convergence, as seen in the norms of the World Trade Organization (“WTO”) and the Basel Accords.¹ Ironically, however, a series of recent crises have plunged globalization—and comparative law with it—into a new, turbulent terrain: deglobalization. The original promises of globalization have been punctuated by perils of an epic scale, such as Brexit, the United States–China trade wars, the rise of anti-European Union parties in Europe, and the Russia–Ukraine war.² Destructive

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¹ Globalization demands the generation of a new common core as nations have turned increasingly to the rules of *jus gentium* and businesses to the rules of *lex mercatoria*. For example, optimally managing global value chains would require a discovery of shared aspects between the *Sharia* law and the Western financial legal system. See Horatia Muir Watt, *Globalization and Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 579, 582, 585, 604, 606 (Mathias Reimann et al. eds., 2006).

² See, e.g., WORLD ECONOMIC FORUM, THE GLOBAL RISKS REPORT 2023 9 (18th ed. 2023), https://www3.weforum.org/docs/WEF_Global_Risks_Report_2023.pdf [https://perma.cc/7HB2-SSET] (“Eroding geopolitical cooperation will have ripple effects across the global risks landscape over the

populism and economic nativism have emerged as a new zeitgeist of domestic politics.³ The new norm of various commercial and military conflicts throws into sharp relief the tension—both potential and actual—between the self and the other. The age of divergence—in stark contrast with the erstwhile age of convergence—tends to pit the self against the other. The Western world, especially the United States, has begun departing from the shared legal universe and is attempting to create its own legal enclave.⁴

In the age of deglobalization, legal parochialism invites dire damage that is both intellectual and practical. First, it eviscerates our “curiosity” about the operation of other legal systems.⁵ Bloc mentality, fueled by deglobalization, tends to render a comparativist unable or unwilling to compare. Indifference, ignorance, and even hostility borne out of deglobalization gravely undermine a critical project of understanding a foreign legal system within a multiverse of legal realities.⁶ In a practical sense, legal parochialism leads to what may be dubbed a “reshoring” of law, which is reflected in the recent surge of regulatory unilateralism and extraterritorial application of domestic laws. For example, the United States has increasingly applied its financial laws on an extraterritorial basis as a tool of “lawfare” in an attempt to achieve broader foreign policy goals.⁷ Likewise, legal parochialism has pushed larger host states to snub important domestic legal innovations—namely, “new legal hubs,” for international commercial dispute resolution, such as those in Astana, Dubai, and Shenzhen.⁸

Eventually, legal parochialism closes the domestic legal mind to any foreign stimulation and thus nurtures intransigence toward the very idea of learning from a different legal experience.⁹ It prevents the domestic legal mind from critically analyzing other legal systems, which is necessary for any international negotiation. The domestic legal mind is then destined to

medium term, including contributing to a potential polycrisis of interrelated environmental, geopolitical and socioeconomic risks”); *see also id.* at 4, 5, 19, 29.

³ Jan-Werner Müller defines populism as “a particular *moralistic imagination of politics*, a way of perceiving the political world that sets a morally pure and fully unified . . . people against elites who are deemed corrupt or in some other way morally inferior.” JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 16 (2016).

⁴ *See* Natalie L. Dobson & Cedric Ryngaert, *Provocative Climate Protection: EU ‘Extraterritorial’ Regulation of Maritime Emissions*, 66 INT’L & COMPAR. L.Q. 295, 295 (2017) (discussing the EU’s recent “extraterritorial” regulation of maritime emissions); Matthias Lehmann, *Legal Fragmentation, Extraterritoriality and Uncertainty in Global Financial Regulation*, 37 OXFORD J. LEGAL STUD. 406, 407 (2017) (problematizing the inconsistent and duplicative domestic extraterritorial statutes regulating derivatives); Carey DeGenaro, *Looking Inward: Domestic Policy for Climate Change Refugees in the United States and Beyond*, 86 U. COLO. L. REV. 991, 996 (2015) (suggesting that unilateral domestic legislation to address climate migration may be more politically sensible than relying on relief under international law). *But cf.* Anna Sauerbrey, *Germany Is Learning a Hard Lesson*, NY TIMES (July 5, 2023), <https://www.nytimes.com/2023/07/05/opinion/germany-africa-west.html> [<https://perma.cc/AJX9-DDZC>] (referring to Germany’s diplomatic efforts, as well as their limitations, to reconstruct its self-image against the background of its colonial past and enduring postcolonial resentments from the former colonies).

⁵ Peter Thomas Muchlinski, *Globalisation and Legal Research*, 37 INT’L L. 221, 226 (2003).

⁶ *See* Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J.L. & SOC’Y 279, 293 (1987); Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1444 (1992).

⁷ Federico Lupo-Pasini, *The Rise of Nationalism in International Finance: The Perennial Lure of Populism in International Financial Relations*, 30 DUKE J. COMPAR. & INT’L L. 93, 96 (2019).

⁸ Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT’L L. 225, 227–28, 234 (2020).

⁹ Jedidiah J. Kroncke, *Moving Beyond the Future Now Past of U.S.–China Legal Studies: Re-Opening the American Legal Mind?*, 61 VA. J. INT’L L. 115, 123–24 (2020).

commit “critiquing the other to avoid self-reflection,”¹⁰ and it loses a critical opportunity to “test [its] own misconceptions” about its own legal system.¹¹ In particular, Western legal centers—which are the arch-source of legal transplantation—seldom heed non-Western legal peripheries.¹² Thus, local distinctions in implementing international law would hardly be studied, which risks undermining its own efficacy.¹³ In sum, law will lose its therapeutic potential against dogmatism.¹⁴

These perils precipitated by deglobalization have shifted comparative law’s focus from “what to know” to “*how* to know.”¹⁵ Escaping from legal parochialism requires serious existential reflection on the legal self. Here, comparison must be geared a fortiori, toward not only seeking similarities but also acknowledging differences. Critically, one should shift their attention from legal integration to discovery or construction of certain “links” by which cross-relevance of each legal system may be enhanced. In other words, these links are our key to the multiverse of law. Importantly, this key might not be in any “reified” form—such as statutes or treaties—as the main paradigm of comparative law shifts from harmonization to plurality. Rather, such key might better be described as a certain type of discursive device or interpretive attitude. The point is that such interpretive attitude treats foreign law as a potential extension of one’s own law, rather than as mere fact.¹⁶

This self-reflection of comparative law leads to its new mission, which “impel[s] the comparatist toward an ethical encounter with the other-in-the-law.”¹⁷ Note that the conventional debates in comparative law studies sparked by globalization have largely been functional.¹⁸ In the age of globalization, comparative law scholars are typically burdened with epistemological complications due to the density of information, opaque filters to information, shortened temporality, and the need for process information.¹⁹ Yet, such conventional “ideological agnosticism” appears to be passé, as “the politics of comparative law cry out for analysis.”²⁰ A

¹⁰ *Id.* at 158.

¹¹ *Id.* at 151.

¹² Cf. William P. Alford, *Tasselled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers*, 141 CHINA Q. 22 (1995) (criticizing the tendency of some foreign observers of China to mistake appearances for substance under the rhetoric of the “tasselled loafers” phenomenon).

¹³ See, e.g., Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOB. POL’Y J. 127, 127 (2010) (debunking a hidden assumption of the conventional studies of treaty compliance that “there is a stable and agreed meaning to a rule, and we need merely to observe whether it is obeyed” and highlighting the importance of domestic “interpretation”).

¹⁴ Francesca Fiorentini & Marta Infantino, *The Potential of Comparative Law*, in 77 MENTORING COMPARATIVE LAWYERS: METHODS, TIMES, AND PLACES 263, 274 (2020).

¹⁵ Cf. David J. Gerber, *Globalization and Legal Knowledge: Implications for Comparative Law*, 75 TUL. L. REV. 950, 969–70 (2001) (emphasis added) (observing that the conventional function/context dyad does not focus on issues of “*how* we know law”).

¹⁶ Usually, a foreign law is considered as a matter of adjudicative fact and subject to “judicial notice.” FED. R. EVID. 201.

¹⁷ Pierre Legrand, *The Same and the Different*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 240, 303 (Pierre Legrand et al. eds., 2003) (emphasis added).

¹⁸ Gerber, *supra* note 15, at 950 (“Globalization brings laws and legal cultures into more direct, frequent, intimate, and often complicated and stressed contact. It influences what legal professionals want and need to know about foreign law, how they transfer, acquire, and process information, and how decisions are made.”).

¹⁹ *Id.* at 953–55.

²⁰ Watt, *supra* note 1, at 594–95.

functionalist zeal to “assimilate the ‘other’” and “invalidate dissonance”²¹ should not exhaust a comparativist’s methodological options with which to imagine mutual trust and cooperation between different legal jurisdictions. Under these circumstances, should comparative law offer a new “grammar of otherness”?²² More importantly, could this grammar provide any therapeutic response to the aforementioned new toxic politics of deglobalization that appear increasingly unsustainable?

This Article argues that developing such grammar requires comparative law to employ certain philosophical insights. In particular, it contends that “philosophical hermeneutics”—developed by Hans Georg Gadamer—can furnish a critical intellectual foundation for such grammar.²³ According to this strand of modern philosophy, genuine understanding of any human subject—including a foreign legal system—begins with an awareness of one’s own finitude, which is deeply entrenched yet remains unnoticed until it collides with the other’s horizon. The practical consequence of the fusion of horizons in a hermeneutic circle is an opportunity to alter an investigator’s native horizon. Out of this critical self-consciousness emerges the “ethics” of comparative law, or the readiness to accept the fact that we may be wrong and others right.

Notably, this Article advances that a court is uniquely qualified to serve as a testing ground for philosophical hermeneutics by fusing one’s legal horizon with that of others. In many jurisdictions, courts can offer critical agency in contributing to this goal due to their apolitical and independent nature.²⁴ Legislation—in terms of both domestic statutes and treaties—is prone to ambiguities and eventually requires judicial interpretation. In the age of deglobalization, transjudicial nexus has been critical in helping global citizens untangle conflicting decisions and co-prosper through legal stability.²⁵ Of course, the prerequisite for transjudicial nexus is for a domestic judge to familiarize—and even empathize—themselves with foreign rules and decisions.²⁶ The more often domestic judges are open to foreign rules and decisions, the more likely they will be able to learn from foreign judges who have already adjudicated similar, relevant disputes.²⁷

Admittedly, sovereigntists, including those who advocate political and economic deglobalization, are liable to defy transjudicial connection. They fear the alleged toxic influences from certain foreign cultures as well as the

²¹ *Id.* at 594.

²² Calvin O. Schrag, *Comparative Philosophy and the Politics of Otherness*, in *COMPARATIVE POLITICAL THEORY AND CROSS-CULTURAL PHILOSOPHY* 75, 75 (2009); see also Vivian Grosswald Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 *AM. J. COMPAR. L.* 657, 657 (1998) (exploring the relationships between comparative legal analysis and otherness).

²³ See *infra* Section I.B.

²⁴ Cf. John Kuhn Bleimaier, *The Doctrine of Comity in Private International Law*, 24 *CATH. LAW.* 327, 332 (1979) (“While international political differences always will serve as a potential source of division, a universal respect for judicial decisions and the rule of law can bring people together.”).

²⁵ STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 195 (2015); see also *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 164 (2004) (defining comity as an effort to “take account of the legitimate sovereign interests of other nations . . . [thereby helping] potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world”).

²⁶ See *Hoffmann-La Roche*, 542 U.S. at 168.

