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New Approaches to Comparative Law: Comparativism and International Governance

*David Kennedy**

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* Henry Shattuck Professor of Law, Harvard Law School. I would like to thank Nathaniel Berman, Dan Danielsen, Karen Engle, Jorge Esquirol, and Duncan Kennedy for helpful conversations about comparative law, as well as all those who participated in the Comparative Law Nights series in the Graduate Program at Harvard Law School over the past three years. I owe a great deal also to Anthony Anghie, who developed the idea of systematically unraveling the relationship between international law and the problems of cultural difference, and Annelise Riles, who focused my attention on images of culture in international law. I would like to thank David Charny, Jorge Esquirol, Günter Frankenberg, Jon Hooks, Outi Korhonen, Amr Shalakany, and Stepan Wood for their very helpful comments on earlier drafts.

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I. NEW APPROACHES: THE PROBLEM OF METHOD

I would like to thank the University of Utah School of Law along with my good friends Karen Engle and Lee Teitelbaum for the invitation to participate in this conference reconsidering the traditions of comparative law. Over the last several years, the effort to develop new approaches to comparative law, pioneered here at Utah by Mitch Lasser, along with Günter Frankenberg, Jorge Esquirol, Marie-Claire Belleau, and a number of their colleagues, has generated an enormous amount of innovative scholarly energy, for which I have been an enthusiastic consumer.[1] I appreciate the opportunity to reflect on the scholarly work and intellectual project which has emerged from that energy.

To the extent comparative law is a discipline, however, I must begin with a disclaimer, for I am foreign to it. I have written about public international law and international economic law, fields which struggle more to transcend than to comprehend difference, to build bridges among national legal cultures in the name of a universal pragmatic, humanitarian, or commercial spirit. Although I have written about the law of the European Union as a technocratic project of international governance, I am not now, nor have I ever been, a comparativist.

As a result, I come to this project of disciplinary reconsideration obliquely. Over the course of a lengthy tradition, comparative law has developed an elaborate etiquette of reciprocal differences between an "us" and a "them," a center and a periphery, an east and a west, a "common" and a "civil" law. Difference—the elaboration of similarities and dissimilarities—is, in a way, their metier. If we seek to renew or critique the traditions of comparative law, it is hard not to inquire into the methods and presumptions for consid-

1. Among the most interesting work in the emerging tradition of new approaches to comparative law are Lama Abu-Odeh, Feminism, Nationalism and the Law: The Case of Arab Women (1995) (unpublished S.J.D. thesis) (on file with Harvard Law Library); Marie-Claire Belleau, *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379; Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985); Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1994); Jorge L. Esquirol, *Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425; LEO SPECHT, THE POLITICS OF PROPERTY: SOVIET PROPERTY AS A BUNDLE OF RIGHTS (1994). For a bibliography of new approaches to international and comparative law, see David Kennedy & Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 HARV. INT'L L.J. 417 (1994).

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ering the different, the temptations of imperialism and "going native," the risks of understanding and misunderstanding, of shrinking or magnifying the distances between legal cultures, and so forth. This is what it means to be a comparativist or specialist in foreign law—to study and relate to other legal traditions. These are the methodological puzzles the field takes as its own, and it seems fair to ask how they are doing. Looked at this way, there is every reason to hope that successive methodological innovations from the social sciences, the latest wave from anthropology perhaps, or feminism or literary studies, will rejuvenate or imperil comparative law. It is not surprising that the most innovative efforts to renew the field of which I am aware begin here, assessing the viability of the comparative tradition's engagement with the foreign.

There is much to be said for this. It engages the discipline on its own terms, accepting its sense of what's in and out, who's good and bad, what's new and old. It seems reasonable to begin with an analysis of the classic texts, the great comparativists, on the presumption that their limitations will be general to the discipline. This way of proceeding places the question of method front and center, asking whether the method or methods for reporting and analyzing other legal systems on display in the field's most sophisticated studies are adequate to the task. The goal is to lay blame for the discipline's lack of energy or insight at the doorway of method—and, if possible, to develop a theoretical key or keys to doing things differently. Since methodological innovation is an accepted marker in the discipline for innovation and generational change, this seems, from a strategic point of view, a wise course for scholars self-consciously seeking to establish a new "school" of comparative law. Where there is comparative work that seems new and exciting, the natural tendency is to try to see what methodological presuppositions its authors must have shared to separate themselves so from the mainstream.

The danger to be avoided, of course, is failing to generate a twist which is, in fact, both new and generalizable enough to count as a method, rather than a tip. For comparativists have a disciplinary history of absorbing methodological imports from elsewhere in the modern academy; they have, after all, ploughed this ground for more than a hundred years. We can forgive their most savvy elder statesmen the sense that they have seen it all before, in their own turn to functionalism or thick description or whatever. Placing method front and center may also obscure understanding the projects—polemical, professional, political, or personal projects—of actual comparativists, who are, after all, people with projects, not texts written by methods. Intergenerational struggles, identity affir-

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mations, engagements with the theoretical and political issues of their academic milieu—all this messy stuff may be lost by turning the classics into examples of method.

For an internationalist, however, the issue is, in any event, somewhat different. The comparativist's focus on an "us" and a "them" is replaced by a more universal claim and project: to empower an international public order above the nation, an international private order below or outside the state, or a complex regime of transnational order. We could overstate this disciplinary difference, of course. Comparativists also participate in a universal project, elaborating a universal legal ideal, a universally applicable comparative method, or an aspirationally universal taxonomy of law. And cultural difference troubles the internationalist, threatens to disturb their emerging order (what about women's rights in Chad or intellectual property in China?), but the internationalist's optic is less "understanding" than governing.

By governance, I mean the project, common to public international lawyers for generations, to build what seem to a particular generation the essential normative or institutional conditions for international public order. For some international lawyers this has primarily meant embroidering the doctrines of public international law and supporting the institutions and incidence of international adjudication.[2] For some, the great public law institutions of the United Nations system and its predecessors, or of federal systems at the regional or global level, have seemed more central.[3] It is now fashionable in public international law circles to treat both these normative and institutional projects as passé, in favor of what are thought the more complex, more or less formalized bundles of rules, roles, and relationships that define the interactions among governmental units and nonstate actors alike in a broader transnational civil society.[4] These various internationalist projects differ in the

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2. *See, e.g.*, THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992); HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS: THE OLIVER WENDELL HOLMES LECTURES, 1940–41 (1942); Manley O. Hudson, *Integrity of International Instruments*, 42 AM. J. INT'L L. 105 (1948).

3. *See, e.g.*, GRENVILLE CLARK & LOUIS B. SOHN, WORLD PEACE THROUGH WORLD LAW: TWO ALTERNATIVE PLANS (3d ed. 1966); INIS L. CLAUDE, JR., SWORDS INTO PLOWSHARES (4th ed. 1971); HENRY G. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW (1980); David W. Kennedy, *A New World Order: Yesterday, Today, and Tomorrow*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 329 (1994).

4. It is with this latest set of scholars and practitioners that "governance" has emerged as a distinctive motto for international public order, consciously distinguished from "government" and consciously identified with the group of phenomena that are thought to define the late twentieth-century international condition: global-

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ization, interdependence, the demise of sovereignty, the apparent futility of further United Nations institution building, and the emergence of international civil society. These writers identify governance as a new, distinct phenomenon: either a defining characteristic of the new world order or a prescription for resolving its pragmatic challenges, or both. "Governance" in this literature, as opposed to "government," is the complex of more or less formalized bundles of rules, roles, and relationships that define the social practices of state and non-state actors interacting in various issue areas, rather than formal interstate organizations with budgets and buildings and authority to apply rules and impose sanctions. The term has been picked up by an increasing number of liberal pragmatists in the mainstream of U.S. public international law, as a buzzword for pragmatic international order, and as a clarion that will resurrect public international law as the keystone of international order despite the apparent demise of the project of United Nations institution building. A good example is Benedict Kingsbury, *The Tuna-Dolphin Controversy, the World Trade Organization, and the Liberal Project to Reconceptualize International Law*, 5 Y.B. INT'L ENVTL. L. 1 (1994). Kingsbury relinquishes the public internationalist's project of government—building international organizations to generate and administer rules, in favor of governance: "rules defining social practices, assigning roles, and guiding interactions to facilitate cooperation and overcome collective action problems." *Id.* at 27–28. His goal is to rescue public international law from irrelevance by proclaiming it to be "the juridical expression of such a governance system." *Id.*

Economic globalization, complex interdependence (an idea that flourished in the 1970s with the work of Keohane and Nye, *see, e.g.*, TRANSNATIONAL RELATIONS AND WORLD POLITICS (Robert O. Keohane & Joseph S. Nye, Jr. eds., 1972); ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION (1977), but which all but disappeared from the time of Reagan's inauguration to the end of the Cold War), and the demise of state sovereignty are often linked. *See, eg.*, Sol Picciotto, *Networks in International Economic Integration: Fragmented States and The Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014, 1016–18, 1020–21; 1039 (1996–1997). Even writers critical of the neoliberal agendas often associated with the term governance, including those who seek to expose the sexist or neocolonial character of the phenomena represented by the move to governance, often adopt governance rhetoric. *See, e.g.*, Saskia Sassen, *Toward a Feminist Analytics of the Global Economy*, 4 IND. J. GLOBAL LEGAL STUD. 7, 38–39 (1996).

The rhetoric of governance has been loosely linked to two broad projects: global environmental protection and the advancement of "international civil society," by which scholars seem to mean the world of human rights activists and nongovernmental organizers. *See, e.g.*, Kingsbury, *supra*; Daniel C. Esty, *Stepping up to the Global Environmental Challenge*, 8 FORDHAM ENVTL. L.J. 103 (1996) (arguing need for improved global environmental governance is clear and improved governance need not mean world government). Most of these approaches situate themselves in self-consciously "liberal" political projects. *See, e.g.*, Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 377 (1994) (arguing liberal conception of global governance requires reconceptualization of state and international organizations in relation to transnational society).

In addition, a large body of work on the "legitimacy" of international and national governmental institutions employs "governance" as a vehicle for the vindication of individual human rights and collective self-determination, and as a source and marker of legitimation for international organizations and state governments. *See, e.g.*, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); David D. Caron, *Governance and Collective Legitimation in the*

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eagerness or anxiety with which they embrace what seems to them "political," in their engagement with public, as opposed to private, institutions, in their conceptions of the necessary degree of centralization to achieve world public order, in their attitudes towards the importance of moral or value commitments within the project of global governance, and in the role they see for law and legal norms. They share a sensibility or style, however, which differentiates them from most comparativists, particularly North American comparativists, at once a disciplinary will to power and an optimistic attitude towards the development of ever more international governance, however defined. For the internationalist governance

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New World Order, 6 HAGUE Y.B. INT'L L. 29, 30–31 (1993). This sense of governance was given institutional manifestation in the Commission on Global Governance, which issued its report in 1995, advocating (among other things) public participation in international governance. *See* COMMISSION ON GLOBAL GOVERNANCE, OUR GLOBAL NEIGHBOURHOOD (1995). The same year saw the launching of an eponymous journal, the *Journal of Global Governance*. This strand of discourse has been embraced by some Third World public internationalists. *See, e.g.*, Obiora Chinedu Okafor, *The Global Process of Legitimation and the Legitimacy of Global Governance*, 14 ARIZ. J. INT'L & COMP. L. 117 (1997).