²⁷ See Justice Sandra Day O’Connor, *Keynote Address*, 96 *PROC. ANN. MEETING (AM. SOC’Y INT’L L.)* 348, 349 (2002).

loss of their country's legal-constitutional autonomy.²⁸ Importantly, however, not all modes of transjudicial affinity warrant such fear. First, a domestic judge may replace their own interpretive choice with simple references to foreign sources. This mode ("allusion") may provisionally bestow upon their interpretation a cosmopolitan air of prominence. Yet, this mode risks provoking internal objections fueled by fears of undue foreign influence when its uncritical reliance on foreign sources obscures a more nuanced interpretive potential. In contrast, transjudicial affinity can emerge from a pragmatic motivation like gap-filling ("enrichment"),²⁹ or from an intersubjective background such as judicial comity ("rapport").³⁰ In these latter modes, transjudicial nexus can be said to be "logically required"³¹ to meet the "exigencies of modern life."³²

Finally, this Article offers insights regarding the current legal and constitutional controversies on certain sensitive issues, such as abortion in the United States. Practicing comparative legal ethics has the potential to be enormously rewarding in the sense that it would provide American jurists with a rare opportunity to test various possible legal solutions against the empirical backdrop of foreign rules and regulations on the same issues.³³ Although a comparativist opportunity should not translate into uncritically replicating foreign legal solutions in a distinctively American context, this attitude would still enrich and innovate American jurisprudence and legal practice on relevant areas of law. In the same vein, situating comparative law at the heart of domestic legal curricula would help students rediscover the meaning of their own laws and legal institutions.³⁴

Against this background, this Article unfolds in the following sequence. Part I introduces philosophical hermeneutics to comparative law. It first divulges the deep-rooted tensions between the legal self and the legal other driven by deglobalization and then seeks to unearth philosophical

²⁸ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (quoting *Foster v. Florida*, 537 U.S. 990, n.* (2002) ("The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'"); see also Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L. L. 57, 59 (2004) (arguing that "international norms cannot be internalized within our Constitution unless such norms are first internalized by our people as our community standards").

²⁹ See *infra* Section II.A.

³⁰ See *id.*

³¹ MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 29 (1981).

³² Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 5, 16 (Mar. 3).

³³ See, e.g., Marge Berer, *Abortion Law and Policy Around the World: In Search of Decriminalization*, HEALTH & HUM. RTS. J. 13, 24 (June 2017) (observing that studying foreign abortion laws is to "motivate transformative thinking," rather than offer answers); Julie C. Suk, *A World Without Roe: The Constitutional Future of Unwanted Pregnancy*, 64 WM. & MARY L. REV. 443, 488 (2022) (submitting that certain insights from German abortion law are "useful" for the U.S. legislators, policymakers and lawyers "navigating the new legal landscape without *Roe*").

³⁴ KONRAD ZWIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 21 (3d ed. 1998) (arguing that "[c]omparative law offers the law student a whole new dimension; from it he can learn to respect the special legal cultures of other peoples, he will understand his own law better"); see also Jaakko Husa, *Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing Pluralistic Legal Mind*, 10 GERMAN L.J. 913, 925 (2009) (contending that mainstreaming the comparative law curriculum will contribute to the "construction of the pluralistic legal mind for the transnational legal world"); Stephen H. Legomsky, *Globalization and the Legal Educator: Building a Curriculum for a Brave New World*, 43 S. TEX. L. REV. 479, 487–89 (2002) (discussing "distinctive gains" from integrating comparative law into other courses).

foundations of comparative law. Part II applies philosophical hermeneutics to the situation of transjudicial nexus, particularly in terms of gap-filling (“enrichment”) and comity (“rapport”). It demonstrates how comparative law investigations—employed by the courts in tackling transjudicial nexus—exhibit the operation of the hermeneutic circle. Part III then highlights the ethical implications of a hermeneutic approach to comparative law. The “intersubjective” logic embedded in the hermeneutic circle tends to evoke an ethics of “empathy” by conducting a comparative law investigation. This Article concludes by proposing a common grammar of comparative law in the form of a hermeneutic heuristic.

I. PHILOSOPHICAL HERMENEUTICS AND COMPARATIVE LAW

A. FUNCTIONALISM AND ITS DISCONTENT IN A DEGLOBALIZING WORLD

Both populist grievances and geopolitical tensions have fueled the recent deglobalizing and re-territorializing trends in the West. Indeed, these trends harken back to the European provenance of traditional comparative law scholarship, characterized by its provincial and nation-building ethos as revealed in the codification movement following the French Revolution.³⁵ Yet, the recent rise of “the Rest,” or the Global South, has forced comparative law scholarship to embrace a paradigm shift from its geocentric trend to a heliocentric one, which requires both a dynamic and diverse notion of law.³⁶ The new zeitgeist of comparative law compels comparativists to “organiz[e] the diversity of discourses around different (cultural) forms”³⁷ in a “global legal space.”³⁸

The existential test to comparative law posed by deglobalization agonizingly exposes comparative law’s characteristic “methodological agnosticism.”³⁹ While the deep-rooted tensions between the legal self and the legal other pervade, there is no shared grammar of comparative law—other than the conventional function or context dyad—to redress such tensions. Comparative law scholarship remains largely descriptive and compartmentalized.⁴⁰ One of the reasons behind this intellectual vacuity of comparative law is the so-called “reportorial trap” that is characterized by the lack of philosophical foundations in most conventional comparative law investigations.⁴¹ This superficial and mostly descriptive culture of

³⁵ See generally H. Patrick Glenn, *The Nationalist Heritage*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 76 (Pierre Legrand et al. eds., 2003).

³⁶ See, e.g., Maurice Adams, *Comparative Law in a Globalizing World: Three Challenges*, 17 *TILBURG L. REV.* 263, 266 (2012) (“[H]ow do the societal changes that occur as a result of globalization impact on the configuration of legal traditions or cultures . . . how do new legal configurations become assimilated, rejected or refashioned in a host legal system, etc?”).

³⁷ Legrand, *supra* note 17, at 299.

³⁸ Elisa D’Alterio, *From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?*, 9 *INT’L J. CONST. L.* 394, 396 (2011).

³⁹ John C. Reitz, *How to Do Comparative Law*, 46 *AM. J. COMPAR. L.* 617, 618 (1998).

⁴⁰ Gerber, *supra* note 15, at 969.

⁴¹ George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 *AM. J. COMPAR. L.* 683, 691–92 (1998).

comparative law tends to naturalize the status quo,⁴² de-emphasize genuine variances in different legal traditions, overestimate the homogenizing gravity of law, and thus unintentionally serve the hegemonic agenda.⁴³

Under Ernst Rabel's classical dyadic formula of function and context, function always comes first.⁴⁴ Function prioritizes an external logic (legal solution) at the expense of an internal logic (legal meaning). It presupposes commensurability and an instrumental view of law *qua* problem-solver. It assumes, and subsequently pursues, an accurate description of a parallel *nomos*,⁴⁵ in what Hans Georg Gadamer dubbed the "anticipation of completeness."⁴⁶ Methodologically, comparativists are drawn to a behavioral and causal mechanism of a foreign legal system. In doing so, they risk neglecting the fact that law is as much an effect as it is a cause.⁴⁷ Legal function is as much an *ex post* phenomenon as it is an *ex ante* factor.

This preemptive functionalism leads eventually to a conformation bias, often manifested as the Western bias. It rationalizes and promotes legal isomorphism, slighting legal diversity and pluralism.⁴⁸ Here, comparative law creates a dual failure: misrepresenting others' legal lives *and* depriving our own legal system of an opportunity of "self-transcendence."⁴⁹ In the absence of a genuinely pluralist legal culture, jurists either merely come up with an unsystematic, one-time, stop-gap solution for a comparative law situation, or give up the construction of new vocabularies facilitative of understanding another legal system.⁵⁰

Comparative law should generate a new type of knowledge in an age of alienation. Bloc mentality leads to the subsequent inclination to refuse comparison and interaction. Tackling this regressivism mandates comparativists to close a gap between a legal self and a legal other. Technical knowledge (*techne*), such as how a foreign legal system operates and how

⁴² See, e.g., Gerber, *supra* note 18, at 968–69 (discussing various methodological concerns such as "confirmation bias," "illusion of similarity," and "illusion of ease").

⁴³ See, e.g., JAMES TULLY, *STRANGE MULTIPLICITY, CONSTITUTIONALISM IN AN AGE OF DIVERSITY* 39 (1995) (viewing that hegemonic legal traditions tend to define and impose the titular "universal" meanings of law). Cf. ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* (2017).

⁴⁴ See Jaakko Husa, *Methodology of Comparative Law Today: From Paradoxes to Flexibility?*, 58 *REVUE INTERNATIONALE DE DROIT COMPARÉ* 1095, 1105–06 (2006) (observing that a "context"-centered approach to comparative law may seem paradoxical considering an orthodoxy of function-based one stressing similarities).

⁴⁵ In this Article, I refer to *nomos* as a normative community or universe in its broad sense, mainly from a socio-legal standpoint. In a *nomos*, historically habituated social norms, such as custom, construct the members' collective identities and therefore shape their everyday activities in a practical (taken-for-granted) dimension. See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 9 (1983); PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 22–27 (1967). The most important mission of a *nomos* is to maintain order and prevent anomie ("nomization"). *Id.* at 22.

⁴⁶ HANS-GEORG GADAMER, *TRUTH AND METHOD* 294 (Joel Weinsheimer et al. trans., Continuum, 2d rev. ed. 2004) (1975) [hereinafter GADAMER, *TRUTH AND METHOD*].

⁴⁷ Cf. Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 *AM. J. COMPAR. L.* 89, 109 (2003) (criticizing the application of the "Rights Hypothesis" to China on the ground that the proponents of the Hypothesis have "mistaken effect for cause").

⁴⁸ See generally Sungjoon Cho & Jürgen Kurtz, *Legalizing the ASEAN Way: Adapting and Reimagining the ASEAN Investment Regime*, 66 *AM. J. COMPAR. L.* 233 (2018).

⁴⁹ See Kah Kyung Cho, *Phenomenology as an Idea of Bridging Cultural Divide*, in *COMPARATIVE POLITICAL THEORY AND CROSS-CULTURAL PHILOSOPHY* 103, 104 (Jin Y. Park ed., 2009).

⁵⁰ Cf. Georgia Warnke, *Hermeneutics, Ethics, and Politics*, in *THE CAMBRIDGE COMPANION TO GADAMER* 79, 96 (Robert J. Dostal ed., 2002) (observing that interpreters must "integrat[e] alternative interpretations and compromis[e] on the policies to which they lead").

its structure impacts legal actors within it, would not suffice: comparativists need to know what makes an identity of a foreign legal system as a whole in an intuitive fashion. This kind of knowledge (*phronesis*) can only be obtained by actively and intentionally projecting our own legal system against a foreign legal system. Here, comparative law should offer an intellectual foundation for border-crossing, which eloquently demonstrates the critical relevance to “hermeneutics.”⁵¹

This “hermeneutic sensitivity”⁵² holds practical—not merely philosophical—implications, particularly in terms of treaty interpretation. Any treaty text cannot but remain ambiguous and anodyne. It employs abstract language based on a general concept of norms that can accommodate all signatories while evading culturally diverse (“thick”) national practices.⁵³ However, to determine whether a foreign country complies with the treaty text or not, we are forced to compare our own understanding of the treaty text, based on our own values, with different ways of understanding the same text based on foreign values.⁵⁴ In this subtle endeavor of treaty interpretation, hermeneutic discourse is the first step in avoiding legal antinomies and promoting tolerance for plural interpretations of the text. Generally, we should learn to live with differences rather than either forcing universalization, or walling off unfamiliarity.⁵⁵ This is nothing but the comparative law foundations of international law.⁵⁶

Moreover, philosophical hermeneutics can generate original insights in formulating a constructive response to a neo-colonialist criticism on the allegedly Eurocentric, and even Orientalist, framework of contemporary comparative law.⁵⁷ Several scholars have already spotlighted this problem from varying perspectives. For example, five decades ago, David Trubek insightfully observed that a modern law thinker, driven by their “core conception”—which he referred to as a concept from their own society on the nature and function of law—might be led to believe that “measures to increase legal purposeness will both foster legal autonomy and strengthen liberal and democratic tendencies.”⁵⁸ According to Trubek, this

⁵¹ Cf. Jin Y. Park, *Introduction: Rethinking Philosophy in a Time of Globalization*, in *COMPARATIVE POLITICAL THEORY AND CROSS-CULTURAL PHILOSOPHY* 1, 7 (2009).

⁵² Warnke, *supra* note 50, at 96.

⁵³ Regarding the “thin” and “thick” aspects of moral and cultural foundations, see generally MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* (1994).

⁵⁴ Warnke, *supra* note 50, at 95.

⁵⁵ See Christopher McCrudden, *Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW*, 109 AM. J. INT’L L. 534, 537 (2015) (emphasizing that the domestic interpretation of international law differs from country to country).

⁵⁶ See generally Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg, *Comparative International Law: Framing the Field*, 109 AM. J. INT’L L. 467, 469 (2015) (preferring the main goals of comparative international law, such as explaining of similarities and dissimilarities among nations in interpreting international law); Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 BROOK. J. INT’L L. 386, 408 (2011) (highlighting the risk of negating cultural relevance in identifying common values in implementing international law). These socio-cultural variances across the nations in applying and interpreting international law have prompted the “social science” approach to comparative international law. See, e.g., Emilia Justyna Powell, *Comparative International Law and the Social Science Approach*, 22 CHI. J. INT’L L. 147 (2021); Matthew S. Erie, *China and Comparative International Law: Between Social Science and Critique*, 22 CHI. J. INT’L L. 59, 63 (2021).

⁵⁷ Watt, *supra* note 1, at 597–98; see also Mauro Bussani, *Deglobalizing Rule of Law and Democracy: Hunting Down Rhetoric Through Comparative Law*, 67 AM. J. COMPAR. L. 701, 704 (2019) (discussing risks of regressing into legal Eurocentrism and reproducing the colonialist suppression of legal diversity).

⁵⁸ David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 19 (1972).

“ethnocentric” nature of the core conception derived from Western culture and history is implicitly based on a “pluralist” political system under which law is a form of settlement from competitive political struggle in a society.⁵⁹ In other words, such an ethnocentric core conception of law fails to bring legitimacy to a non-Western society.⁶⁰

B. ENTER THE HERMENEUTIC CIRCLE OF COMPARATIVE LAW

Comparativists are often warned not to project the experiences or perspectives from their own legal systems onto those of the foreign jurisdictions they investigate. A negative treatment of a comparativist's own context or tradition, as a “bias” to be purged, may find its intellectual root from the Cartesian legacy that methodologically alienates the knower (“interpreter”) from their own historicity.⁶¹ Earlier hermeneuticians, such as Friedrich Schleiermacher and Wilhelm Dilthey, indeed followed this legacy and urged the knower to rid themselves of this potentially distorting bias.⁶² Yet, while the absence of dogmatic, solipsistic attitude within a comparativist is ideal, it does not necessarily warrant an absolutely detached, Olympian standpoint.⁶³ The point is that a comparativist cannot be a completely neutral observer, nor must they be.⁶⁴ A comparativist must admit that a pure emic viewpoint is neither possible nor desirable. Indeed, “our prejudices . . . are reflections of our past experience; and like our past experience, they belong to us and define us—for good or ill.”⁶⁵

Note that the very term “compare” actually assumes a pre-judgement based on our own legal system, even before we notice similarities and dissimilarities between the former and a foreign legal system. Thus, a comparativist's pre-judgement (*Vorurteil*) structured by their own biographical and professional experiences is more an enabler than an obstacle to a comparativist inquiry.⁶⁶ While knowing a foreign law presupposes the limits of one's own law, one may not realize such limits until one genuinely encounters the foreign law.⁶⁷ Gadamer underscored: “[T]he prejudices and fore-meanings that occupy the interpreter's consciousness are not at his free disposal. He cannot separate in advance the productive prejudices that enable understanding from the prejudices that hinder it and lead to misunderstanding.”⁶⁸

In this sense, a good comparativist would approach a foreign legal system with some preceding ideas of it, although vague and unarticulated.

⁵⁹ *Id.* at 20.

⁶⁰ *Id.* at 16.

⁶¹ HANS-GEORG GADAMER, *PHILOSOPHICAL HERMENEUTICS* xiv (David E. Linge ed. trans., 1976) [hereinafter GADAMER, *PHILOSOPHICAL HERMENEUTICS*].

⁶² *Id.*

⁶³ See Vincent Pouliot, “Subjectivism”: *Toward a Constructivist Methodology*, 51 INT’L STUD. Q. 359, 365 (2007) (discussing what Pierre Boudieu called the “scholastic bias” or the “intellectualist fallacy”).

⁶⁴ GADAMER, *TRUTH AND METHOD*, *supra* note 46, at 271.

⁶⁵ RONALD BONTEKOE, *DIMENSIONS OF THE HERMENEUTIC CIRCLE* 108 (1996); *id.* at 484.

⁶⁶ But see Hudson Meadwell, *The Foundations of Habermas's Universal Pragmatics*, 23 THEORY & SOC’Y 711 (1994) (Jürgen Habermas objected to this role of tradition or pre-judgment in hermeneutics. Habermas contended that certain preconditions for an ideal communication (“universal pragmatics”) could lead interlocutors to reach a consensus on the validity of truth.).

⁶⁷ GADAMER, *PHILOSOPHICAL HERMENEUTICS*, *supra* note 61, at xxi.

⁶⁸ GADAMER, *TRUTH AND METHOD*, *supra* note 46, at 295.

Indeed, their prejudice, a tradition or “horizon” in a phenomenological sense, is a necessary element in understanding a foreign legal system. Their constitution of a “foreign world” is always against the background of their own “homeworld.”⁶⁹ Their “effective historical awareness” (*wirkungsgeschichtliches Bewusstsein*) is an inevitable fulcrum with which to lift the other’s legal system from the dark and turn strangeness, or otherness, into familiarity.⁷⁰

This dialectic process of understanding a legal other through a legal self can be portrayed as a “hermeneutic circle.”⁷¹ A comparativist *qua* interpreter fuses their horizon (*Horizont*) or their Lifeworld (*Lebenswelt*) with a foreign legal text to create a new horizon—a whole meaning. David Lange aptly epitomizes a hermeneutic mission of comparative law as follows: “[A] [foreign] text speaks differently as its meaning finds concretization in a new hermeneutical situation and the interpreter for his part finds his own horizons altered by his appropriation of what the text says.”⁷²

Informed by philosophical hermeneutics, comparative law should not be equated to simply acquiring information on a strange (in other words, foreign) law. Rather, comparative law should assume a philosophical attitude in the self’s interpretation of the other through a “fusion of horizons (*Horizontverschmelzung*),” integrating a comparativist’s own horizon (familiarity) and a foreign legal system’s horizon (strangeness) to create a new, whole legal meaning. Importantly, legal meaning here denotes not “something lying *behind* the text” but law’s “own contemporaneity” in a particular hermeneutical situation, as in the case of literary interpretation.⁷³

To paraphrase in a more traditional comparative law methodology (function or context), a comparativist begins their investigation from the standpoint of their own tradition or horizon (Context I). This embedded self-horizon leads inevitably to a form of contextualized function (Function I) tailored to the comparativist’s own experience. Then, they project their own self horizon into that of a foreign legal system (alter-horizon: Context II). “Critical self-consciousness”⁷⁴ emerges from the fusion of horizons, creating a “critical space” within a comparativist. It is this peculiar space where the comparativist can acknowledge the “contingency of contemporary beliefs” as well as the existence of “internal differences” in their own assumption susceptible to future changes.⁷⁵

Such a critical attitude eventually leads to a Copernican abandonment of dogma or essentialism: “We are not the center of the universe, but only

⁶⁹ *Husserliana: Edmund Husserl Gesammelte Werke*, KU LEUVEN, <https://hiw.kuleuven.be/hua/editionspublications/husserliana-gesammeltewerke> [https://perma.cc/D6KR-ZWKH].

⁷⁰ GADAMER, TRUTH AND METHOD, *supra* note 46, at 291 (“Understanding is to be thought of less as a subjective act than as participating in an event of tradition, a process of transmission in which past and present are constantly mediated.”).

⁷¹ In contrast, a legal historian “has no case from which to start, but he seeks to determine the meaning of the law by [considering constructively] the whole range of its application.” *Id.* at 322.

⁷² GADAMER, PHILOSOPHICAL HERMENEUTICS, *supra* note 61, at xix.

⁷³ *Id.* at xx.

⁷⁴ See generally JENS ZIMMERMANN, HUMANISM AND RELIGION: A CALL FOR THE RENEWAL OF WESTERN CULTURE 230–71 (2012).

⁷⁵ Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT’L L. 1, 8 (2000).

another element in a universal order.”⁷⁶ Therefore, hermeneutics are capable of decoding discourses from different times, places, and languages “without imposing one’s own categories on them.”⁷⁷ After all, a foreign legal text, and the other’s horizon embedded in it, serves as a “thick foil” against which we can check and monitor our self-understanding.⁷⁸ Finally, this hermeneutic empathy generates a new whole in the form of a broadly-defined function or meta-function (Function II), which eventually constitutes a new, fused horizon (Context III). This hermeneutic circle may be illustrated in the following.

[Figure 1] A Hermeneutic Circle of Comparative Law

Context I (Self-Horizon) → Function I (Contextualized Function)
 → Context II (Alter-Horizon) → Function II (Meta-Function) →
 Context III (New Horizon)

In fact, similar insights expressed by several comparativist scholars lend credence to the value of hermeneutic circle of comparative law. Mary Ann Glendon, Paolo Carozza, and Colin Picker sharply observe that the contemporary American legal education fails to provide American law students with opportunities to reflect on their own legal system as a “functioning whole.”⁷⁹ Their fragmented curriculum, in contrast with the European counterpart,⁸⁰ offers no holistic overview of the legal system.⁸¹ Therefore, American perceptions on law and lawyers cannot be “liberated from the conceptual categories of their home systems,” except for being saved by such rare vehicles as comparative law.⁸² As emphasized by Glendon, if a French person wants to truly understand France, she should live for some time in London.⁸³

By the same token, William Alford identifies American legal scholars’ misunderstanding of the development of the Chinese legal profession as a lack, or misuse, of self-reflection on the role of the American lawyers. Anthony Kronman’s celebrated *The Lost Lawyer* bemoaned that the contemporary American legal profession, driven by commercialization and specialized techniques, lost the prototypical vision of common law lawyers as “social engineers” or “lawyer-states[men].”⁸⁴ According to Kronman, the

⁷⁶ *Id.* at 18.

⁷⁷ Richard E. Palmer, *On the Liminality of Hermes and the Meaning of Hermeneutics*, 5 PROC. HERACLITEAN SOC’Y 4, 6 (1980).

⁷⁸ Warnke, *supra* note 50, at 94.

⁷⁹ MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 10 (3d ed. 2008).