Much of the energy behind the recent turn to "governance" in public law internationalism is provided by the work of international relations theorists on regimes and complex interdependence, especially the work of Oran Young. *See, e.g.*, ORAN R. YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY 15–16 (1994) [hereinafter YOUNG, INTERNATIONAL GOVERNANCE]; Oran R. Young, *Introduction: The Effectiveness of International Governance Systems, in* GLOBAL ENVIRONMENTAL CHANGE AND INTERNATIONAL GOVERNANCE 1 (Oran R. Young et al. eds., 1991) [hereinafter Young, *Introduction*]. Like most international relations theorists who believe in the possibility for international cooperation but also in the fundamental tenets of a realist tradition which regards international organizations as epiphenomenal, Young advocates setting aside our "preoccupation with world government" (a central public authority or complex of material organizations possessing offices, personnel, and budgets, and authority to limit member states' sovereignty), and focusing attention on regimes and institutions, such as the GATT, which perform the function of international "governance" (the management of complex interdependencies among actors engaged in interactive decision making) without government. *See* Young, *Introduction*, *supra*, at 2–3. A book edited by Rosenau and Czempiel has also been very influential among international lawyers. *See* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (James N. Rosenau & Ernst-Otto Czempiel eds., 1992). Most of this work by international relations scholars has focused on the establishment or emergence of international regimes, but attention has shifted in recent years to the operation and "effectiveness" of such institutions. *See, e.g.*, Young, *Introduction*, *supra* (assembling "North" and "South" perspectives on effectiveness of international environmental regimes). In a sense, international relations theorists are focusing on concerns that have preoccupied public international lawyers all along, and it seems no coincidence that international lawyers' surge of renewed interest in international relations theory coincides broadly with this turn to "process" within international relations itself. *See* Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487 (1997). I am indebted to Stepan Wood for development of the ideas in this note.

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project, the foregrounded relations are between global and local, norm and fact, law and society, the legal and the political, the universal and the particular, rather than here and there or us and them. The most ambitious intellectual and practical accomplishment of the field of international law is to align these images so that the universal and the legal have a geography as the global, consigning the political, the social, the factual, and the particular firmly to the local or national.

What I propose is to look at comparative law from the standpoint of this internationalist governance project. I want to explore the roles comparativists, as legal specialists in difference, play in the broader international project of public and private governance. What, moreover, is their contribution to the production of a "local" or "national" which is particular or political beneath a "global" which is universal and legal? My thesis is this: that if we are to rejuvenate comparative law, criticize or claim the discipline, we should do so not simply by interrogating the methods and limits of its own project, but should also see comparative law in relation to the broader problems of governance in which it plays, often unwittingly to be sure, a number of important roles. And we should see comparativists as people with projects—political, professional, and personal projects of cosmopolitan governance.

II. CULTURE AND DIFFERENCE: INTERNATIONAL AND COMPARATIVE STYLE

International law has an uneasy relationship to something it thinks of as international society, as the international community of states or the world of international relations, and which it imagines as a ubiquitous terrain for normative engagement with the particular. International law is thought to arise from political turmoil and calculation and to prove its mettle when enforced or obeyed or symbolically valued on the ground, in society, among states, in thousands of local encounters where the rubber meets the road. International law worries constantly about its ability both to reflect accurately the sovereign's will and to bring sovereign behavior within its ken. International lawyers are constantly searching for better methods to "enforce" their norms in international society and feel the need to defend international law when enforcement seems unlikely.[5] For international law, global governance means, at least in

5. A good contemporary example is provided by ABRAHAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).

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part, norm generation and enforcement.

Relations with something called "culture" are both more fraught and less central than those with sovereigns, with international society, with the world of international relations. For the internationalist, law and culture inhabit different frames. Like politics or religion, culture and cultural difference precede the move to law, exist external to it as a constant challenge or threat, or live below it, beneath the veil of the sovereign state. For the internationalist, culture is a natural, local, antiquated, and largely national thing.[6] We might think of the international lawyer as a photographer, the sovereign as the subject of his photograph. The international lawyer looks from global to local, or from law to society, in much the same way a photographer might look while adjusting his camera's zoom lens to pick up more or less of the lovely lake behind Aunt Betty's head. The term "culture" throws a wringer into the scene. Betty is no longer simply a focal plane, close or far from the camera, set off against or merged into the beautiful background the photographer has so nicely framed for her. Now she has relationships of similarity or difference with various third parties, cultures, at once larger than the local but different from the global. It is as if all of a sudden Uncle Chuck is trying to get into the picture, or calls Aunt Betty off to another scene, another role, no longer simply the subject of the photo, but a member of a different world, a wife, a woman, a cook.

For the internationalist, differences between states are there to be bridged, unified, transcended, or managed by the rules and institutions of international law, both public and private. The goal of internationalist discourse is to erect a zone or plane or viewpoint above relations between states, from which one might look now very specifically at the facts of a dispute, now very generally at the "regime" through which international society processes its internal

6. Annelise Riles, analyzing the late nineteenth-century international legal scholar Thomas J. Lawrence, describes two "essentializations" of culture in international law: (1) understanding international law as the cultural expressions of a European identity coterminous with "civilization"; and (2) figuring international law outside the European context as "above" what are understood to be local (and primitive) cultures. *See* Note, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723, 733–34 (1993); *see also* Annelise Riles, *The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law*, 6 LAW & CRITIQUE 39 (1995). I focus here on cultural images of the second sort, which animate international law's understanding of its relationship to cultures of both the first and third worlds. I share Riles's suggestion that we map differences in the way these cultural images are deployed at the center and the periphery.

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disagreements. To establish, imagine, or inhabit such a viewpoint is to govern. Although international law must accurately reflect sovereign will and be understood in the context of society, the internationalist seeks to build bridges among states by remaining agnostic about culture, by having no culture. The neologism "nation-state" reminds us not simply of the idea that each nation might one day have a state, that the relation between state and nation is somehow natural, but also that the nation and the state are terms in different registers. International law reflects, engages, bridges, governs, states. Nations have cultures. For the internationalist, the problem of culture disappears from view once equated with "nation." If each nation has a culture, if each state internalizes its own cultural differences, "manages its minorities," the internationalist can, by bridging states, bridge cultures. The idea here would be to invite Uncle Chuck to join the photograph or ask him to wait just a moment, offer to take his picture, or, if necessary, simply snap a photo of the argument which ensues.

The term "culture" creates difficulties when it wriggles free of the term "nation"—when the nation-state becomes a formal, legal, administrative unit, and culture an alternative pattern of differences and solidarities, a conflicting set of loyalties. If culture can slip the collar of the nation, it might also infect the global, transforming a cosmopolitan bridge into a cultural hierarchy. Or it might relate nations to one another in a voice quite different from the agnostic cosmopolitanism of international law. Culture may break the internationalist frame in two related ways, by generating solidarities which cross the neat boundaries of nation-states or by empowering smaller entities within states to erupt into international consciousness. These may be familiar identities—ethnic, religious, familial, gender, racial, indigenous—which may be minorities within a state or unrepresented, even suppressed, aspects of the state's majoritarian identity seeking expression in a way which renders the nation-state frame untidy, or they may be associated with aspects of social life which seem inappropriate for international expression at all because private or personal or primitive.[7]

At the risk of revolt against the metaphor, although the photographer might try to get Uncle Chuck into the picture or settle for a snapshot of the sun setting into the lake, what he does not want is constant interference from the sidelines or questions about his own relations with Betty (or Chuck). He does not want to participate in

7. *See, e.g.*, Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359 (1996).

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the drama of Betty and Chuck's marriage—he just offered to take their picture. There is a great deal about Betty's internal life about which he doesn't wish to know. Or, better, in staging the photograph, he is figuring a surface which will suggest one particular interior. We might think of a wall of family portraits, effacing the interior lives of one stoic figure after another, reconfiguring whatever confusing relations they might have had in life into the familiar patterns of a family tree. Just so the ranks of flags before the United Nations headquarters or the rows of even nameplates within. Or we might think of childhood simulations of international governance—each nation one national costume, one anthem, just as every American state has one bird, one flower. For the internationalist, cultural differences are best when they remain differences between or within nations and when states can be brought into relationship with one another in a regime of global governance which floats above culture. The architecture by which the pull of culture is shaken off is, of course, not a simple thing, nor is it accomplished in the same way by the various strands and traditions of international public and private law. In many ways this effort to be outside or above differences between legal cultures, precisely *not to be comparative law*, is the central project of international public and economic law. I think of international law establishing itself through an ongoing process of imagination, creating doctrines and institutions as efforts to transcend and bridge what it imagines as differences in a world of cultures it seeks to hold at arm's length, offering an agnostic order, selfless, objective, faithful to all sovereign desires, respectful of all sovereign prerogatives. The imaginative construction of such an order, literally and metaphorically, expresses public international law's sense of good governance.

The interesting point is that comparative law shares this imaginative construction from the other side, seeing itself as precisely not about politics or governance, as existing rather in the realm of history or thought, as an intellectual project of understanding between cultures whose similarities and differences are foregrounded. If we may speak of the comparative enterprise in the most general terms, we might say it is less internationalist in spirit than intercultural. Of course, cultures, including legal cultures, exist in ongoing relationships, and these may as well be relations of conquest as serendipity; but to the comparativist, matters of intercultural struggle and international rule are matters of fact, of history, part of the background to understanding. Imperialism or free trade, the migration of armies or intellectuals or ideas, are facts, not projects.

Like the internationalist, the comparativist inhabits a disciplinary geography which aligns the local with the particular and the

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cultural, but the comparativist sees himself seeking a horizontal engagement of ideas rather than a vertical engagement of authority. If you like, the comparativist may be friends with Betty or Chuck, but is more likely to present as an ego-suppressed family therapist, alert to remain on their level, concerned with relations between them rather than seeking to place them in a broader interpretive or therapeutic frame. The photographer is there, the lakefront is there, the sun is setting, Chuck is hungry, and dinner hasn't been started, but the comparativist is calm, open, attentive to Betty, to Chuck, to Betty and Chuck, listening, understanding.

The point of analytic ego-suppression, after all, is to offer a surface on which the client can draw himself, to present the therapist less with a project of diagnosis and medical intervention than of responsive understanding. Like the analyst, the comparativist presents as responsive only to the vagaries of cultural or client specificity and to the imagined demands of scientific rigor and method. Analyst and comparativist may well profit from the encounter, both financially and in their own work on the self,[8] but unlike the photographer staging a shot, the analyst remains open to the continual

8. When we imagine the comparativist as analyst, we are inevitably reminded of our own suspicion that what leads many psychotherapists to their field is not so much a detached, clinical interest in the patient but rather a deep, often unacknowledged need to work through their own psychopathologies. It is, of course, possible that the comparativist, as therapist, is similarly impelled toward comparative study by his or her own "pathology"—understood either in social terms as the felt need to understand and resolve problems or conflicts within his or her own legal system, or in psychological terms as the need to address the denials or contradictions that characterize his or her engagement with law, society, governance, or culture. All the major textbooks list as one of the principal functions or purposes of comparative law the better comprehension of one's own legal system and the resolution of its problems. *See, e.g.*, KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 15–19 (Tony Weir trans., 2d rev. ed. 1992) (presenting comparative law as tool of domestic law reform and domestic statutory interpretation, and comparative research as indispensable for adequate understanding of one's own legal system); MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES 10 (2d rev. ed. 1994) ("The hope is that the experiences of countries at comparable levels stages of social and economic development will give us insight into our own situation."). Similarly, Henry Maine declared that "the chief function of Comparative Jurisprudence is to facilitate legislation and the practical improvement of law." HENRY S. MAINE, VILLAGE COMMUNITIES IN THE EAST AND WEST 4 (London, 2d ed. 1872), *quoted in* Jonathan Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXFORD J. LEGAL STUD. 101, 102 (1989). Whether or not we understand this oft-deployed justification of comparative law as a reflection of the comparativist's preoccupation with his or her own "pathology," this justification helps the comparativist to keep a distance from power and governance, for how better to renounce a will to power than by protesting that all one really seeks is a better understanding of one's own problems at home.