⁸⁰ See, e.g., *Courses & Curriculum 2024-2025*, MAASTRICHT UNIV., <https://curriculum.maastrichtuniversity.nl/education/bachelor/bachelor-european-law-school/courses-curriculum> [https://perma.cc/ZL58-NQ76] (“The European Law School bachelor aims to educate you to be European jurist in a globalising world. You will learn the distinct way of analytical and critical thinking that is unique to the legal discipline, by adopting a European and comparative perspective.”).

⁸¹ GLENDON ET AL., *supra* note 79.

⁸² *Id.* at 11–12.

⁸³ *Id.* at 11 (quoting Fernand Braudel).

⁸⁴ William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionalism in the People’s Republic of China*, in *RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA* 299 (William P. Alford ed., 2007).

titular “science” of law, which can be traced back to Christopher Columbus Langdell, may have contributed to increased complexities—but not deliberation—of legal thoughts.⁸⁵ However, Alford warns that the current U.S. penchant for China’s legal reform is perilously based on the lost vision of common lawyers. He casts a critical question: “If we believe that the high ideals undergirding our profession are failing here, what is the moral basis for our seeking to persuade the Chinese or anyone else to adopt them?”⁸⁶ Americans should not attempt to find in China their own lawyers lost in America, as the title of Alford’s article implies. Therefore, American scholars’ typical heuristic distortions on the Chinese emerging legal profession derive not only from challenges of understanding China’s socio-cultural characteristics but also from inaccurate appreciations of their own legal profession.⁸⁷

Paul Kahn’s critical observation on the contemporary constitutional discourse uniquely exhibits the value of hermeneutic circle—bridging the unbridgeable through self-denial.⁸⁸ He views that the critical distance created by self-reflection may establish the “transcendental” conditions beyond mere politics.⁸⁹ This critical space in turn cultivates fertile grounds for novel discourse leading to an open constitutional terrain.⁹⁰ This credo in openness is a sufficient condition for Kantian “transcendental proof” of the common good, by which we can convert scientific narratives of law into normative ones.⁹¹

The following example may illustrate a practical operation of hermeneutic circle in a comparativist investigation. Suppose that a Korean lawyer studies American contract law and understands that American contract law is KorAmC. An American contract lawyer understands that their own contract law is AmAmC. Would KorAmC be the same as AmAmC? Who is right and how do we know who is right? Suppose the same American lawyer studies Korean contract law and understands that Korean contract law is AmKorC. The same Korean lawyer understands that their own contract law is KorKorC. Would AmKorC be the same as KorKorC? Again, who is right and how do we know who is right?

What may happen after the two lawyers engage in a long, soul-searching dialogue on each’s earlier, possibly prejudiced, understanding of the other’s legal system? The edifying goal of fusing each other’s legal horizon is not to determine the *right* version of a particular legal system. Indeed, this attitude would contradict a hermeneutic nature of comparative law investigation.

⁸⁵ *Id.*

⁸⁶ *Id.* at 304.

⁸⁷ *Id.* at 288. In a similar fashion, the recent legal development in China may be mischaracterized as “minimalist” from the Western standpoint. See Jacques deLisle, *The Chinese Model of Law, China’s Agenda in International Law, and Implications for Democracy in Asia and Beyond*, THE ASAN FORUM (Oct. 24, 2018) (“The assumptions of the liberal-democratic-legalist model addressed and evangelized by the United States and others may in the long run prove correct, and the role of law and democratic politics may in the end be interdependent and mutually reinforcing. But a model plausibly derived from recent Chinese experience and seemingly reflected in Chinese strategy suggests that law may serve—at least over some relatively extended period—as a complex but viable substitute for democracy.”).

⁸⁸ Kahn, *supra* note 75.

⁸⁹ Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J.L. & HUMAN. 141, 168 (2001).

⁹⁰ *Id.* at 168–69.

⁹¹ *Id.* at 169.

Rather, the philosophically authentic destination of a hermeneutic enterprise in comparative law would be mutual expansion of one's own earlier legal horizon. A transformed legal horizon is now broad enough to accommodate a critical reexamination of one's previous understanding of law.

For example, the American lawyer may disabuse himself of the "warping presumption" that all foreign contract law would, and *should*, look like American contract law.⁹² Moreover, they can even critically review their renewed understanding of Korean contract law to "improve" American contract law, divorced from "a self-aggrandizing dream of America as solely an exporter of legal knowledge."⁹³ An authentic interrogation of Korean contract law can function as a useful empirical source to verify, or falsify, existing assumptions of American law.⁹⁴ Likewise, the Korean lawyer can now test their own misconceptions about American contract law⁹⁵ and embark on a reformation of Korean contract law. In their own reappraisal of American contract law, the Korean lawyer may even realize that "not every divergence from Western paradigms is to be blindly praised."⁹⁶

In sum, the American contract lawyer's hermeneutic engagement with Korean contract law, if conducted in earnest, would bestow upon them two moments of transformation. First, the American contract lawyer will be able to secure a truly contextualized appreciation of Korean contract law, free from their earlier misconceptions. Second, their broadened legal horizon will equip them with a critical faculty of rethinking and reformulating American comparative law. The very same phenomenon will arise to the Korean contract lawyer regarding their understanding of American contract law and their own native Korean contract law. At the end, each lawyer's revised understanding of one's own legal system (AmAmC* and KorKorC*) will converge (AmAmC* $\cong$ KorKorC*), not by the terms of their doctrinal contents but from the perspective of hermeneutic distance.

C. HERMENEUTIC CIRCLE AND IDENTITY COST

As discussed above, the "duality" of understanding—in other words, understanding of a foreign legal authority *and* self-understanding—is quintessentially the hermeneutic circle that a comparativist undergoes in their dialogue with a foreign legal authority. An existential resolution is required of a comparativist: a resolution that they will accept the "risk,"⁹⁷ or "identity cost,"⁹⁸ of revising their own original, and therefore comfortable, legal categorization.⁹⁹ In this regard, Gadamer aptly observed: "[W]hat we

⁹² See Kroncke, *supra* note 9.

⁹³ *Id.* at 124.

⁹⁴ *Id.* at 149.

⁹⁵ *Id.* at 151.

⁹⁶ Bussani, *supra* note 57, at 705.

⁹⁷ See Teemu Ruskola, *Law Without Law, or Is "Chinese Law" an Oxymoron?*, 11 WM. & MARY BILL RTS. J. 655, 669 (2003) (arguing that we have to accept a risk of changing our own legal view if we want to pursue an earnest conversation with a foreign legal system).

⁹⁸ Charles Taylor, *Understanding the Other: A Gadamerian View on Conceptual Schemes*, in GADAMER'S CENTURY: ESSAYS IN HONOR OF HANS-GEORG GADAMER 279, 295 (Jeff Malpas et al. eds., 2002).

⁹⁹ Ruskola, *supra* note 97, at 669 ("In the end, honest views of 'law' may result in psychological changes in how we view law. But if we wish to enter into a serious conversation with the Chinese legal tradition—or any other, for that matter—that is the risk we have to accept.").

find happening in speaking is not a mere reification or intended meaning, but an endeavor that continually modifies itself, or better: a continuously recurring temptation to engage oneself in something or to become involved in with someone. But that means to expose oneself and to *risk* oneself.”¹⁰⁰

Openness to the other then involves recognizing that one must accept some things that are against oneself, even though no one else forces one to do so.¹⁰¹ When it comes full circle, the fundamental purpose of comparative law goes beyond an initial trigger: it is to expand our legal horizon by fusing it with that of others and to eventually capture an authentic understanding of our *own* legal system. Again, Gadamer opined that “the horizon, while inescapable, nonetheless *changes* constantly as, in the course of her life, the individual moves through the world acquiring new experience (and thus altering her prejudices).”¹⁰²

This comparativist discourse is driven by cognizant human attempts to reduce, not necessarily eliminate, hermeneutical differences. Here, comparativist discourse can be characterized as a “play” (*Spiel*) in that it features its own discursive essence independently of the consciousness of those who participate in that discourse.¹⁰³ A foreign legal text enjoys its “self-presenting reality” as a *game* in a phenomenological sense and goes beyond a mere object for interpretation.¹⁰⁴ Joining the comparativist game (to locate, sign up, and engage in the discourse) takes various forms, including not only referencing foreign law in legislating, executing, or adjudicating domestic law but also in studying, debating, and criticizing foreign law. These various activities of comparative law are all conducted through hermeneutics and tend to spawn “hermeneutical cells” amid hermeneutical dynamics. These hermeneutical cells, such as court decisions or scholarly comments, may crystallize into a certain *corpus juris*—be it a domestic statute or a treaty—when converging hermeneutics gather enough energy in the right context. Thus, a hermeneutical cell spawned by a domestic judge could find its way into a future foreign judge’s legal mind and constitute a new precedent on comity by the latter.

Of course, running a hermeneutic circle is not always successful. A comparativist *qua* interpreter might be cursed to remain uncritical of their own legal system. This is the typical pitfall of functionalism. A failed hermeneutic circle would mislead a comparativist investigator into equating, immediately and uncritically, their own practicality with a legal reality in a foreign jurisdiction.¹⁰⁵ In this vein, a domestic judge would subject themselves to their prejudice and refuse to embrace a foreign legal system through a

¹⁰⁰ Hans-Georg Gadamer, *Text and Interpretation*, in *DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER* 21, 26 (Diane P. Michelfelder et al. eds., Dennis J. Schmidt et al. trans., 1989) (emphasis added); see also Jean Grondin, *Gadamer’s Basic Understanding of Understanding*, in *THE CAMBRIDGE COMPANION TO GADAMER* 36, 46 (Robert J. Dostal ed., 2002) (attributing the open nature of the philosophical hermeneutics to a “risk”).

¹⁰¹ GADAMER, *TRUTH AND METHOD*, *supra* note 46, at 355.

¹⁰² BONTEKOE, *supra* note 65, at 109.

¹⁰³ GADAMER, *TRUTH AND METHOD*, *supra* note 46, at 102.

¹⁰⁴ GADAMER, *PHILOSOPHICAL HERMENEUTICS*, *supra* note 61, at xxv.

¹⁰⁵ Catherine Valcke & Matthew Grellette, *Three Functions of Function in Comparative Legal Studies*, in *THE METHOD AND CULTURE OF COMPARATIVE LAW: ESSAYS IN HONOUR OF MARK VAN HOECKE* 99, 102 (2014).

reasonable interpretation. They would then end up merely “confirming [themselves] at the expense of others.”¹⁰⁶

Worse, because their legal vision is clouded by concepts from their own society on the nature of law and its functions, they might propose measures counterproductive to the societies of others.¹⁰⁷ Worst, it might mean the end of law itself! In the age of deglobalization, the failure of judicial hermeneutic circle means the deprivation of deferential space between two different legal jurisdictions. The consequent vacuum of law could be filled by violence in the name of sovereignty. In this vein, Fred Dallmayr trenchantly observes:

Hermeneutical mediation comes to an end whenever one party arrogates to itself a sovereign prerogative, that is, the capacity to determine the meaning of legal and other texts unilaterally in a binding fashion. At this point, mediation is replaced by the stark antitheses between text and praxis, between law and politics—an antithesis which typically resolved through the absorption of law by power, of reason by sovereign commands.¹⁰⁸

II. APPLYING PHILOSOPHICAL HERMENEUTICS TO TRANSJUDICIAL NEXUS

A. A TYPOLOGY OF TRANSJUDICIAL NEXUS

In the praxis of transjudicial nexus, philosophical hermeneutics may materialize differently depending on the way two horizons, the legal self and legal other, are embraced and fused to each other. The most widely documented occasion of transjudicial nexus has been to cite foreign sources to gain prominence and legitimacy of one's interpretative choice.¹⁰⁹ This judicial practice of interpretation by reference may be dubbed “allusion.” The hermeneutical function of such referencing is essentially obscure as it serves only circumstantial—not substantial—grounds for one's interpretation. At the same time, the main audience of this mode of transjudicial dialogue is the domestic legal constituency, including fellow judges. Thus, the allusive mode of transjudicial nexus is prone to politicization and vulnerable to backlash from legal nationalists.¹¹⁰

¹⁰⁶ Cho, *supra* note 49, at 116.

¹⁰⁷ Trubek, *supra* note 58, at 18–19.

¹⁰⁸ Fred Dallmayr, *Hermeneutics and the Rule of Law*, 11 CARDOZO L. REV. 1449, 1466–67 (1990).

¹⁰⁹ See, e.g., Stephen Yeazell, *When and How U.S. Courts Should Cite Foreign Law*, 26 CONST. COMMENT. 59, 64 (2009) (observing that “the U.S. Constitution is full of references to foreign law, so full that one cannot make sense out of many of its provisions without foreign law”); Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 657–58 (2007) (explaining that the domestic legal community is better positioned, now more than ever, to interpret the laws of other nations).

¹¹⁰ See, e.g., Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 653, 662–663 (2009) (arguing that “judges with little knowledge of foreign systems will use foreign law material selectively or haphazardly” which effectively allows domestic judges to “cherry pick” cases and provisions from specific countries); Martin Gelter & Mathias M. Siems, *Citations to Foreign Courts—Illegitimate and Superfluous, or Unavoidable? Evidence from Europe*, 62 AM. J. COMPAR. L. 1, 6 (2014) (noting that “the influence of foreign case law might undermine national sovereignty and democracy . . . if there are useful legal ideas abroad, it is only for the legislator to consider adopting such rules”).

In contrast, other modes of transjudicial nexus may reveal more direct and profound hermeneutic functions than allusion. This Article henceforth focuses on two such distinct modes of transjudicial nexus: “enrichment” and “rapport.” First, despite the recent deglobalizing trend, the original inertia of globalization will continuously prompt a domestic court to fill the gap between its static laws and new, dynamic legal problems. These modern *non liquet* situations call for an ingenious appropriation of foreign sources in resolving the domestic dispute at hand. This is a moment of judicial “enrichment,” in that a domestic court can effectively broaden and sophisticate the legal sources readily available in a domestic judge’s toolbox. While those legal sources may not necessarily be applicable laws per se, they can still enrich a domestic judge’s hermeneutic space, especially in the form of judicial discretion or equity consideration.

Another propitious hermeneutic occasion for transjudicial nexus is “rapport,” often in the form of comity, which can be defined as the “respect owed to the laws and acts of other nations by virtue of common membership in the international system.”¹¹¹ In particular, judicial comity originates from “respect for the integrity and competence of foreign tribunals.”¹¹² An intersubjective connection that inevitably transpires in a comity situation can reverberate to one’s foreign counterparts in a consistent and durable manner through reciprocity.¹¹³ Under these circumstances, a domestic court can confidently bestow upon itself a liberal standard of judicial comity in the spirit of “a fundamental identity of transnational judicial interests.”¹¹⁴ If repeated, this type of comity can generate a new transjudicial precedent that attenuates the potential tensions arising from deglobalization.

Interestingly, these two modes of transjudicial nexus do not require any extra-judicial interventions, such as legislation or political pressure. They are endemic to judicial reasoning itself, and therefore amenable to hermeneutic operation. Indeed, the two cases in point discussed below¹¹⁵ are decades-old disputes whose hermeneutic meanings still echo in contemporary judicial practice.

B. ENRICHMENT: GREENSPAN V. SLATE

Barbara Slate, a seventeen-year-old high school student, injured her foot while playing basketball. Her parents, Thomas and Nelda Slate, underestimated her injury and refused to provide her with medical attention. In the meantime, a passerby, Mr. Sylvester Garfield, witnessed Barbara’s predicament and immediately sent her to Dr. Sydney Greenspan. Upon

¹¹¹ Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 205 (2003). See also *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (describing comity as “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws”).

¹¹² *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

¹¹³ Cf. Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT’L. J. CONST. L. 296, 297 (2003) (discussing a certain type of transjudicial nexus labeled as “cross-constitutional influence,” whose meaning is broader than mere “constitutional copying”).

¹¹⁴ Slaughter, *supra* note 111, at 207.

¹¹⁵ Rudolf Schlesinger had originally introduced these two cases (*Greenspan* and *Shoop*) in his textbook. See RUDOLF B. SCHLESINGER, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 1–5, 152–65 (Stevens & Sons Ltd. 6th ed. 1998).

discovering a bone fracture in her foot through x-rays, Dr. Greenspan applied a cast which Barbara wore for a month, along with crutches. Both Mr. and Mrs. Slate knew of Dr. Greenspan's emergency treatment as Barbara lived at home with them. When Barbara's cast was removed, Dr. Greenspan asked Barbara's parents to pay him a medical bill of forty-five dollars. However, the parents refused to pay, arguing they had not agreed to Dr. Greenspan's medical treatment of Barbara.

Dr. Greenspan sued the parents to seek compensation for his medical services. Both the trial and the appellate courts sided with the defendants on the grounds that Dr. Greenspan had acted without any explicit or implicit authorization from the defendants. Interestingly, however, the appellate court sided with the defendants only "reluctantly." Why? Those judges admitted, albeit impliedly, that denying a father's legal duty to support his own child and ruling against Dr. Greenspan would be largely unfair. Nonetheless, the appellate court could not escape from the common law's obsession with "contracts" and "consent." It could not help but follow New Jersey precedent on contractual relationships that focused on the existence of consent of the parties.

Upon appeal to his bench, Chief Justice Vanderbilt of the New Jersey Supreme Court had two choices. First, as the appellate court had done, he could have conveniently recycled a dictum—not a holding—of a New Jersey precedent, *Freeman v. Robinson*, which ruled that a father's duty to support his children is a mere "moral" obligation. Second, upon stricter scrutiny of the relevant New Jersey court decision, he could have discovered that there was in fact no controlling precedent under the New Jersey court on this issue. Justice Vanderbilt took the second option.

First, Justice Vanderbilt discerningly pointed to the unjustifiable inconsistency in legal treatment between a neglected wife and a neglected child. The New Jersey case law imposed upon a husband a quasi-contractual obligation to support his wife for necessities. Yet, in the case of a neglected child, the New Jersey court held that no such legally enforceable obligation would exist as a father's duty to support his child is a "natural duty" or mere "moral obligation."

Although the New Jersey court ostensibly attempted to remedy this inconsistency, such a jurisprudential attempt was futile, as it was accompanied by a certain evidentiary requirement. In other words, a neglected child might claim a legal right to receive necessary support from his father only if "the authority of an infant to bind the father for necessities may be inferred from slight evidence."¹¹⁶ However, Justice Vanderbilt censured such "artificial" requirements as "not only unsound in principle but ineffective in operation" because "it does not reach the cases where . . . there is no 'slight evidence' from which to infer a promise, and the cases not so reached are the ones where in simple justice a legal right and an adequate remedy are most needed."¹¹⁷

Upon conceding the flaw of the common law in this area, yet liberated from the unseen shackle of precedent, Justice Vanderbilt turned to the court

¹¹⁶ *Freeman v. Robinson*, 38 N.J.L. 383, 384 (N.J. 1876).

¹¹⁷ *Greenspan v. Slate*, 12 N.J. 426, 432 (N.J. 1953).

of equity. There, he could enjoy ample hermeneutic space in which he attempted to remedy the lack of justice in the decisions of the lower courts. This was essentially a “gap-filling” enterprise in that New Jersey’s jurisprudential lacuna must be filled from the *outside*. Here, Justice Vanderbilt boldly enriched his equity reasoning by meticulously tapping the relevant European statutes on a father’s legal duty to support his children. He began his transjudicial investigation with the very pedigree of the civil law—in other words, the Roman law system. His humble observation of the common law’s flaw in this area merits a full quotation: “[T]he course of the Roman law and the modern civil law of Western Europe, which is based on it, suggests that the common law rule, which we are now discarding in favor of the equitable doctrine, may be merely an instance of early *undeveloped* law.”¹¹⁸

Here, Justice Vanderbilt’s admission that civil law exhibits a far greater extent of legal evolution than common law tends to justify his transjudicial benchmarking. He also acknowledged that “the common law was *slow* in permitting the use of *assumpsit* in suits other than our express contracts or contracts implied in fact.”¹¹⁹ He then surveyed a wide scope of provisions from major European legal systems, such as Austria, France, Germany, Italy, and Switzerland, as follows:

The duty of taking care of the children's support until such time as they are capable of supporting themselves is primarily incumbent on the father. (Austrian Civil Law)¹²⁰

Spouses are jointly obligated, by reason of the sole fact of contracting marriage, to feed, support and educate their children. (French Civil Code)¹²¹

An infant unmarried child may require his parents to support him although he owns property, to the extent to which the income from his property and from his own work are not sufficient for his support. (German Civil Code)¹²²

The duty of supporting and of giving an education and instruction to the issue is borne by the father and by the mother in proportion to their property, including in the mother's contribution income from her dowry. (Italian Civil Code)¹²³

The father and the mother shall bear the expenses for the support and education of the child [and they shall share in them] according to their matrimonial regime. (Swiss Civil Code)¹²⁴

Once Justice Vanderbilt enriched New Jersey case law by identifying a father’s legal duty to support his children by benchmarking the civil law system, the issue of restitution was easily resolved. He turned to sections 113 and 114 of the Restatement of the Law of Restitution that require a person to compensate another who performed the former’s noncontractual duty, even

¹¹⁸ *Greenspan*, 12 N.J. at 441 (emphasis added).

¹¹⁹ *Id.* at 442 (emphasis added).

¹²⁰ Allgemeines bürgerliches Gesetzbuch [ABGB] [Civil Code], § 143 (Ger.).

¹²¹ Code civil [C. civ.] [Civil Code] art. 203 (Fr.).

¹²² Bürgerliches Gesetzbuch [BGB] [Civil Code], § 1602 (Ger.).

¹²³ Codice civile [C.c.] [Civil Code] art. 147 (It.).

¹²⁴ SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [Civil Code] Dec. 10, 1907, SR 210, RS 210, art. 278 (Switz.).

without the former's consent or knowledge.¹²⁵ In sum, a transjudicial nexus in the form of enrichment empowered Justice Vanderbilt to create a new precedent on a father's legal duty to support his children in New Jersey.

C. RAPPORT: IN RE SHOOP

A century ago, an improbable harbinger of globalization materialized in the Philippine Islands when Max Shoop, an American lawyer who had practiced in the highest court of the State of New York for more than five years, applied for admission to practice in the Philippine courts. The relevant part of the Rules for the Examination of Candidates for Admission to the Practice of Law ("the Rules") in the Philippine Islands provides:

Applicants for admission who have been admitted to practice in the Supreme Court of the United States or in any circuit court of appeal or district court, therein, or in the highest court of any State or territory of the United States, *which State or territory by comity confers the same privilege on attorneys admitted to practice in the Philippine Islands*, and who can show by satisfactory affidavits that they have practiced at least five years in any of said courts, may, in the discretion of the court, be admitted without examination.¹²⁶

The reciprocity clause within the Rules requires that the New York court confer the same privilege (bar admission without examination) to Filipino lawyers. The relevant part of the New York rule provides that "[a]ny person admitted to practice and who has practiced five years in another country whose jurisprudence is *based on the principles of the English Common Law*."¹²⁷

Since the exercise of comity must be based on reciprocity, Justice Malcolm, the Filipino Supreme Court judge in this case, needed to know the prior pattern of the New York court's exercise of comity toward Filipino petitioners' applications. He could have relied on empirical data. For example, had the New York court accepted a total of one hundred Filipino applications and rejected only several others, Justice Malcolm could then have identified a reliable pattern of comity by the New York court. However, there were only two cases in the past: one admitted and the other, which was a more recent one, rejected. Because the exercise of comity is by discretion, the most recent decision of rejection would not be conclusive.¹²⁸ Therefore, the only option left to Justice Malcolm was a "reasonable" speculation as to whether a "reasonable" New York judge would admit or reject a hypothetical Filipino applicant.