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transformation of the scene, comes less to freeze the frame than to discuss it. The comparativist's knowledge might be useful to the internationalist, but after it has left his hands, he cannot be responsible.[9] He seeks less photos than stories. The aspiration to rule is as foreign to the comparativist sensibility as cultural understanding is to the internationalist. Even the construction of universal taxonomies is an operation of the intellect, not the will, in a project of understanding rather than control.[10] Where the internationalist who becomes too interested in culture has put away the camera and "gone native," the comparativist who becomes too interested in governance has given in to a messiah complex, or to the insecurity of the intellectual in the world of practical men. For the comparativist, internationalists seem rather vulgar presentists, always wanting lessons and applications and solutions, content that the other has been understood when he has consented to be ruled. For the inter-

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9. As Rudolfo Sacco stated:

> The aim of science is to satisfy a need for knowledge that is characteristic of man himself. Each individual science satisfies the need to acquire knowledge of its particular object. It is true that theoretical knowledge may subsequently find a practical application. Man would never have set foot on the moon without astronomy. Yet astronomy measured the distances that separate the planets long before the first moon landing. In general, then, the use to which scientific ideas are put affects neither the definition of a science nor the validity of its conclusions.

Rudolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1, 1 (1991) [hereinafter Sacco, *Legal Formants (Part I)*]; *see also* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343 (1991) [hereinafter Sacco, *Legal Formants (Part II)*]; Rodolfo Sacco, *Mute Law*, 43 AM. J. COMP. L. 455 (1995) [hereinafter Sacco, *Mute Law*].

Other comparativists, particularly those in the traditions of universal private law or of technocratic harmonization, seem much more eager to embrace the "applied" uses of comparative knowledge. Nevertheless, even comparativists who move away from Sacco's disdain for applied uses still pay homage to the pursuit of "pure knowledge," even if only as a mantra. *See, e.g.*, ZWEIGERT & KÖTZ, *supra* note 8. Although Zweigert and Kötz repeat that the "primary aim of comparative law, as of all sciences, is knowledge," *id.* at 15, and that comparative law deals with legal systems "without having any practical aim in view," *id.* at 6, this seems a largely perfunctory gesture, since the purpose of such knowledge is to extend and enrich the supply of solutions to practical legal problems. The authors devote the vast majority of their chapter on the functions and aims of comparative law to a discussion of these practical, applied "benefits" of comparative law. *See id.* at 15–27; *see also id.* at 3 (stating comparativists "have no immediate aim, only the ultimate goal of discovering the truth," but "if one did want to adduce arguments of utility, comparative law must be at least as useful as it was [at its inception around 1900]").

10. *See, e.g.*, Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997) (constructing new universal taxonomy of three legal families: rule of professional law, rule of political law, and rule of traditional law).

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nationalist, the comparativist seems a snob or dilettante, as if society might be organized through understanding without the taint of control.

In bringing comparative law and internationalist governance together, I want to focus on the frame common to both, which we might put baldly in these terms: there is a problem of order above states and a problem of understanding between cultures. Once posed this way, it doesn't take Freud to wonder about the internationalist's relationship to culture or the comparativist's relationship to governance. At the very least, these terms are reciprocal temptations, positioned by each discipline as an external real, forever threatening to erupt into the disciplinary project. My suggestion is that the internationalist and comparativist share more than they realize, indeed that they have evolved an uncanny partnership to manage relations with these parallel threats and temptations.

As a result, the difference I am drawing between internationalist and comparativist might easily be overstated or misunderstood.[11] Moreover, the mix and balance of concerns between disciplines differs in various national legal traditions. The broad differ-

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11. Many comparativists, for example, have shared the utopian aspirations common among public international lawyers. Immediately after the First World War, comparative law was thought capable of making a contribution to the effectiveness of the League of Nations, by promoting a general movement for the unification of law as a means of reducing international tensions. Hill continues the story:

> With rather different aims in mind, American comparatists in the 1950s suggested that comparative law might be employed for "the promotion of each of our basic democratic values." Hazard, having noted that Soviet law schools were using comparative law to attempt to establish the superiority of socialist law over bourgeois laws, advanced the following programme:
>
> > "It is possible to utilize comparative law in the American law schools for the same purpose, namely for perfecting American law and for convincing American law students of the desirability of their system of law. . . . In this way the study of comparative law could become an instrument in the current ideological struggle . . . ."

Hill, *supra* note 8, at 109–10 (quoting Myres S. Mcdougal, *The Comparative Study of Law of Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 1 AM. J. COMP. L. 24, 27 (1952) and John N. Hazard, *Comparative Law in Legal Education*, 18 U. CHI. L. REV. 264, 273 (1951)). Lambert and Saleilles, the organizers of the first International Congress of Comparative Law in Paris, in 1900, believed that their vision of a universal private law of mankind "would soon help to improve international relations and the standard of living of humanity." Roman Tokarczyk, *Some Considerations on Comparative Law*, 59 REV. JURISPRUDENCE U.P.R. 951, 955 (1990). The memory of these ideological projects may have something to do with the comparative law mainstream's enduring reticence to embrace international governance projects, and a reaction against earlier political engagements—for Americans, the 1950s project of anticommunist or, for the German comparative law academy, the 1930s project of apology for national socialism (the role of comparative law in Nazi Germany is described briefly by Hill, *supra* note 8, at 110–11).

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ence I have in mind is a matter of style or sensibility or character. It is not that internationalists are not interested in culture or comparativists uninterested in power.[12] It is not that the photographer is active and the therapist passive—we can imagine soft-spoken internationalists, hoping only to offer opportunities for consensus building or alternative dispute resolution, just as we can imagine comparativists firmly pursuing projects of intercultural assimilation.[13] In a way the most interesting point is the photographer's relative passivity—he's just taking a picture—and the therapist's bold engagement. It turns out, moreover, that internationalists, like comparativists, come from both "left" and "right." The difference between them is one of starting point, emphasis, self-image, or professional method and perspective. The relation between them is as much partnership as rivalry. We might best think of this as a stylistic rivalry between two different disciplinary wills to power: the comparativist aspiring to understand, the internationalist to order.

One starting point, a first hint that the photographer and the therapist might share more than they let on, might be two terms which wiggle between their two discourses: "politics" and the "pragmatic." Each discipline imagines the terrain of the other as politics, while both manage the obliquity of their relations to that other political terrain in the key of pragmatism. For the internationalist, the local or national is the repository of the political—international governance will be a matter of consensual structures wrung from intersovereign political differences.[14] In this vision there is good

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12. Indeed, some comparativists make little effort to conceal their will to power. An article by Franz Wieacker on the European legal tradition, for example, reads like a public order polemic of the first order. *See* Franz Wieacker, *Foundations of European Legal Culture*, 38 AM. J. COMP. L. 1 (1990). Wieacker urges the world to adopt Western techniques of rule and administration but what he takes to be the Western behavior and ethos of "personalism," "legalism," and "intellectualism," including the political structures and norms of human rights and the welfare state, without which, he suggests, not even a minimum tolerable existence is possible.

13. Among internationalists, it is common to picture the international civil servant poised between these two sensibilities. See, for example, the depiction of the U.N. Secretary General as "leader" or "clerk" in Leon Gordenker, *The Secretary General, in* THE UNITED NATIONS, PAST, PRESENT AND FUTURE 104, 108–09 (James Barros ed., 1972).

14. Oscar Schachter, for example, calls the sources doctrine of international law "[t]he principal intellectual instrument in the last century for providing objective standards of legal validation," and summarizes the history of the emergence of sources doctrine as follows: "the powerful ideas of positive science and State sovereignty were harnessed to create a doctrine for removing subjectivism and morality from the 'science' of international law." OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 35–36 (1991); *see also* Alejandro Alvarez, *The New International Law*,

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politics and bad. Good politics feeds slowly up the representational chain from local to global; bad politics disrupts this smooth chain, perhaps by cutting the international free of its roots and consent and responsibility, by seeking the local from participation or by aspiring to rule one locale from another without international sanction. Cultural solidarities present paradigmatic opportunities for bad politics, like Islamic fundamentalism or Chuck calling from the kitchen for Betty to mix him another drink. There is also good and bad culture. Good culture embraces the residual tolerable differences left after good politics has harmonized preferences for the sake of the universal, bad culture a warning sign that someone might be bucking the frame. For the comparativist, by contrast, the political is the stuff of international governance and imperium. Relations among legal cultures are historical and might be understood through a combination of intellectual history and pragmatic functionalism. Bizarre local symptoms and strange relations receive a cool, optimistic reception which promises understanding and asks only expression. International lawyers, political scientists, and regime theorists, however necessary their craft, are all too likely to medicate the patient, a temptation with which comparativists are only too familiar.

On the other hand, when international law must relate to culture rather than to the society it imagines among states, it does so pragmatically, treating the existence of culture as a limit condition, asking whether a particular culture has opted out of the system or the rule, whether cultural difference threatens application of the law, or whether knowledge of the culture might inform the project of universal norm generation.[15] Of course, these might be good questions to ask a comparativist. When comparativists engage the project of governance, they often do so with a certain disdain, offering themselves for pragmatic use in various projects of practice or reform, or asking how international governance has affected the reception and development of legal cultures.

The interesting thing is that critical traditions exist within both disciplines which insist on engagement with what is usually

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15 TRANSACTIONS GROTIUS SOC'Y 35, 46 (1930) (writing in 1929 that "[t]he essential reform cannot . . . consist in the laying down of rigid juridical rules for all cases, but rather in the elimination from politics of all arbitrary notions. What is essential and desirable is that the solution of political problems be governed by rules of morality, justice and equity").

15. One can get a good sense of this from the worry expressed throughout the Henkin, Pugh, Schachter, and Smit textbook about "multiculturalism." *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 6–10, 675–76 (3d ed. 1993).

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left to one side. Internationalists are in constant dialogue with critics who accuse them, one way or the other, of failing to elevate themselves above the worlds of national culture and difference, claiming that international law is all politics, or is Eurocentric, or hegemonic, and so forth. The internationalist tradition harbors an ongoing strand which insists on the cultural and the intellectual against the discipline's tendency to the instrumental or the technical. To a certain extent this is the strand carried by international public law against international private or economic law, by naturalism against positivism, and by a tradition of demystifying reformers against formalism.[16] However persuasive criticism which insists that the international engage the cultural "reality" it has heretofore excluded from its gaze, such criticism is also the easiest to answer, for it shares in the fantasy of a law which really might be above politics, might be universal, and so on, as well as in the image of a cultural realm oblique to the axis of power, available for representation. One can simply appeal to the critic to join in, add his or her voice to a project which is always only beginning.

Indeed, we might also write the history of international law as an effort to embrace differences between cultures, starting with the religious differences stabilized in the Westphalian settlement of 1648. Dealing with difference, of course, is a rather different optic from understanding differences, but we should not think international lawyers unaware of political and cultural struggle. Where difference may have been dealt with in an austerely formal way in the classic international legal order (say between roughly 1880 and 1930), both before and after we find a more mixed picture—twentieth-century international law has dealt with difference largely by seeking in one way or another to sidle up to the political, to come down from the heights of a procedural or formal legal architecture, to recruit into its folds political and cultural conflicts, while preserving, indeed precisely to preserve, the viability of the international governance project.

Comparative lawyers are in similar dialogue with critics who charge that they have not sufficiently purged themselves of aspirations to the universal or the will to power, and that they have therefore not really understood the other, have unwittingly privileged either their own or the other legal culture, have been tainted by the anti-intellectual temptation to place "doing business with" above "understanding," and so on. These criticisms, however telling,

16. *See* David W. Kennedy, *A New World Order: Yesterday, Today, and Tomorrow*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 329, 370–74 (1994).

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also meet a ready response. To all of this, the only reasonable response can be: Well, let's try harder, study more rigorously, listen more carefully, suppress our egos more fully. We should not be surprised to find comparative law preoccupied with an exaggerated image of its own marginality to governance, compensating in various ways, edging up to the political or pragmatic, while preserving the viability of its project of erudition and understanding. And indeed, methodological strands which seem from the outside either to eschew or to draw near the practical concerns of governance are defended in the same terms—as ways of preserving the overall (therapeutic) posture of disengaged understanding.

The best example is perhaps functionalism. When the internationalist hears that the comparativist is aligning legal cultures according to the different ways they achieve common economic or political functions, he can only cheer. What could be more conducive to governance? But functionalism enters comparative law as a method of understanding, an objective strategy for analytic ego suppression, perhaps technically useful, but more appropriately understood as an open-ended project of inquiry and analysis, precisely as a way of avoiding the temptation to subjective judgment and premature closure.[17] And functionalism is then criticized, in what its proponents are bound to think is an elaborate misunderstanding, precisely for its orientation to political outcomes rather than cultural meanings.[18]

My sense is that the critical tradition in international law has been strengthened by breaking out of this *pas de deux* with the mainstream. Conventional efforts to renew or rebuke international law have tended to take two forms: either criticism of what seems the internal development of international law (largely for philosophical difficulties or pragmatic failings), seeing issues of cultural engagement, colonialism, etc., as examples or by-products of these difficulties; or criticism of international law from what is thought to be the outside (largely for excluding this or that political or cultural perspective), seeing issues of philosophical or pragmatic incoherence as by-products of the failure to contextualize. Both of these critical

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17. *See, e.g.*, ARTHUR T. VON MEHREN & JAMES R. GORDLEY, THE CIVIL LAW SYSTEM (2d ed. 1977); Arthur T. von Mehren, *The Comparative Study of Law*, 6 TUL. CIV. L.F. 43 (1991).

18. *See, e.g.*, George P. Fletcher, *The Universal and the Particular in Legal Discourse*, 1987 BYU L. REV. 335, 335–38 [hereinafter Fletcher, *Universal and Particular*]; George P. Fletcher, *Law as Discourse*, 13 CARDOZO L. REV. 1631, 1631–37 (1992). For a further exploration of the ways in which American functionalism and its critique participate in projects of disengaged understanding, distancing themselves from governance, see *infra* notes 72–75 and accompanying text.

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traditions have something to teach, to be sure. My own sense, however, is that they may well become stuck if not pursued together. One more deconstruction of international law ("when we haven't even constructed it yet," in the immortal words of Abe Chayes) is likely to seem a distraction from the main event, just as one more indignant claim to have been excluded is likely to be met with an enthusiastic request to choose representatives and join the party.

The most innovative work associated with the "new approaches to international law" school has sought to bring these critical traditions together by showing how the internal contradictions and pragmatic limitations of international law are connected to its cultural exclusions and how both the identity of the culturally excluded and the modes of its possible representation are marked by the contradictions and pragmatic failings of the discourse from which it seeks recompense or engagement. This is easy to say, but hard to do. One easily falls back into either an internal critique of the field's philosophical failings or an external critique of its failure to engage. Since my proposal is that a complementary project be pursued in comparative law, it is worth spending some time reviewing the strategies taken to do this in international law.

To a certain extent, these strategies may be expressed as methodological precautions or tips. Be wary of accepting either the artificiality of the field's internal structure (its amenability to reimagination and methodological revision) or the reality of the discipline's terrain of engagement (its amenability to representation or inclusion). Seek to link a generalist critique of the local with a situated critique of the general. Focus on the perspectives common to both the mainstream and its traditional critics. Worry more about questions not asked than inadequate answers, and so on. Similar tips might be offered for comparative renewal: be wary of treating legal culture as an *a priori*, treat disciplinary epistemologies as strategic, ask whether moments of uncovered misunderstanding or methodological contradiction might be linked to unstated dreams of power. But such tips quickly fade into the sort of methodological cliché any careful scholar ought to heed, hardly a recipe for disciplinary renewal.

In the end, the work itself is likely to be more suggestive for comparative law than any methodological aphorism. My proposal is that at least some of the ideas developed in the effort to find new approaches to international law with which I am most familiar suggest avenues of useful inquiry for comparative law. This broad initiative to retell the disciplinary history of international law against the grain of the prevailing progress narratives, to recapture earlier confusions or repressions by which the field's forgetfulness

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has supported its own will to power, to situate international lawyers as people with projects, has generated a number of working hypotheses about international law's relation to culture which might be stated as follows: (1) international law has a culture and a politics which is less that of Europe than of the Cosmopolis or the Enlightenment;[19] (2) treating the local or national or periphery as the site for something called "culture" or "politics," which must be "let in" to the international, is one of the standard rhetorical gestures of cosmopolitan government itself; (3) scholars have underestimated the extent to which local political sensibilities (whether European national identities or professional cultures of anticolonial struggle) back formations of engagement with the international order;[20] and (4) specific doctrinal contradictions or philosophical weaknesses uncovered by internal criticism of the internationalist discipline often turn out to have been forged in an effort to imagine an order among those who seemed most culturally different—placing the problem of cultural difference at the center, rather than the periphery, of the discipline.[21]

III. INTERNATIONALISM AND CULTURE

International law does not wear its relationship to culture or difference on its sleeve. It defines itself rather by its relationship to sovereign states (it is the law of which and to which they are subjects) and by contrast to international politics and domestic law. To rethink these relations from the perspective of difference and cul-

19. *See, e.g.*, MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 1–51 (1989) (analyzing objectivity and distinct identity of international law); Nathaniel Berman, *"But the Alternative is Despair": European Nationalism in the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792, 1800–08 (1993) (analyzing European nationalism and comparative law during and after World War I); David Kennedy, *The International Style in Postwar Law & Policy*, 1994 UTAH L. REV. 7, 99–103 (studying "intellectual sensibilities of the largely liberal mainstream international post-World War II intelligentsia").

20. *See* Note, *supra* note 6, at 732–35; *see also* Chris Tennant, *Indigenous Peoples, International Institutions and the International Legal Literature from 1945–1993*, 16 HUM. RTS. Q. 1, 6–12, 49–55 (1994) (examining relationship between indigenous peoples, international institutions, and literature); Berman, *supra* note 19, at 1821–27.

21. *See, e.g.*, David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1, 1–98 (1986) (analyzing work of comparative legal scholars prior to 1648); Antony Anghie, *The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L L.J. 445, 445–49 [hereinafter Anghie, *Heart of My Home*] (discussing application of international law to remedy environmental damage); Antony Anghie, Creating the Nation State: Colonialism and the Making of International Law (1995) (unpublished S.J.D. dissertation, Harvard Law School) (on file with author) [hereinafter Anghie, Creating the Nation State].

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ture is a reinterpretive project on which a great deal more work remains to be done. Before we can model an inquiry into comparativism's hidden relationship to governance on the internationalist's hidden relationship to culture and cultural differences, we must disentangle the various techniques developed in the internationalist tradition to separate the general from what it sees as a world of particulars, differentiating global and local as a disjuncture between governance and culture.[22] This requires a reframing of the discipline's routine arguments, doctrinal patterns, professional identities, and institutional cultures every bit as jarring as rethinking comparative law from the point of view of governance. Still, we can sketch a few of the most familiar techniques of the international style, in both public international law and international economic law.

A. Public International Law: Governance Among Nations/Culture Within Nations

For public international law, we might begin with the nineteenth-century consolidation of a territorial sovereignty, the international gaining a procedural competence over the boundaries between sovereigns by forswearing substantive scrutiny of the activities of sovereigns within their territories.[23] This classic system, a reinterpretation of the Westphalian settlement, remains at the core of the discipline, having embraced a century of new actors, new institutions, and new intellectual methods. This classic trade-off permitted the conceptual extension of an international map of jurisdictions to the limit of the occupied world.[24] Cultural differences between sovereigns became internal matters, while relations between sovereigns, to the extent they were matters of law rather than politics, would be based upon a formally imposed similarity—all actors on the international plane would be states, absolute within their territories, equal before the law. Classic international law would resolve conflicts between sovereigns primarily by deduction from the entailments of sovereign authority and the procedural

22. *See* Riles, *supra* note 6, at 47–52 (providing alternative reading of mechanisms by which international sustains perspective gradations between international and local "plane").

23. On the proceduralization of international law, see, for example, KOSKENNIEMI, *supra* note 19, at 1–51; DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES 109–88 (1987); and VEIJO HEISKANEN, INTERNATIONAL LEGAL TOPICS (1992).

24. *See generally* ANTHONY CARTY, THE DECAY OF INTERNATIONAL LAW? A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS 43–60 (1986) (discussing nineteenth-century doctrine on nature of state territory).

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boundaries of sovereign jurisdiction. As this approach reached an apogee in the early twentieth century, so did the perceived thinness of the international legal fabric. Indeed, the sovereign state was no sooner consolidated as the disciplinary unit of account than it was disaggregated into a pragmatic bundle of rights and powers.[25] The early twentieth-century discipline was preoccupied with the "sources" of international law and the corollary project of "codification," seeking to build an international normative order on the consent of those it sought to bind, rendering any legal rule universal and noncoercive across the terrain of its application.[26] Common to these two sides of the classic system, doctrines of sovereignty and sources, procedural deduction from sovereignty and a normative order based on sovereign consent, was a passive image of international law—a governance system which did not rule, was precisely not a vertical authority, but a horizontal public order, disconnected from matters of subjective politics or culture which themselves would remain firmly within the reserved domain of sovereign power.

Also common to these efforts was an international idea about positivism, which seemed to permit a universal order grounded on a politics, a history, an authority, which could be understood to be external to it. The goal is a global order, a governmental instance, whose norms and institutions will then channel, bind, and define the sovereigns which create it. This classical order has been variously defined—as primitive, decentralized, horizontal—but for our purposes, the key point is that no state would experience itself submitting to a foreign culture or politics or interest, but rather only to itself, to the entailments of its own absolute sovereignty or the norms to which it had consented. The cosmopolitan international would not be another culture, one culture among many, but would have no cultural content, no subjective or political preferences of its own. The camera is simply a mirror.

From a philosophical point of view, this effort may be contradictory—can sovereigns, after all, make a law so powerful they cannot lift it? Can sovereignty be defined without being bound, affirmed without being limited? Can a law reflective of sovereignty bind, be

25. This was spurred on by efforts to explain the status of the various non-sovereign international institutions which had been created during the period in which the sovereign was consolidated as the only international actor, a process of interpretation which reached a peak with the League of Nations. *See, e.g.*, P.E. Corbett, *What is the League of Nations?*, 1924 BRITISH Y.B. INT'L L. 119–48.

26. On the paradoxes of this effort, see David Kennedy, *The Sources of International Law*, 2 AM. U. J. INT'L L. & POL'Y 1 (1987).

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enforced, govern? Is international law really law? Can a mirror rule? A great deal of disciplinary attention has been spent seeking answers to these and similar questions, and a rich critical and renewalist tradition in the field has developed by demonstrating the insufficiency of the latest response. In the event, however, the discipline has by and large simply accepted that there may be no good theoretical answer, preferring to get on with the project of international governance at a technical or pragmatic level—and who could argue with that? Taken on its own, it does seem senseless to ask whether international law is possible in some philosophical sense; let's just see if it can be done. One might reasonably object if there was some subjective or political or cultural bias in the endeavor. On that score, however, the answer is a practical one. If someone has been left out, let's include them. Again, reasonable enough.