The New York court's criterion of comity is that a foreign applicant should come from a "jurisprudence based on the principle of the English common law." If a hypothetical, reasonable New York judge was to believe that the Filipino legal system is indeed based on the principle of the English

¹²⁵ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 113, 114 (Am. L. Inst. 2011).

¹²⁶ *In re Shoop*, 41 Phil. 213, 215 (S.C. 1920) (emphasis added).

¹²⁷ *Shoop*, 41 Phil. at 216 (emphasis added).

¹²⁸ *Id.*

common law, they would likely admit a Filipino applicant. Accordingly, Justice Malcolm had to assume a role of anthropologist who takes an *emic* view. In other words, from the standpoint of the hypothetical, reasonable New York judge, Justice Malcolm had to undertake a serious scrutiny on the compatibility of the Filipino legal system as a common law system. Markedly, this is a *double* comparative law moment: a Filipino jurist reviews the Filipino legal system not as its own native legal system but as a foreign legal system from a third-party point of view.

First, Justice Malcolm labored to articulate the New York court's criteria of comity—"jurisprudence *based on* the principle of English common law." Here, the language of "based on" is critical. It eloquently demonstrates the defining feature of the common law system itself. Although the common law system originated from England, a common law is not synonymous with, or identical to, *the* English common law. It obviously recognizes an "evolving" nature that allows certain adaptations to local conditions necessary for such an evolutionary process. Instead of merely alleging this cardinal point, Justice Malcolm located a powerful example in the evolution of the American common law itself from the original English common law.

According to Justice Malcolm, the history of the American common law is "as perpetuated and modified by the American cases." While the American common law is not identical with the English common law, the former is still *based on* the latter. The evolution of a common law system countenances certain impurities vis-à-vis the original English common law, including some legacies or traits from the civil law system, as seen in Louisiana legal system.

After establishing the nature of a "living" common law through a powerful analogy to the American common law system, Justice Malcolm moved to review the Filipino common law system. He judiciously described how the Filipino legal system had consistently been "Americanized" since the transition of its colonial status from Spain to the United States. Apparently, the evolution of the Filipino common law system should not be taken lightly. After all, as a previous Spanish colony, the Filipino legal system used to be a "code" system following the civil law tradition, which in principle dramatically diverged from the typical common law tradition. Therefore, Justice Malcolm's analytical focus centered on how the erstwhile civil law system transformed into the current common law system.

David Gerber's "system dynamics" approach may best elucidate Justice Malcolm's epic comparativist journey. Justice Malcolm strove to portray, with fascinating details, the Filipino legal system's odyssey to Americanization. Under the system dynamics approach, his account of legal Americanization is anchored by four main factors.¹²⁹

First, Gerber covers "authoritative texts." The Filipino government had abrogated old Spanish statutes, particularly those that might be labeled "political law," "immediately by the change of sovereignty."¹³⁰ It had also eliminated Spanish jurisprudence and adopted American statutes. Even in interpreting the remnants of Spanish statutes, the Filipino court used Anglo-American case law, "showing the real permanency of the hold which Anglo-

¹²⁹ See generally David J. Gerber, *System Dynamics: Toward a Language of Comparative Law*, 46 AM. J. COMPAR. L. 719 (1998).

¹³⁰ *Shoop*, 41 Phil. at 228 (citing *Sanchez v. United States*, 216 U.S. 167 (1910)).

American Common Law ha[d] fastened upon the jurisprudence of [the Philippines] jurisdiction.”¹³¹ Justice Malcolm emphasized: “[W]hat we really have, if we were not too modest to claim it, is a Philippine Common Law influenced by the English and American Common Law, the *derecho comun* of Spain and the customary law of the Islands and buil[t] on a case law of precedents.”¹³²

Second, Gerber discusses “institutions.” The U.S. Congress enacted new laws and established new institutions to transplant its own legal system into the Filipino jurisdiction.¹³³ The Filipino legal system was to “replace the old judicial system, with its incidents and traditions drawn from Spanish sources, with a new system modelled in all its essential characteristics upon the judicial system of the United States”¹³⁴

The third factor is “communities.” Legal communities comprised of lawyers, professors, and law students were also involved in the process of legal transformation. The study of Bench and Bar dispensed with the previous digests of Spanish decisions. Instead, local libraries contained American legal sources, such as digests and reports of the federal courts and Supreme Court of the United States, most of the State courts and even the English courts. In addition, local libraries were also supplied with English and American textbooks. As a result, Filipino lawyers were trained mainly from a study of Anglo-American case law.¹³⁵

Lastly, Gerber looks to “patterns of thought.” After the United States colonized the Philippine Islands, many Spanish statutes were “derivative” from Anglo-American sources in the sense that they had been “copied, and in the sense of having been enacted by Congress or by virtue of its authority.”¹³⁶ In interpreting these statutes, Anglo-American precedents, and in particular dictum therein, Filipino lawyers thereby developed a legal mind that was based on a “substantial common law.”¹³⁷

After completing his analysis of the status of the Filipino legal system from the standpoint of a hypothetical New York judge, Justice Malcolm departed from his self-designated surrogate status and stood his *etic* ground as a neutral spectator. If the hypothetical New York judge were to be a “reasonable” interpreter, he or she would have reached the same conclusion rendered by Justice Malcolm, who had acted as a surrogate to the New York judge. The Filipino legal system was based on the English common law, and therefore the hypothetical Filipino petitioner would have been admitted. Informed by this reasonable interpretation, Justice Malcolm could identify the existence of reciprocity and therefore exercised his own comity in light of the current case involving Max Shoop. Justice Malcolm held: “The New York rule, given a reasonable interpretation, permits conferring privileges on

¹³¹ *Id.* at 238.

¹³² *Id.* at 225 (citing *United States v. Abiog & Abiog*, 37 Phil. 137 (S.C. 1917)).

¹³³ *Id.* at 223 (citing *Alzua and Arnalot v. Johnson*, 21 Phil. 308 (S.C. 1913)).

¹³⁴ *Id.* (citing *Alzua and Arnalot v. Johnson*, 21 Phil. 308, 333 (S.C. 1913)).

¹³⁵ *Id.* at 251.

¹³⁶ *Id.* at 231.

¹³⁷ *Id.* at 237–38.

attorneys admitted to practice in the Philippine Islands similar to those privileges accorded by the rule of this court.”¹³⁸

Max Shoop was finally admitted to practice in the Philippines Islands. Interestingly, Justice Malcolm ended his ruling and comparativist journey with a disclaimer. Justice Malcolm emphasized the provisional nature of his decision. Note that the New York court rejected the most recent petition from a Filipino petitioner. Justice Malcolm would realize that despite his decision to admit Max Shoop, the New York court might still act unreasonably in the future. Believing that the American legal system and the Filipino legal system were irreconcilably different from each other, the New York court would continue to reject future Filipino applicants’ petitions to practice in New York. Therefore, Justice Malcolm had to conclude:

Our decision [to admit the American attorney Max Shoop to practice in the Philippine Islands] is based upon our interpretation of the New York rule and it does not establish a precedent which may be controlling on this court with respect to future applications if our interpretation is not borne out by the future enforcement of that rule by the New York court.¹³⁹

In doing so, Justice Malcolm solemnly warned that the Filipino court could reject a future petition to practice in the Philippines from an American petitioner in the name of reciprocity.

D. A HERMENEUTIC LOGIC OF TRANSJUDICIAL NEXUS

The two aforementioned cases elucidate a hermeneutic logic of transjudicial nexus. On a superficial level, Justice Malcolm might have been said to simply apply a technical rule on reciprocity. On a more profound level, however, what Justice Malcolm commissioned concerns a serious act of interpreting a foreign (New York) legal system *and* eventually one’s own native (Filipino) legal system. Although Justice Malcolm might not have completely identified himself with an imaginary New York judge, he could still understand the New York judge’s interpretive concerns and could also understand *himself* better as he would eventually discover himself reflected in the eyes of the New York judge.¹⁴⁰ In a sense, Justice Malcolm understood the imaginary New York judge better than he understood himself, “achiev[ing] insights into the real intention of the author—insights [the author] would have shared if [the author’s] thinking had been clear enough.”¹⁴¹

In what can be labeled “altercasting,” Justice Malcolm *casted* an identity of a model comparativist onto the hypothetical New York judge (*alter*). If a New York judge, as a good comparativist, confronted a Filipino law, their first reaction would always be “negative” in the sense that such *new* experience would not conform to them. Then, the New York judge would realize that they “ha[d] not seen the thing correctly and now [would] know

¹³⁸ *Id.* at 256.

¹³⁹ *Id.* at 257–58.

¹⁴⁰ *Cf.* BONTEKOE, *supra* note 65, at 111.

¹⁴¹ *Id.* at 100; GADAMER, TRUTH AND METHOD, *supra* note 46, at 195.

it better,”¹⁴² which leads to the “evolution of tradition” on the part of the New York judge.¹⁴³ At the same time, the hypothetical New York judge could be said to undertake a process of “translation.” The New York judge may embrace what is strange to them only through what is familiar to them.¹⁴⁴ Yet, as the translation moves along, they tend to question the merits of their own tradition in a particular occasion.

Crucially, a comparativist project is always motivated by their present, and practical, problems, such as an adjudicatory situation involving a foreign law as seen in *Shoop*. The imaginary New York judge was then immediately confronted by an enigmatic challenge of reconciling the Filipino legal system and the current issue at hand—that is, whether to admit a Filipino lawyer to the New York bar. Deciphering the meaning of a foreign legal text cannot be separated from its application to a current problem situation confronted by a comparativist. Note that the New York judge would not seek simply to restore the tortuous history of the Filipino legal system that had to intermediate two colonies in one lifetime.¹⁴⁵ Nor would the New York judge have to first know the Filipino jurisprudence and then later apply that meaning to a case at hand; rather, application, here and now, is an integral part of interpretation.¹⁴⁶ Thus, every practical situation calling for interpretation, as seen in *Shoop*, is *non liquet*. It requires the creation of a novel legal reality, such as admitting a Filipino lawyer to the New York bar. It seeks to close a gap between an old legal reality (rejecting a Filipino lawyer’s access to the New York bar) and a new legal ideality as an “imagined alternative”¹⁴⁷ (a reasonable interpretation by the New York judge).

Likewise, Justice Vanderbilt’s comparative law attitude also deserves a mark of hermeneutic circle. His humility and courage to self-critique encouraged him to attempt fusing his own (New Jersey) horizon and that of the civil law tradition. He identified “shortcomings” of common law, instead of resigning himself to the comfort of the common law habit. The discovery of such shortcomings justified Justice Vanderbilt’s departure from the problematic case law of New Jersey. It also led him to approach the horizon of the European legal system through the court of equity where he could afford a discursive room for a comparative law investigation (“there are no precedents in our courts of last resort, so we are free to choose between the common law rule and the Chancery principle in deciding the instant case”). There, he could fill the gap left by the common law by imagining the “preferable” rule. He critically observed:

The course of the Roman law and the modern civil law of Western Europe, which is based on it, suggests that the common law rule, which we are now discarding in favor of the equitable doctrine, may be merely an instance of *early undeveloped* law. In the Roman law the

¹⁴² GADAMER, TRUTH AND METHOD, *supra* note 46, at 347.