A difficulty arises in the relationship between these two pragmatic claims. The claim that overlooked subject positions might simply be included seems to imply that assimilation would neither challenge core elements of the international regime nor require the foregoing of important cultural values. One might have grounds for thinking so if one could confidently answer the philosophical questions about the possibility for a purely procedural, acultural intersovereign order. When one then turns to reflect on these philosophical questions directly, however, asking whether there really can be, from a theoretical standpoint, a noncoercive order among absolute authorities, one is likely to be returned to the practical observation that such an order does, in fact, seem to exist, and, paradoxically, must be sufficiently neutral because all these different societies have, after all, agreed to go along with it.

The first hints of the importance of the cultural dimension comes in looking at the chronological and architectural narratives the discipline uses to assuage uncertainty which arises from this pragmatic effort to have it both ways. The chronology is a progress narrative: historically, the international emerges, will be built, will evolve, slowly as international society moves from primitivism to maturity.[27] All of international legal history chronicles a movement away from politics to law, from religion to reason, from coexistence to cooperation, from philosophy to pragmatism, which situates the internationalist project forward of the particular.[28] Martti

27. *See* Kennedy, *supra* note 19, at 7–15 (examining evolution of international law through analysis of legal texts of Hans Kelsen and John Jackson); Carl Landauer, *J.L. Brierly and the Modernization of International Law*, 25 VAND. J. TRANSNAT'L L. 881, 899–910 (discussing J.L. Brierly's *The Law of Nations*).

28. For analysis of two breaks forward from politics in the years 1648 and

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Koskenniemi speaks of a repeated narrative move between apology for an unavoidable politics or particularism and promises of a universal normative utopia.[29] It is a chronology confident of the distinction between the particularities of culture and the generalities of law, as of the contrast between primitive and modern governmental forms. But it is also a chronology which models law on the evolution of cultures, models international law precisely as a culture, if peculiarly the culture of an agnostic enlightenment.

As a result, the metaphorical architecture which accompanies this story is equally important, an arrangement of planes or levels, in which politics, religion, or ideology remain matters of domestic jurisdiction, protected against "intervention" from without and above. We might think of this classic structure as a geometric arrangement of jurisprudential levels and instances arrayed outward or downward from a central metropolis to the periphery—only here the metropolis floats free of any geographical position, embodied in the decentralized, horizontal, primitive, quasi-governmental bodies of "the international community."

In this conception, matters rise to international cognizance in two ways. Substantively, they may be taken up from the realm of politics into law, from religion or ideology into principle, from national interest to universal norm, by consent—consent to the jurisdiction of the International Court of Justice, the norms of the Universal Declaration of Human Rights, and so on. Procedurally, the international regime deduces its boundaries and the rights and duties of relations between absolute and equal powers from the nature of sovereignty itself.[30] As a purely procedural order, the

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1918, see Kennedy, *supra* note 21, at 1–13; David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841, 841–49 (1987); and Kennedy, *supra* note 16, at 329–75.

29. *See* KOSKENNIEMI, *supra* note 19, at 2.

> A law which would lack distance from State behaviour, will or interest would amount to a non-normative apology, a mere sociological description. A law which would base itself on principles which are unrelated to State behaviour, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way. To show that an international law exists, with some degree of reality, the modern lawyer needs to show that the law is simultaneously normative and concrete—that it binds a State regardless of that State's behaviour, will or interest but that its content can nevertheless be verified by reference to actual State behaviour, will or interest.

Id.

30. The International Court's classic procedural jurisprudence of the 1950s and 1960s, parallel to the preoccupations of the International Law Commission with state responsibility, are illustrative. Think of the *Barcelona Traction* case, in which the court differentiated the clear injury sustained by the Belgian shareholders, even by Belgium, from the question of legal "right" on the "international plane" (Barcelona

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international by definition embodies no preferences other than the full realization of sovereign equality and autonomy. The architecture, like the chronology, is confident of the distinction between the cultural and the governmental.

Successfully or not, the basic structural assumptions of international law thus seek to externalize differences between societies or domestic legal systems. The international legal order is universal, in the sense that it has no *particular* culture of its own and can remain agnostic as between cultures. Its content, normative authority, both procedurally and structurally, is the reflection of the sovereigns it governs. The pragmatism of its return engagement with particular disputes, differences, or problems, relies for its dispassionate acceptability on the stability of the boundary between culture and governance. Sovereigns can be enticed into governance with the promise that the photographer seeks only a photo. This, of course, was the foundational principle of the Westphalian system—that an order of states could leave religious difference to the discretion of territorial sovereigns. Sovereigns may be narcissists but they are not masochists.[31]

B. Public Law Internationalism Engages Cultural Difference

At the same time, however, international law was never fully disengaged from intercultural struggles. Many of the substantive doctrines and debates in international law concern issues of cultural identity, in establishing the national identities of sovereigns within and without Europe as well as in managing differences, both among the nation-states of Europe and between European and non-European cultures. One might even say, from Westphalia on, the overt point of the enterprise was to develop a way of solidifying nations as

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Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5) (second phase)); or, the *Nottebohm* case, in which the court distinguished Liechtenstein's clear sovereign freedom to treat whomever it wanted as its national for its own internal purposes from its legal "right" to expect other sovereigns to recognize its nationality decrees for purposes of making a claim on the "international plane" (Nottebohm case (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6) (second phase)). This is most evident in the doctrines of state responsibility and interstate claims. *See* KENNEDY, *supra* note 23, at 166, 173–88; *see also* Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 217, 307–13 (1977) (deploying procedures of state responsibility to compensate for absence of adequate consensual norms governing terrorism).

31. One might well wonder, however, whether the perceived breakdown of this classic order by the triumph of international economic law over public international law has rendered sovereigns masochists in their relations with the "global market," playing out reciprocal sadistic urges in the realms of asylum law, immigration, criminal cooperation against terrorism or drugs, and so forth.

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cultural entities and managing relations between them.[32] But when the internationalist engages cultural difference overtly, understanding is less important than managing—or understanding is only instrumental to management. The Westphalian solution embodies a certain systemic agnosticism, or a religiosity, which would only much later be read as a contending cultural tradition in its own right. Indeed, it is only after the classic international legal system consolidated the state sovereign as the only subject of international law and extended a proceduralized order oblivious to domestic politics to universal application, equated it with civilization, that it became both problematic and possible to see this agnosticism as an expression of European enlightenment culture and colonial power.

Rethinking international law as a method for managing differences, rather than ignoring or transcending them, is a project which has only just begun. All too often, the scholarly debate about international law is confined to routine conflict between defenses of its overt acultural posture and assertions of cultural relativism—insistence upon the inassimilable, unrepresentable other of international law. This repeated dialogue remains satisfying in part because the internationalist can seem quite defensive about political or cultural differences which might neither be successfully managed nor left below the line of sovereignty, displaying anxiety that the universal project might not have succeeded. The palpable relief with which so many international legal scholars now announce that the two main threats to the universality of international law in this century, from the socialist world and from the post-decolonization third world, did not in the end materialize cannot help but suggest a weak spot in the program.[33] And there is a parallel defensiveness in the work of third-world scholars who engage the universal and pragmatic claims of the international regime, whose efforts since decolonization to relate international public order to the history of colonialism have veered wildly between assimilative participation (the other always already a player, a state, an empire) and a puz-

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32. *See* Anghie, *Creating the Nation State*, *supra* note 21 (providing historical study reinterpreting public international law as effort to accommodate extreme cultural differences).

33. Contemporary international law casebooks take pains to inform students early on that for all temptations of multiculturalism, the most divergent cultures have, in fact, accepted the regime to be described. We can read, for instance, that "contrary to fears expressed during the early years of decolonization, international law has not been discarded and, instead, its universalism has been established." HENKIN ET AL., *supra* note 15, at 7; *see also id.* at 4–10 (stating neither Cold War nor Third World dismissive attitudes presented significant development of international law).

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zling combination of the cultural relativism of the historic outsider and defenses of a classic image of "sovereignty."

If we are to go beyond this deadlock, we might begin by listing international law's difference-managing strategies. Here are four which link international law's internal structure with its relationship to cultural variance: (1) cabining differences within the boundaries of the state; (2) facilitating assimilation to the state form; (3) internalizing differences within the international regime either geographically or substantively; and (4) externalizing differences as beyond civilization's pale.

Of the wide range of methods for managing what are understood to be political or cultural differences developed by the discipline in the years since Westphalia, the most significant remain the two established in the Westphalian period to deal with cultural differences within Europe and with the recently discovered cultures of the "New World." First, within Europe, religious differences would be managed by territorial deference, leaving the issue of religious confession to the territorial sovereign. In the nineteenth century, this system was consolidated and universalized. In the twentieth century, by lowering the water line of sovereignty, this structure has embraced a broader range of political and cultural issues, identifying various institutions and group formations (NGOs, corporations, individuals) as "subjects" of international law and regarding their interactions as forms of sovereign interaction, their norms as international norms, their judiciaries as international judiciaries, and so forth.

Second, relations with newly discovered non-European cultures were doctrinally organized to compel assimilation to the territorial sovereign form, through submission to conquest or cession, or autonomy. In this way, alternative cultures could be compelled to internalize their own differences. Once dressed as sovereigns, they could be treated with a sense of equality and deference which continues to be cited as humanitarian, tolerant, and accepting.[34] In the twentieth century the extension of compulsory statehood was facilitated by development of numerous institutional and procedural

34. For example, Vitoria's attitudes toward Indians are often cited as humanitarian. Vitoria recognized Indians as sovereigns, but at the same time, this recognition led him to see the Indians as subject to a natural order which would permit their slaughter when they did not accept Christian faith after it had been duly explained to them. *See, e.g.*, G.C. Marks, *Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas*, 13 AUST. Y.B. INT'L L. 1, 37–39 (1992) (noting Vitoria allowed for Indian sovereignty grounded in natural law).

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techniques to manage internal cultural conflicts or facilitate self-determination and state building.[35]

The result in both settings was to render cultural differences internal to the sovereign form, outside the arena of international governance, as local matters of politics or culture.[36] Where differences threatened this form, they would be assimilated to it. Once differences between cultures were brought within the sovereign form, international governance could confine itself to bridging particular disputes between the political interests of various sovereigns by the reasoned or consensual or universal expressions of a globally legitimate authority.

In this system, most cultural differences simply do not rise to the level of the international. Differences are manageable when they can remain internal matters, below the waterline of sovereignty. In most cases, international law will not visibly be involved in the process of cultural domestication. Sometimes, however, and especially in exceptional situations which might threaten the placidity of the sovereign fabric itself, international law does become directly involved in the domestication of difference—in doctrines about aboriginal cultural practices, in the criteria for effective statehood, in the various international regimes of trusteeship and tutelage, in systems of minority protection or self-determination, and so on.[37]

Once this traditional structure is firmly in place, a universal and apparently value-free governance system can manage a wide range of differences. If a state (or "subject" of international law) disagrees with an international legal norm, in the classic system, it would simply not be bound by it, or, if it did once consent, would simply be in violation—in the zone of politics rather than law (and in the case of indigenous peoples, among others, available for conquest in just conflict). In contemporary legal process terms, "actors" simply make claims, at once political and legal, which might or might not be reflected back as valid by the decentralized mirror that is world public order.[38] Should a group of states have a differ-

35. For a discussion of the case of *Western Sahara*, see Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WIS. J. INT'L L. 51, 96–103 (1988).