¹⁴³ *Id.* at 293.

¹⁴⁴ Grondin, *supra* note 100, at 43 (“I can only unfold my understanding in terms that I can follow and hope to communicate.”).

¹⁴⁵ GADAMER, TRUTH AND METHOD, *supra* note 46, at 290.

¹⁴⁶ Dallmayr, *supra* note 108, at 1461–62.

¹⁴⁷ Cover, *supra* note 45.

duty of a father to support his child was enforced only by criminal proceedings, Radin, Handbook of Roman Law 108 (1927), but in the modern civil law the obligation of the parents is direct¹⁴⁸

Indeed, a hermeneutic circle represents how judicial comity works in practice. Exercising comity never means that a domestic judge should uncritically replace their own horizon with that of a foreign court. Instead, a domestic judge must consider their own horizon in deferring to a foreign court decision. For example, in *Ackermann v. Levine*, the Second Circuit held that enforcing a German default judgment would not infringe New York public policy.¹⁴⁹ The Second Circuit used the relevant German, not the United States, statute in calculating the attorney's fees, which would have been regarded as excessive by the U.S. standard.¹⁵⁰ The Second Circuit, *qua* comity, accepted the German fee statute's validity, noting that globalization required that "American courts recognize and respect the judgments entered by foreign courts to the greatest extent *consistent with our own ideals of justice and fair play*."¹⁵¹ Here, the Second Circuit successfully ran a hermeneutic circle in that it fused its own horizon (the New York public policy) with the horizon of a foreign nation (the German attorney fee statute).

Finally, the Gadamerian concept of "fusion" denies the separation of an interpreter, such as the imaginary New York judge, and an object of interpretation, such as the Filipino legal system.¹⁵² Deciphering the abstract meaning of a foreign law and applying it to a particular legal situation at hand required by practicality—such as whether to admit a Filipino lawyer to the NYSBA—are inseparable from each other.¹⁵³ It is a kind of "performative" interpretation as if a violinist understands the original note and reproduces (performs) it in their own style at the same time.¹⁵⁴ The subjectivity of an interpreter and the objectivity of a text (meaning) is a "false antithesis" to be avoided.¹⁵⁵ Even if there were an identifiable original intention that a foreign text might exhibit, a comparativist need not be bound by it. A comparativist themselves, such as the New York judge, is part of the meaning, as much as the Filipino legal system they try to comprehend.¹⁵⁶ It is in this sense that the way a hermeneutic circle operates is self-dialogical.¹⁵⁷

¹⁴⁸ *Greenspan v. Slate*, 12 N.J. 426, 441 (N.J. 1953) (emphasis added).

¹⁴⁹ *Ackermann v. Levine*, 788 F.2d 830, 834 (2d Cir. 1986).

¹⁵⁰ Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U.L. REV. 591, 609 (2001).

¹⁵¹ *Id.* at 610 (emphasis added).

¹⁵² Francis J. Mootz III, *Introduction*, in GADAMER AND LAW xi, xiii (Francis J. Mootz III ed., 2007).

¹⁵³ GADAMER, TRUTH AND METHOD, *supra* note 46, at 309.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 339–40.

¹⁵⁷ Jeff Malpas, *Hans-Georg Gadamer*, STAN. ENCYC. OF PHIL., <https://plato.stanford.edu/entries/gadamer> [<https://perma.cc/47RP-ZS4L>].

III. MORAL IMPLICATIONS OF HERMENEUTIC COMPARATIVE LAW

A. INTERSUBJECTIVITY AND WORLD-CONSTITUTION

As discussed above, the ultimate purpose of employing the concept of a hermeneutic circle in comparative law is to illuminate its dialogical and integrative nature. For example, a comparativist acquires a meaning of a foreign legal provision or court decision by speaking to (interpreting) it. They fuse their own horizon (legal background) with that of the foreign text or judicial decision to arrive at a *new* legal meaning that informs the dual understanding of the foreign law in investigation and their native legal system.

Justice Malcolm's hermeneutic reasoning enabled the fusion of two horizons, his and that of an imaginary New York judge. His reasoning is of an intersubjective discourse to be persuaded, rather than of an authoritative decision to be obeyed. Importantly, the audience of Justice Malcolm's ruling was beyond Max Shoop himself. From the standpoint of transjudicial nexus, the more significant audience was a future New York judge who would adjudicate on a parallel petition from a Filipino attorney. The New York court would later review Justice Malcolm's decision to decide on the same issue—that is, comity considering reciprocity. Consequently, Justice Malcolm created a unique space for transjudicial dialogue by which both the Filipino judge and the American judge could deepen their respective understandings of each other's legal system.

As a dialogue, a comparative law investigation is driven by an intersubjective logic. A comparativist's investigation is not akin to that of natural science: they would not simply watch and record movements of electrons or viruses. In this situation, they would not expect those electrons or viruses to talk *back* to them. This is the single hermeneutic. In contrast, when a comparativist speaks to a foreign legal text or court decision, that legal system—or people from the system, such as judges or government officials—tend to respond, if not instantaneously, in various manners. Their interpretation also influences their own interpretation. In other words, my hermeneutic circle vibrates in sync with theirs. This is the “double hermeneutic.”¹⁵⁸ The double hermeneutic issue highlights the intersubjective nature of comparative law investigation. Our attempt to understand a foreign legal system is linked inextricably to a parallel attempt by a foreign comparativist to understand our own legal system. According to the phenomenological tenet of “publicness” of mind, our own mind and the world, which includes the minds of others, are always mutually connected.¹⁵⁹ In this regard, Robert Sokolowski aptly observes: “We not only appreciate the world as given to others; we can also turn toward these others and

¹⁵⁸ ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* 20 (1984) (“The ‘findings’ of the social sciences very often enter constitutively into the world they describe.”).

¹⁵⁹ ROBERT SOKOLOWSKI, *INTRODUCTION TO PHENOMENOLOGY* 12 (1999).

experience them as like ourselves, as datives of disclosures, who can reciprocate our recognition and see us as like themselves.”¹⁶⁰

At first blush, the Filipino court would not have needed to marshal the “reciprocity” requirement at all to grant Max Shoop a license to practice law in the Philippines. After all, the Philippines was under American colonial rule at that time and had every political reason to grant such petition, even without consideration of the reciprocity requirement. Importantly, however, the Filipino court’s invocation of the reciprocity requirement went beyond the dimension of mere technical rules. It played a more critical role of “double hermeneutic” in the Filipino court’s comparative law dialogue with the U.S. legal system. In other words, the true motivation of the Filipino court behind its handling of the reciprocity requirement was to speak to its American counterpart.

The initial trigger of the Filipino court’s hermeneutic circle was to recognize its own domestic rule that required the reciprocity in comity before granting a foreign lawyer’s petition to practice law in the Philippines. The next step was to investigate whether comity in the New York jurisdiction regarding the cross-licensing of attorneys had ever been established. In a typical situation, the Filipino court would have needed to rely on a scientific investigation based on data, which would have been a “single hermeneutic.” Yet having no quantitative data at hand, it had to resort to a *qualitative* investigation that is closer to reasonable speculation. In doing so, the Filipino court engaged in an intersubjective communication with its counterpart (the New York court) and transmitted a signal to the latter court.

In sum, the reciprocity requirement, which was originally a technical requirement, in fact performed a crucial catalytic role in triggering a hermeneutic circle for the Filipino court, which was able to empathize with the New York court and at the same time lay a discursive ground based on which the latter might *re-empathize* with the former.¹⁶¹ What the Filipino court performed so elegantly in its reasoning was nothing but a comparative law investigation to substantiate that the Filipino legal system was indeed the American—and not merely the English—legal system. Therefore, the final destination of *that* hermeneutical circle run by the Filipino court is an ideal kind of *communitas*, where two legal horizons—Filipino and American—are fused.¹⁶²

This is the very juncture where Filipino lawyers may become American lawyers and, at the same time, American lawyers may become Filipino lawyers after the equally critical self-reflection on both sides. Perhaps, it is *the* common role of lawyers to adjust these frequencies to facilitate the discourse and eventually earn common heuristic on law and lawyers at various levels. The advent of these lawyers equipped with a “global perspective” as well as a “local sensitivity” can contribute greatly to the theme of convergence among different legal traditions.¹⁶³

¹⁶⁰ *Id.* at 154.

¹⁶¹ See EDITH STEIN, ON THE PROBLEM OF EMPATHY 59 (Waltraut Stein trans., 1970) (discussing the notion of “reiterated empathy”).

¹⁶² VICTOR TURNER, THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE 132 (1969).

¹⁶³ See Joshua D. Sarnoff, *Equality as Uncertainty*, 84 IOWA L. REV. 377, 381 n.11 (1999) (observing that intersubjective communication can lead to a non-arbitrary form of rule of law); see also Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT’L. L.J. 429, 491 (1997).

Eventually, comparative law becomes a process of discovering a “world held in common”: what I cannot see can be seen by others, what remains the potential to me can be the actual to others.¹⁶⁴ Here, comparative law offers itself as a critical medium for world-constitution whose understanding “will never presume to have freed itself from the limitations imposed upon it by the fact of its own situatedness within the world.”¹⁶⁵ In this regard, comparative law is potentially juris-generative in that it always opens a new legal horizon (legal mind) and constructs a new linguistically mediated legal reality. Both clarity and coherency increase in every iteration of the circle.¹⁶⁶ Yet no interpretation is final in that it only offers a snapshot of truth. Every time a comparativist makes a truth claim over some aspects of a foreign legal system, they investigate and simultaneously, mostly unbeknownst to them, “conceal” another truth in other aspects of the same legal system.¹⁶⁷ One cannot see any entity or phenomenon without bracketing something in it.¹⁶⁸ A comparative law project only generates a provisional conclusion, open to future revisions and therefore tolerating the plurality of interpretations.¹⁶⁹

Suppose that a New York judge followed a comparativist approach proposed by Justice Malcolm in the *Shoop* case. The New York judge could discover the like nature between American common law and Filipino common law and would therefore be ready to concoct a new legal reality—for instance, exercising comity by admitting a Filipino applicant to the New York bar. This decision would in turn constitute a new precedent in the New York jurisdiction, informing subsequent cases. The first comity decision by the Filipino court would reverberate into the New York court and could prompt the New York court’s comity decision on a parallel petition. In that situation, both courts would escape the jurisdictional constraints imposed by territorial sovereignty and collaborate “for the interests of all the parties and the ends of justice.”¹⁷⁰

B. TOWARD AN INTERSUBJECTIVE ETHICS OF COMPARATIVE LAW

The late Justice Scalia censured his fellow Justices’ attempt to summon foreign sources to reach a broader, or universal, moral ground for their decision. Justice Scalia attacked those Justices’ views as purely “subjective.”¹⁷¹ At first glance, Justice Scalia’s criticism seems to apply equally to the hermeneutic circle: can *any* interpretation on a foreign text, even a dogmatic and arbitrary one, be accepted? Note, however, that plural possibilities of interpretation are not necessarily synonymous to relativism. According to Gadamer, the circular form of bringing up traditions and creating new ones by revising self-understanding represents an “objectivistic science.”¹⁷² If we fail to let others speak to us in a genuine manner, we will

¹⁶⁴ SOKOLOWSKI, *supra* note 159, at 152.

¹⁶⁵ BONTEKOE, *supra* note 65, at 133.

¹⁶⁶ GADAMER, TRUTH AND METHOD, *supra* note 46, at 293.

¹⁶⁷ *Id.* at 38.

¹⁶⁸ See, e.g., Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419 (1992).

¹⁶⁹ Grondin, *supra* note 100, at 44.

¹⁷⁰ *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] AC (HL) 460, 461.

¹⁷¹ *Roper v. Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

¹⁷² Warnke, *supra* note 50, at 91.

end up with incoherency in understanding our own words.¹⁷³ This open nature of comparative law investigation can be dubbed “global due diligence,” which aims for procedural objectivity as a “function of intersubjectivity,”¹⁷⁴ not substantial objectivity informed by a miraculous theory or formula.

A comparative law investigation, if performed properly, can set off the aforementioned synchronic hermeneutic circle toward a new intersubjective meaning-reality complex. It is this hermeneutical mission that lends credence to the “ethics” of comparative law. If we are to understand, and not simply explain, a foreign legal system, and thereby eventually understand our own legal system, we are ready to accept the fact that we may be wrong and others right.¹⁷⁵ This “learned ignorance” (*docta ignorantia*)¹⁷⁶ itself is a form of ethics. Without being crystalized as such a moral command, it appears difficult, if not impossible, to expect a comparativist to initiate a hermeneutic circle on a voluntary basis. Our “deep identity investment in the distorted images we cherish of others”¹⁷⁷ often resists altering our prejudices through a hermeneutic circle.

In a practical sense, what a comparativist must invoke through this ethics is akin to a Kantian attitude to others—in particular, “friendship.”¹⁷⁸ This attitude concerns empathy in terms of “how we experience others.”¹⁷⁹ This ideal, though not necessarily empirical, framework,¹⁸⁰ presumes foreign jurists and their decisions to be reasonable and in good faith. These ethics mandate us to regard others as a “cognitive extension of self,”¹⁸¹ evoking an “ethics of inclusion” within comparative legal analysis.¹⁸²

These comparativist ethics render a special meaning to judges. They can be said to belong to a global interpretive community not because they necessarily share the same values but because they are all committed to the same goal as judges—that is, upholding justice and rule of law.¹⁸³ This common goal behooves judges to listen to “foreign voices”¹⁸⁴ through various means, such as comity or judicial notice. In this sense, a comparative law investigation is to acknowledge the “presence and role of foreign courts” and to “give due regard to their role as participants in an international scheme of dispute resolution.”¹⁸⁵ On the one hand, comparative law questions the “global generality”¹⁸⁶ of one’s own tradition or social identity. On the other

¹⁷³ *Id.* at 99–100.

¹⁷⁴ David C. Gray, *Why Justice Scalia Should Be a Constitutional Comparativist . . . Sometimes*, 59 STAN. L. REV. 1249, 1274, 1277 (2007).

¹⁷⁵ Robert J. Dostal, *Gadamer: The Man and His Work*, in THE CAMBRIDGE COMPANION TO GADAMER 13, 32 (Robert J. Dostal ed., 2002).

¹⁷⁶ GADAMER, TRUTH AND METHOD, *supra* note 46, at 356.

¹⁷⁷ Taylor, *supra* note 98.

¹⁷⁸ GADAMER, TRUTH AND METHOD, *supra* note 46, at 320 (“Both the person asking for advice and the person giving it assume that they are bound together in friendship.”).

¹⁷⁹ DAVID WOODRUFF SMITH, HUSSERL 340 (Routledge, 2d. ed. 2013) (2007).

¹⁸⁰ *Id.* at 355.

¹⁸¹ See Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 386 (1994).

¹⁸² Curran, *supra* note 22, at 658.

¹⁸³ Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud’s Theory of the Rule of Law*, 134 U. PA. L. REV. 817, 875 (1986).

¹⁸⁴ BREYER, *supra* note 25, at 92.

¹⁸⁵ Lien, *supra* note 150, at 651.

¹⁸⁶ Michael Calvin McGee, *Phronesis in the Gadamer Versus Habermas Debates*, in JUDGEMENT CALLS: RHETORIC, POLITICS AND INDETERMINACY 31 (John M. Sloop et al. eds., 1998) (“The global

hand, however, it still aspires “a global allocation of judicial responsibility, sharpened by the realization that the performance of one court's function increasingly requires cooperation with others.”¹⁸⁷ Comparative law can even work as a “subversive discipline” that challenges established beliefs.¹⁸⁸ Thus, condemning comparative constitutionalism is a self-inflicting gesture, since it deprives us of a critical opportunity of improving not only our legal system but also *ourselves*.¹⁸⁹

If comparativists do not act on these ethics, their comparativist undertakings will be prone to the behavioristic and instrumentalist definition of others, “not as much to understand others as to predict their behaviors so that we can more easily effect the ends of our own or of our society.”¹⁹⁰

CONCLUSION

Recent deglobalizing trends tend to proliferate offensive rhetoric, communication breakdown, and dialogues of the deaf. They diminish an epistemic foundation of understanding *others*—in particular, their legal worlds. Upon this exigency, what should be the new intellectual grammar of comparative law?¹⁹¹

Whilst comparison is a serious project and should thus be conducted with rigor and accuracy, it should not be an end itself. Nor should comparison fall into a defeatist fissure of incommensurable legal anthropology. Comparison is eventually a liberating enterprise through critical self-reflection, and this can be done in a mutual, if not reciprocal, fashion. We, the jurists, can enlighten each other through epistemic, on the one hand, and virtuous, on the other hand, discourses, which in turn can generate common heuristics at various levels.

In conclusion, this Article proposes a model of “intersubjective interpretation” as a hermeneutical heuristic, which may serve as a common grammar of comparative law. This heuristic, which may be labeled as a research guideline for comparativists, is expected to help comparativists operate their hermeneutic circle and therefore provide them with a compass, if not an actual coordinate, for their comparative law research. Intersubjective interpretation may unfold in the following sequence.

First, identify the “question” or “problem” under investigation in factual, not legal, terms. The point of reference (*tertium comparationis*) must be without pre-defined legal concepts or categories.¹⁹² This is because the

generality is made concrete, and thus understandable, because of the particular situations it might make clear.”).

¹⁸⁷ Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L. L. 708, 711 (1998).

¹⁸⁸ See Fletcher, *supra* note 41, at 683.

¹⁸⁹ But see John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U.L. REV. 303 (2006) (objecting to citing foreign decisions for the fear of democratic deficiency and the loss of self-governance).

¹⁹⁰ Warnke, *supra* note 50, at 91.

¹⁹¹ Regarding an earlier effort to pursue a “common grammar” of comparative law, see Vittoria Barsotti and David Gerber, *Preliminary Notes: Common Grammar Project Exploratory Meeting*, Collegio Carlo Alberto, Torino, Italy (Oct. 9, 2017) (on file with the author).

¹⁹² This approach is similar to what Rudolf Schlesinger had introduced in the Cornell studies in the 1960s. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (Installment I of II), 39 AM. J. COMPAR. L. 1, 29 (1991) (“This factual approach thus asked respondents about the results that would be reached in particular cases, not about a doctrinal system.”); see also Valcke et al., *supra* note 105 (“The trouble is that concepts, rules and domains are, like all intellectual constructs, delineated only

question or problem (*sache*) acts as a *trigger* of a hermeneutic circle, not for the purpose of functional identification under a conventional comparative law methodology.

Second, confirm my own horizon comprised of history and particular styles of thinking or particular manners of categorization, embedded in my native statutes and case law. Then, try to match my own horizon with the aforementioned factual situation by temporarily suspending my own logic or method of legal reasoning, no matter how scientific it may seem to myself. Then, try to answer the question or solve the problem from a *foreign* perspective (horizon) by mobilizing completely different sources of law or “legal formants” with their varying interpretive weights. For example, in foreign contexts, the legal mentality characterized by implicit, non-verbalized rules (“cryptotypes”¹⁹³) may matter more than formal sources of law in legal decision-making. This is as if we engage in an interdisciplinary study of law¹⁹⁴—first, investigating a foreign legal system as a *fact*, and then fusing (my) law and (their) fact.

Third, return to your own pattern and critique it to get a holistic meaning of the given subject matter, including similarities and dissimilarities in every possible level of abstraction. This may reveal your own pattern of thought that has remained hidden under the surface of explicit sources of law, such as statutes and case law.¹⁹⁵ Then, a *new* legal horizon can emerge through this self-understanding.¹⁹⁶ Only situated at this new legal horizon can we perceive a foreign legal system as a possible cognitive extension of our own legal system, not merely as an uninvolved set of facts.¹⁹⁷ Thus, we will eventually be able to perform foreign law as a jurist would, more than merely knowing it as a legal historian would.¹⁹⁸ This is the true value of a hermeneutic circle¹⁹⁹ as “the law can never exhaustively stipulate its range of application.”²⁰⁰

In due course, intersubjective interpretation will trigger a propitious dynamic of mutuality among jurists around the globe. If a judge in one jurisdiction cites a judicial decision from another jurisdiction, the latter is

vaguely at best, with the result that it is not always clear where each begins and ends. The risk is high, therefore, that what may look like counterpart legal objects in fact are not, and that the whole comparative process accordingly is rigged from the outset.”).

¹⁹³ Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (Installment II of II), 39 *Am. J. Compar. L.* 343, 385–87 (1991).

¹⁹⁴ Cf. Thomas C. Kohler, *Comparative Law in a Time of Globalization: Some Reflections*, 52 *Duq. L. Rev.* 101, 102–03 (2014).

¹⁹⁵ Sacco, *supra* note 193, at 387 (showing that, from a legal realist standpoint, a hermeneutic circle-driven comparison tends to offer an essential analytical device by which to unearth the real factors of legal decisions beyond doctrines); see Valcke & Grelette, *supra* note 105, at 108.

¹⁹⁶ See Vlad F. Perju, *The Puzzling Parameters of the Foreign Law Debate*, 2007 *Utah L. Rev.* 167, 168 (2007).

¹⁹⁷ Typically, foreign laws are judicially noticed as “facts” in a domestic litigation setting. See, e.g., *The Scotia*, 81 U.S. 170, 187–188 (1871) (“Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.”).

¹⁹⁸ Cf. Dallmayr, *supra* note 108, at 1462 (noting Hans Georg Gadamer’s borrowing of Emilio Betti’s distinction between the cognition of law by a legal historian and its application by a jurist).

¹⁹⁹ “The jurist who deals with a single system always runs into certain features that he takes to be ‘obvious’ and hence that he does not perceive, identify, or report. These features remain as cryptotypes until the comparativist is struck by the differences in mentality that he observes among different legal environments. When he undertakes the work necessary to describe such difference, he describes the systems themselves.” Sacco, *supra* note 193, at 388.

²⁰⁰ Dallmayr, *supra* note 108, at 1460.

also likely to cite a judicial decision from the former.²⁰¹ In other words, the more frequently a domestic court's judgment echoes—or osmoses—into a foreign court, the more likely the latter responds back to the former, constituting a feedback loop between courts. Only then can we envision symbolic world-constitution by overcoming the conventional “methodological nationalism,” which has dominated legal thought for the past two centuries.²⁰²

²⁰¹ See Jeffrey Toobin, *Swing Shift*, *The New Yorker*, (Sept. 12, 2005), <https://www.newyorker.com/magazine/2005/09/12/swing-shift> [<https://perma.cc/B8DÜ-542E>].

²⁰² Ralf Michaels, *Globalization and Law: Law Beyond the State*, in *Law and Social Theory* 287 (Reza Banakar et al. eds., 2d ed. 2013).