36. The development of law about displaced persons which cleanly splits asylum (a national matter to which one has no international entitlement) from refugee law (an international matter cut off from both causes and solutions) is a good illustration of this process. *See* David Kennedy, *International Refugee Protection*, 8 HUM. RTS. Q. 1 (1986).

37. *See* Anghie, *Heart of My Home*, *supra* note 21, at 457–60 (discussing international trusteeship system); Anghie, *Creating the Nation State*, *supra* note 21.

38. For example, Myres McDougal reinterprets customary law as "a process of

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ent view of some matter, they can either struggle to make that view universal, or prevent the international from legislating in this area. As a result, the international can manage a range of cultural and political disagreements through an ongoing process of mirroring, which transforms substantive commitments and subjective preferences into either normative facts on the international legal plane or residual matters of domestic politics or ideology, cleanly separated from the international.

The traditional system could go further, welcoming some differences of opinion into the web of international rules. In the pre-classical period, this could be done simply by suggesting that some nations might be governed by an alternative international law.[39] Once the classical system extended itself universally, at least in its self-image, this was no longer tenable. Rather, one might carve out a separate geographical terrain of application—for "special" or "regional" customary rules, for example. First Asia, later the Americas (or at least Latin America), and, more recently, Africa, have all been thought to be governed by special regional international law. Because international law reflects the level and geography of consensus, the international need not appear implicated in the political, economic, or cultural causes and consequences of such a differentiation. Indeed, the terms of much contemporary debate are set by this framework, opposing a neoliberal cosmopolitan universalism to an Africa- or Asia-centric relativism. From the internationalist's point of view, so long as Africa- or Asia-centrism is framed as a defense of sovereignty there is no problem. It may be regrettable, backward looking, and so forth, but it is clearly inside the frame. It may not show the most advanced artistic taste, but anyone can insist that their portrait be accurate.

A third difference-managing strategy might be to internalize differences within the international regime either geographically or substantively. Although the internationalist project has firmly re-

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continuous interaction, of continuous demand and response, in which the decision-makers of particular nation-states unilaterally put forward claims of the most diverse and conflicting character," and other states' representatives "weigh and appraise these competing claims . . . and ultimately accept or reject them." Myres S. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 357–58 (1955). In this process, states' representatives display "mutual tolerances—expressed in countless decisions in foreign offices, national courts, and national legislatures—which create expectations that effective power will be restrained and exercised in certain uniformities of pattern" and these tolerances create "expectations of pattern and uniformity in decision, of practice in accord with rule, commonly regarded as law." *Id.* at 358 & n.7.

39. *See, e.g.*, The Antelope case, 23 U.S. (10 Wheat.) 66, 72, 76 (1825).

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jected the idea that there might be more than one international legal order, insisting since the middle of the nineteenth century on universality, even at great cost to the range of substantive legal norms, this insistence has been tempered by efforts to recognize situations of coexistence and cooperation, or of special or regional custom. The traditional distinctions between the law of peace and the law of war, or between the law of coexistence and the law of cooperation, allow an international order to embrace both peace and war as different statuses for recognized subjects. Through such mechanisms, states with strong differences can be regulated by a different set of rules than states whose views are more harmonious without detracting from the unity and agnosticism of the order as a whole. These are all efforts to moderate the sacrifice of substantive depth to procedural breadth without bringing questions of the substantive relationship between coexistence and cooperation or between war and peace into the analysis.[40] Such situational distinctions may also be coded ideologically or geographically, as, for example, in the conventional alignment during the Cold War of "coexistence" for relations between the different social and economic systems in East and West, and "cooperation" for relations between the North/West and the South. The effect was to remove international law during the Cold War from inquiry into the causes and consequences of the bipolar regime, and to promote an alignment of the North/West with the South without taking sides in the Cold War. In the post–Cold War period, this technique has been extended to embrace overtly political differences as well, as in the distinction between the law among liberal and illiberal states or among European states and between Western Europe and the ex-socialist states to the East, which treat cultural and political formations agnostically, as inert international facts to be accommodated in a regime of disaggregated sovereignties, while encouraging a deeper

40. A great deal of the cold-war history of international law in the United States was preoccupied by efforts to determine whether the Soviets should be understood as within the system, in the regime of coexistence, or outside it, hostile to the idea of law itself. In the end, American international law scholars largely isolated themselves from the cold-war liberal mainstream by opting for the universality of their discipline. The main point of the "coexistence/cooperation" distinction was to preserve a universality in the discipline—the law of both coexistence and cooperation has no geography. *See, e.g.*, WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 15 (1964) (stating international diplomacy of coexistence today continues classical reasons for avoiding only logical alternative: pursuit of all-out war, with likelihood of mutual annihilation). The liberal/illiberal distinction, by contrast, has a geography. *See, e.g.*, Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 507–15 (1995).

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and more substantive order within the sphere of "cooperation" or "liberalism."

But sometimes international law is also willing to take a stand—as a general cosmopolitan order, a culture of reasoned governance, of civilization itself—against particular political or cultural formations. In such cases it deploys a fourth difference-managing strategy, the externalization of difference as "beyond the pale" of civilization. Of course this strategy is most evident in doctrines relating to outlaw groups: barbarians, pirates, war criminals, or terrorists.[41] It is also present in the various substantive doctrines which have neither arisen through the consensual apparatus of sources nor been deduced from the nature of sovereignty itself. These doctrines concern situations which "shock the conscience" of mankind as a whole, expressing a normative commitment so fundamental as not to need codification in a treaty or customary rule.[42]

Where such norms play a role, international law is structured in three steps: (1) a general permission (that which is not expressly forbidden the sovereign is permitted) built on a structure of implied norms delimiting the jurisdictions of sovereigns in default of international rules, (2) a narrow range of consensual norms which have become universal but cover only a very few cases or are open to widely divergent interpretations, and (3) a super-norm covering behavior which "shocks the conscience" of "mankind." In these very exceptional moments, the Nuremberg trials offering perhaps the best illustration, the international presents itself as the embodiment of civilization itself, defending the possibility of legal order against cultural or political differences which could not be accommo-

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41. *Cf.* B.R. BURG, SODOMY AND THE PIRATE TRADITION: ENGLISH SEA ROVERS IN THE SEVENTEENTH-CENTURY CARIBBEAN 24 (1995) (stating piracy and highway robbery, among other crimes, most often carried death sentence); ANDREA DWORKIN, *Jews and Homosexuals, in* RIGHT-WING WOMEN (1983).

42. *See generally* LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 2–16 (1988); HENKIN ET AL., *supra* note 15, at 91–92 (discussing jus cogens theory that some aspects of international human rights law may not be derogated in times of war); SCHACHTER, *supra* note 14, at 30–31 (same); Gennady M. Danilenko, *International Jus Cogens*, 2 EUR. J. INT'L L. 42 (1991) (same). In international law cases, *erga omnes* rights and severe international crimes have been discussed, for example, in U.S. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (separate opinion of Judge Ago) (discussing U.N. Charter's prohibition of use of force as characteristic of jus cogens). *See also* U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24) (separate opinion of Judge Lachs) (discussing dispute over Iran's holding of U.S. nationals as hostages, contrary to jus cogens); *Barcelona Traction, supra* note 30, at 3 (discussing violation of international obligation to protect foreign investments).

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dated. There is very little agreement in the discipline about the content of these super-norms, and less experience with their application. Yet they remain central to discussions of numerous fields, as if the internationalist needed to admit that at a certain point (a point too obvious to be partisan, too clear to be objective), the international too would be a culture, would have a politics. Or perhaps the point is simply to reconfirm that elsewhere, between the permission and the prohibition, there would fall not even the shadow of commitment.

C. Work Recovering the Internationalist's Relationship with Culture

If we take the public international law discipline in broad strokes, then, we find a general effort to step back from issues of culture—to cabin them locally or generalize them to a global civilization—coupled with a wide range of efforts to engage, embrace, and assimilate divergent political and cultural ideas. A great deal of work in the "new approaches" school has simply extended more conventional criticisms of public international law as a governance structure, stressing philosophical contradictions internal to the field and practical difficulties of engagement. Some of the most interesting work, however, stresses this secondary or hidden tradition of dealing with matters of culture and difference, foregrounding these efforts, while setting to one side more conventional matters of international jurisprudential speculation. When pursued together with a rethinking of the governance project, a focus on the pull of culture takes us in a variety of new directions.

Some of this work has focused on the claim that public international law itself has a culture, is a culture—both a professional culture, and part of a broader Enlightenment culture of metropolitan and cosmopolitan sensibility. Such work seeks to link the philosophical and practical difficulties encountered by the international law project to other emancipatory governing projects of the European Enlightenment.[43] Much more work might well be done exploring

43. *See* Berman, *supra* note 19, at 1809–11 (discussing enlightenment questioning of social structures); *see also* KOSKENNIEMI, *supra* note 19, at 52–73; MARTTI KOSKENNIEMI, INTERNATIONAL LAW at xi–xxxii (1992). For an updated location of the phenomenology of the international liberal imagination in political science, see Outi Korhonen, *Liberalism and International Law in the Nineties: A Centre Projecting a Periphery*, NORDIC J. INT'L L. 1 (1996); *see also* David Kennedy, *Autumn Weekends: An Essay in Law and Everyday Life*, *in* LAW IN EVERYDAY LIFE 191, 209 (Austin Sarat & Thomas R. Kearns eds., 1993); Kennedy, *supra* note 36, at 2; David Kennedy, *Spring Break*, 63 TEX. L. REV. 1377, 1423 (1985).

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the cultures of international pragmatism, modernism, institutionalism, realism, and so forth, placing the photographer in an intercultural relationship with Aunt Betty and Uncle Chuck, as often a relationship of reciprocal proselytization and seduction as of control. At its best, this work steps outside the critical tradition which claims that international law is somehow the instrument or reflection or product of European culture. Like work which argues that law reflects or enforces the interests of a particular class, this critical tradition in international law continues the aspiration that international law shake off this bias, be purged of the taint of colonialism, live up to its agnostic, acultural promise. The project I have in mind is exploration of the culture of precisely that promise. The more conventional effort to condemn international law as a colonial instrument has led to numerous studies trying (with very little success) to identify and then alter particular rules which served the colonial project. The difficulty is that the colonial project expressed itself through a wide range of contradictory rules, including many favored today by anticolonial interests. The alternative project I have in mind explores international law's role in generating the frame within which cultures colonial and anticolonial could share an aspiration for and belief in an international outside of culture itself.

The same effort to isolate the cultural imagination of governance can also be pursued by focusing attention on the range of practices and identities the international order regards as external, unable to be transformed into a manageable difference within. We are learning a great deal about the internationalist by holding a mirror up to the photographer as the international directs its attention to areas and individuals which fall outside its ken, and can be seen to threaten its universality—terrorists, pirates, and territories which may no longer be *res nullius*, but must be either internationalized or organized into a sovereignty. Ileana Porras describes the role of the figure of the terrorist in the imagination of the international lawyer as a sign of an external which both cannot be defined and must be normatively opposed.[44] Her work sheds light on the whole range of norms in international law which both defy definition and require fealty, such as norms of *jus cogens*, through which the international confirms its culture as civilization precisely without being able to give its commitments controversial content.

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44. *See* Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, *in* AFTER IDENTITY 294, 295–303 (Dan Danielsen & Karen Engle eds., 1994) (discussing concept of terrorist as "other").

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Porras's more recent work on the concept of "nature" as the metaphor for a universal other stabilizing polemics for environmental protection continues this investigation. As a first hypothesis to emerge from this work, we might say that from the perspective of international governance, when differences within cannot be managed, the potential for differences between must be opposed. Uncle Chuck can be in the picture if he'll smile, otherwise he should remain offstage.

Some of the most interesting new work in international law has focused on the traditions through which forces which are understood to be "cultural" and "external" to the project of international governance are arranged for engagement or assimilation. Nathaniel Berman has looked at internationalist images of nationalism from this vantage point and uncovered a variety of different patterns of both imagining, engaging, and, perhaps most interestingly, bringing into being an energetic cultural alternative and partner to global technocratic governance.[45] Karen Engle has analyzed the range of strategies offered to and deployed by women seeking to render international governance more amenable to the concerns of women.[46] Her most interesting finding was to question the common image of a continuum of feminist criticism from assimilative reformism through radical rejection of the entire internationalist enterprise as "male." Engle stresses the difficulty of distinguishing "internal" and "external" feminist postures, as well as the difficulty of predicting their radical potential. Karen Knop's analysis of international feminism pursues a similar theme, tracing the ambivalence among feminist authors about protection by and from the state in public international law.[47]

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45. *See* Berman, *supra* note 19, at 1800–21; Berman, *supra* note 35, at 90–94; Nathaniel Berman, *Legalizing Jerusalem, Or, of Law, Fantasy, and Faith*, 45 CATH. U. L. REV. 823, 823 (1996) (stating international legal responses must necessarily embrace competing fantasies of national, international, and religious adversaries to provide framework of "peace").

46. *See* Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 MICH. J. INT'L L. 517, 531 (1992) (discussing alternative feminist strategies to enforce women's human rights); Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights, in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143, 144 (Dorinda G. Dallmeyer ed., 1993) [hereinafter Engle, *After the Collapse*] (analyzing whether international legal doctrinal tools accommodate women); Karen Engle, *Female Subject of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509, 1510 (1992) (discussing strategies employed by feminists to attack custom of female genital mutilation).

47. Karen Knop, *RE/Statements: Feminism and State Sovereignty in International Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 293 (1993).

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Taken together, this work sees international law as one cultural form among other cultural forms, including those which in one way or another seem to break with the frame. Both nationalism and feminism seem to pull against being either reduced to a matter of domestic law or elevated to an international consensual norm or institution. Both Berman and Engle trace the effort to think of nationalism or feminism oblique to the frame of local and global, beginning with the tension between women's rights and human rights or the philosophical and formal impediments to an implementable right to self-determination, and cataloging efforts by the international regime to fit the force of nationalism and the project of women's rights into the conventional frame. The most interesting aspect of their work, however, is their unwillingness to accept at face value the claim common to international enthusiasts for women's rights and nationalist aspirations that nationalism and feminism are, in fact, alternative cultural forces. Rather, Berman and Engle argue, women and nationalist groups find their way to expression of an identity "exterior" to international governance in important ways through engagement with international law. Their work suggests that we should think of a complex and largely continuous terrain of global and local, internal and external, which might all be termed "cultural," in which an internationalist project encounters a series of other projects.

Seen this way, the notion of "culture" itself comes under pressure as an alternative to governance. Once we imagine a number of intellectuals with projects, some imagining themselves to be inside and some outside the governance project, it is easier to see these positions of marginality and centrality as strategic or accidental matters of choice or assignation. To the extent the term "culture" suggests that the disturbance Chuck creates when he calls Betty from the photogenic scene, or that Betty creates when she imagines a role for herself in neither the kitchen nor the photograph, is somehow more "real" than the photographer's effort to keep Betty in focus and Chuck offstage, perhaps we should recognize "culture" as a polemical term, a claim made for reform, a source of energy for Chuck, for Betty, but also, in the tradition of international governance, for a whole range of newcomers, every bit as strategic as the photographer's agnostic posture is cultural. We know that Uncle Chuck may call for a drink, constituting himself as a husband through assertion of husbandly entitlements, as much from jealousy as thirst. In fact, within the internationalist tradition, there is a long tradition of manifestos for reform made in precisely these terms. For example, the great Latin American jurist Alvarez, later a modernist voice on the International Court of Justice, in 1925 of-

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fered a clarion call for a "new international law," to be developed on the spirit and energy of "the Americas,"[48] on the basis of their unique culture (a confluence of civil and common law), a call that would be repeated throughout the century by the non-aligned, the geographically disadvantaged, the third world, the Islamic world, and so forth.

A number of works in the new approaches school have focused directly on this relativization or disestablishment or demystification of the notion of a cultural exterior or alternative to international governance. In a series of articles, Annelise Riles proposes that we reorient ourselves methodologically away from the cultural study of law or the study of law as a culture or study of the relationship between law and culture, to study of what she terms the "perspectival" shifts which make culture and law seem alternately similar and different from one another.[49] As she sees it, the treatment of one or another group as the carriers of culture or governance is an effect of a perspectival change. Chris Tennant has developed this approach in concrete terms by analyzing the relationship between the images of indigenous people (as "noble" or "ignoble") common in the culture of international institutions at particular moments and the policies of engagement, participation, development, assimilation, preservation, and so on, that were developed to govern relations with them.[50] His work correlates these images of the indigenous outsider to visions of modernism itself—the noble primitive contrasts with a tragic modernism, the ignoble primitive with a progressive modernism. These associations, in turn, suggest strategies of engagement; assimilation for the ignoble, preservation for the noble. These relations would have us see changing images of the culturally autonomous as strategies of governance, and strategies of governance as changing optics on indigenous culture. The shift from the series ignoble primitive/progressive modern/assimilation to noble primitive/tragic modern/preservation reframes the sense for culture and governance in a single shift of perspective. Lama Abu-Odeh's work on the complex subject position

48. *See* Alvarez, *supra* note 14, at 38–39 (suggesting successful revision of fundamental social and political science principles, in order to develop new "international law," must necessarily take into consideration doctrines, practices, and problems of "the Americas").

49. *See* Riles, *supra* note 6, at 46 (discussing perspectival shift in international law which views local conflicts on global scale); Annelise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity*, 1994 UNIV. ILL. L. REV. 597, 598; *see also* Note, *supra* note 6, at 723 (arguing shifting focus of anthropological perspective is inevitable when studying other cultures).

50. *See* Tennant, *supra* note 20, at 12.

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of the postcolonial feminist-engaging debate about a concrete issue of international governance—rules about veil wearing—makes a similar point in the opposite direction, taking the relationship between international governance and local culture into differences among groups within a peripheral culture, even into differences within the subject construction of a particular individual there.[51]

The project of relating reevaluation of the governance project itself to the identities and strategies pursued in relating to it from an ostensible "outside" has also been developed in a number of suggestive historical pieces. Antony Anghie's sustained inquiry into the ways in which public international law doctrines have been inflected by images of the colonial encounter has been extended in two different directions.[52] Nathaniel Berman has brought the inquiry home, looking at the mechanisms by which European identity was itself invented through projects of international governance,[53] while a group of scholars from a variety of locations, led by James Gathii[54] and Bhupinder Chimni,[55] are mapping the reproductions of the difficulties which plagued the international governance project in the strategies and identities of third-world scholars who have sought in various ways to engage the universal and pragmatic claims of the international from what they thought of, or were able to construct, as the outside. This work, taken as a whole, begins to map the encounter between governance and cultural difference in ways which frame both governance as a project of culture and the establishment of cultural difference as a project of governance. It suggests a parallel project in comparative law, reading that discipline's sense for the disengagement of cultural understanding from government in strategic terms.

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51. *See* Lama Abu-Odeh, *Post-Colonial Feminism and the Veil: Considering the Differences*, 26 NEW ENG. L. REV. 1527, 1530 (1992).

52. *See* Anghie, *Heart of My Home*, *supra* note 21, at 457–60; Anghie, *Creating the Nation State*, *supra* note 21.

53. *See* Nathaniel Berman, *Beyond Colonialism and Nationalism? Ethiopia, Czechoslovakia, and "Peaceful Change"*, 65 NORDIC J. INT'L L. 421 (1996); David Kennedy, *Turning to Market Democracy: A Tale of Two Architectures*, 32 HARV. INT'L L.J. 373, 383–85 (1991).

54. *See* James Thuo Gathii, An Outsider's View of Western Notions of Third World Development 16–17 (1995) (unpublished manuscript) (on file with Harvard Law Library) (arguing international law tends to marginalize developing countries and shapes developing countries to be like developed countries).

55. *See* B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES (1993).

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IV. COMPARATIVE LAW AND GOVERNANCE

The scholarly work of reading comparative law's engagement with governance alongside its overt concern with intercultural understanding has hardly begun. Comparative law is a diverse tradition, riven by methodological disagreements and differences of emphasis and style.[56] Largely the project of an occidental legal intelligentsia, comparative law has a different place in various legal traditions. In the United States, for example, the major comparativist traditions of area studies and more universal historicist or functional work are both rather distanced from the organs of government or legislation, having been only marginally involved even in the various projects of codification and restatement. They are each closer to the domain of private practice, facilitating the doing of business in remote territory and the resolution of disputes or the development of common contracting practices among lawyers in industrialized economies. In some places, such as the European Union, the project of "harmonization" brings comparative law and legislation closer together. In some traditions, often on the near periphery, where public law in general has been discredited, the comparativist will often carry the liberal cosmopolitan esprit more associated in North America with the public international law tradition. It is not unusual, moreover, especially at the periphery or outside the occident, to find comparativism which presents as a tool of government or modernization, a conveyor belt for learning from the West. We will need to see more close readings of individual comparativist projects, historical research into the unfolding of the comparative project in legal science in various traditions to investigate the practice of comparative law as an intellectual and technical project of rulership. My own taxonomic first step in that direction draws most firmly on the North American comparative law tradition with which I am most familiar.

A. Comparativism and the Tradition of Private International Law

We should probably begin by noting comparative law's traditional links and stylistic affinities with the broad tradition of private international law.[57] Although it is a routine badge of sophisti-

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56. *See, e.g.*, Cole W. Durham, Jr., *Foreword: Comparative Law in the Late Twentieth Century*, 1987 BYU L. REV. 325; Stephen C. Hicks, *The Jurisprudence of Comparative Legal Systems*, 6 LOY. L.A. INT'L & COMP. L.J. 83 (1983); Vratislav Pechota, *Developments in Foreign and Comparative Law*, 27 COLUM. J. TRANSNAT'L L. 507 (1989).

57. I do not use the term "private international law" in the narrow sense in

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cation these days to insist on the interpenetration of public and private law, internationally as elsewhere, such assertions are liable to obscure more than illuminate. The intellectual attitudes and background assumptions of the two traditions, particularly their attitudes to their own participation in governance, continue to differ dramatically, regardless of how extensively they may have become doctrinally intertwined, particularly in North America, as the teaching of public and private international law gave way to transnational law, international business transactions, international economic law, the international legal process, and so forth.[58]

At the same time, however, the differences between public and private international law are less significantly matters of doctrine than of sensibility, attitude, focus. Those working in the tradition of private international law see themselves in a different relationship to government, both national and international, than do public international lawyers. This is true whether the public lawyer has embraced transnationalism and a differentiated subsovereign legal process involving individuals, corporations, nongovernmental organizations in the current North American style, or remains, with the combination of formalism and fusion with a national political agenda characteristic of public international lawyers in many other national traditions. Private international lawyers tend to see themselves in relationship to the projects of private parties in a sphere outside government, regulated only exceptionally. For those working in the tradition of private international law, the most salient law seems less a "regime" than a helter-skelter affair, the product of numerous professional jurists or legal scientists in many countries struggling to work out the requirements of a rational, objective legal science and the requirements for reliable market transactions. In developing or promoting this scheme, of course, the private international lawyer may be interested in the work of legis-

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which it was once understood as equivalent to "conflict of laws." I mean private international law in the broadest sense, encompassing all fields of transnational and international scholarship that locate themselves in a private law tradition.

58. *See, e.g.*, Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 75–79 (1991) [hereinafter Paul, *Comity*] (discussing comity and attempt to unify private international law); Joel R. Paul, *Free Trade, Regulatory Competition and the Autonomous Market Fallacy*, 1 COLUM. J. EUR. L. 29, 30 (1994/95) [hereinafter Paul, *Free Trade*] (stating legal realism repudiated separation of public/state and private/market more than 50 years ago); Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. J. INT'L L. 149, 164–77 (1988) [hereinafter Paul, *Isolation*] (arguing economic and social forces contribute to erosion of border between public and private law); Emmanuel G. Bellow, *How Advantageous is the Use of Comparative Law in Public International Law*, 11 W. INDIAN L.J. 1 (1987).

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latures, may address himself to an enlightened legislator in expert opinions, may even draft legislation, and may well pursue a tactical relationship to the machinery of government. Nevertheless, for the international private lawyer, the content of particular legal rules is more the consequence of numerous and often random private initiatives and expert clarifications, even when legislated, than it is animated by political choice or governmental objective.[59]

Comparativists share much of this private law sensibility. Many of the leading comparativists have focused on private law and the most central stories of comparative law—the difference between civil and common law, the reception of Roman law—are largely private law stories.[60] Comparativists more often attribute the adoption of particular rules to accidental borrowings or autonomous expertise[61] or to the extension of broad legal cultural families[62] than to political choice or struggle.[63] Like private international

59. *See, e.g.*, Peter H. Pfund, *United States Participation in International Unification of Private Law*, 19 INT'L LAW. 505 (1985); UNIDROIT, DIGEST OF LEGAL ACTIVITIES OF INTERNATIONAL ORGANIZATIONS AND OTHER INSTITUTIONS (9th ed. 1990); UNILATERAL YEARBOOKS.

60. The leading American and European comparative law textbooks and treatises, for instance, situate themselves solidly in the private law tradition, either expressly identifying comparative law with the study of private law or devoting the vast bulk of their materials to the history, taxonomy, description, and analysis of the familiar private law categories of contracts, delictual obligations, status, and property. *See, e.g.*, GLENDON ET AL., *supra* note 8; VON MEHREN & GORDLEY, *supra* note 17; ZWEIGERT & KÖTZ, *supra* note 8; RENÉ DAVID & CAMILLE JAUFFRET-SPINOSI, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS (10th ed. 1992). Moreover, comparative law traces its modern origins to Édouard Lambert and Raymond Saleilles, who organized the first International Congress of Comparative Law in Paris, in 1900, to pursue the express project of establishing a world private law of humanity.

Like the comparativists' distanced relation to governance and world public order, their relation to private law traditions is of course, more nuanced than this quick sketch might suggest. The Glendon textbook, for example, exhibits a tension between public and private ordering. Although the Introduction indicates an interest in public order projects, the body of the book concentrates on private-law legal cultures. *See* GLENDON ET AL., *supra* note 8, at 17–41, 44. Indeed, the comparativist will often allow him or herself to flirt briefly with order in framing his project, the questions of public focus shifting to the cultural and the private when it comes to the serious work of comparative law.

61. *See, e.g.*, Sacco, *Legal Formants (Part II)*, *supra* note 9, at 394–98 (describing change in legal formants as primarily matter of borrowing and imitation by legislators, scholars, and judges); ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1993) (characterizing Western legal development as primarily product of ad hoc borrowing and adaptation); von Mehren, *supra* note 17, at 44–45 (characterizing development of civil law as product of generations of scholars, and common law as product of strong and cohesive legal profession).

62. *See, e.g.*, GLENDON ET AL., *supra* note 8; DAVID & JAUFFRET-SPINOSI, *supra* note 60.

63. Even the few comparativists who describe the development of national legal

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lawyers, the comparativist is more likely to focus on nongovernmental ordering,[64] or on the judiciary,[65] than on the parliament or administration. This is true despite the fact that comparativism had an important early connection to the project of informed regulation, comparing regulatory initiatives of nascent welfare states in the late nineteenth century.[66] Even where the focus is on the development of a legal system or order, as in comparative work in the field of international economic law, the point of departure will generally be the activities of private traders rather than sovereigns. Sovereigns are more likely to be treated as decentralized bargainers on a par with other entities than as the source and subject of law. In

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systems in terms of conscious political choices focus more on the political commitments of autonomous legal scholars and individual judges than on deliberate government policy, locating the crucial moments of political choice in the submission of practicing lawyers to courts, in innumerable acts of individual judicial judgment, in pronouncements of scholarly commentators, and in ad hoc ransacking of foreign statute books by legislators. *See, e.g.*, H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261 (1987) (characterizing reception of foreign law either as political "alliance" to external forms and sources of law or as "construction" of national law through selective borrowing of foreign materials).

64. In an article that is particularly interesting to a public international lawyer exploring comparativists' engagement with international governance, von Mehren argues that "the role of comparative law in international law is fundamental and vital." Arthur T. von Mehren, *The Role of Comparative Law in the Practice of International Law, in* FESTSCHRIFT FÜR KARL H. NEUMAYER 479, 486 (Werner Barfuß et al. eds., 1985). Yet his understanding of "international law" is not that of the public internationalist. For less focus is squarely on nongovernmental ordering. He defines international law as "the institutions, principles, and techniques that facilitate and regulate economic, political, and social intercourse not confined to a single legal order," *id.* at 479, and focuses our attention on the private transaction and the multiplicity of legal orders, whereas the public internationalist tends to aim for a single legal order created not so much by transactions as by an awkward combination of sovereign consent and community norms. On the technical side, this approach has been developed in the field of international commercial arbitration, implementing only the will of the parties without public policy. *See, e.g.*, Eric Robine, *What Companies Expect of International Commercial Arbitration*, 9 J. INT'L ARB. 31 (1992); M. Sornarajah, *The Climate of International Arbitration*, 8 J. INT'L ARB. 47 (1991).

65. A great deal of comparative work focuses on the judiciary. *See, e.g.*, JOHN P. DAWSON, THE ORACLES OF THE LAW (1968) (providing comparative history of judge-made case law); FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS (Rudolph B. Schlesinger ed., 1968) (analyzing contract formation in terms of judicial responses in various societies to particular sets of facts); Alan Watson, *A House of Lords' Judgment, and Other Tales of the Absurd*, 33 AM. J. COMP. L. 673 (1985) (exploring legal "culture" through examination of judicial reasoning in different countries).

66. *See, e.g.*, Roland Drago, *La Société de législation comparée, in* 1 LIVRE DU CENTENAIRE DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE (UN SIÈCLE DE DROIT COMPAREÉ EN FRANCE) 25 (1969) (discussing the august *Société de législation comparée*, which was established in Paris in 1869 and became the model for similar organizations throughout Europe and world).

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articulating model rules, the comparativist may be painfully aware that he lives in a world divided by governments in ways which hamper private traders from themselves adopting wise and uniform rules. In this picture, the private trader, figured as a benign character, a communicator, a bridge builder, a wealth maximizer, needs law to reduce his risks and resolve technical problems of communication, perhaps by standardizing contract terms to minimize misunderstandings and other transaction costs. Where all this activity calls for a regulatory capacity, the scholar in the private law tradition will tend to think of global or universal rules as exceptional rather than routine, as reinforcing the private legal order rather than displacing it, and as a matter for the spirit of free trade rather than the structure of public order.[67] Governments and public lawyers are all too likely to allow petty nationalist feelings or transient political, even ideological, calculations to impede movement toward a liberal and facilitative law which might be common to all humanity.

The tone of comparativist work emanating from the private international law tradition differs from the gung-ho, come-one, come-all polemics of public law internationalism. Public international lawyers, in their eagerness to recruit new participants, routinely sound as if anyone can (and should) play, as if the process of governance were open, willing, obedient, and available. Governance is simple, and indeed, anyone can rule—you can simply leave your culture, with its complexities, at home. The private law comparativist, by contrast, will usually pursue his work in a more self consciously careful and rigorous tone—only after the most careful study, he might suggest, on the basis of the most demanding methodology, with great care, attention to detail, knowledge of languages, breadth, and depth, can even the most minimal statements about the relations among different legal cultures be made.[68] The comparativist feels unable to leave the complexities of culture at home—for this work, he must rather try to leave his subjectivity and will to power in his pocket. This takes work, a work on the self, as well as study of the other. The resulting project of understanding

67. For an excellent initiation to this way of thinking, see JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (3d ed. 1995), especially pages 44–81 on international sales transactions. I discuss Jackson's international economic law in David Kennedy, *The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 671 (1995).

68. Both those dealing with exotic legal cultures and those studying the rule system next door have shared the loneliness of expertise. *See, e.g.*, William P. Alford, *On the Limits of 'Grand Theory' in Comparative Law*, 61 WASH. L. REV. 945 (1986).

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is a solitary work, a vocation. Where comparativism shows a technocratic bent, in developing universal private law rules or facilitating wise resolution of potential conflicts, the job presents itself as one for experts, trusted for their erudition and neutrality, only able to be undertaken with the most careful study and a detached scientific rigor achievable by the true scholar.[69] On visiting the legal office of a typical United Nations specialized agency and then UNIDROIT or

69. Of course there are as many modes and degrees of self-effacement as there are comparativists. If all share a tone of neutrality and detachment, methodological modesty is more characteristic of those attending to more exotic cultures. Zweigert and Kötz hold a middle position. On the one hand, comparativists must "cut themselves loose from their own doctrinal and juridical preconceptions and liberate themselves from their own cultural context in order to discover 'neutral' concepts with which to describe" legal problems. ZWEIGERT & KÖTZ, *supra* note 8, at 11. They must free themselves of all the preconceptions of their own national system and focus on concrete functional problems. *See id.* at 31–32. At the same time Zweigert and Kötz claim that preoccupation with method is the sign of a "sick science," *id.* at 29, and that comparative law's pragmatic, functionalist method is the "cure" for the sickness of general legal science, *id.* at 30. For example: "[C]omparatists all over the world are perfectly unembarrassed about their methodology, and see themselves as being still at the experimental stage," because the use of comparative research in law reform initiatives has been so successful that it has "given rise to no methodological worries" and because "comparative law as a critical method of legal *science*" is so recent that it "could not be expected to have an established set of methodological principles." *Id.* at 29. As a result, for Zweigert and Kötz, method is a matter of trial and error, and there will always remain "an area where only sound judgment, common sense, or even intuition can be of any help. For when it comes to evaluation, to determining which of the various solutions is the best, the only ultimate criterion is often the practical evidence and the immediate sense of appropriateness." *Id.* Moreover, when practicing "applied" comparative law, the comparativist may relax the requirements of scientific rigor:

> [H]e may have to come up with detailed proposals in a very short time. In such circumstances he has to operate with assumptions which, plausible as they may be, would rightly be derided by the sociologist of law as simple working hypotheses. . . . [H]e often cannot avoid adopting, however, tentatively and provisionally, theses which the sociologist of law would regard as unproven, but which are nevertheless cogent enough to carry weight in discussions or decisions about changing the law.

Id. at 12. Zweigert and Kötz's confidence about the comparativist's ability to understand foreign legal cultures on his own, with only the functionalist method and his own diligence and brains, is captured beautifully in this sentence: "It is only when one has roamed through the entire foreign legal system without avail, *asking a local lawyer as a last resort*, that one can safely conclude that it really does not have a solution to the problem." *Id.* at 31 (emphasis added). The comparativist must take into account everything that molds or affects "the living law" in foreign legal systems, including statutory, customary, and case law, legal writing, business practices, politics, history, geography, climate, and race, and he will inevitably make errors; yet he shouldn't worry too much about "natives lying in wait with spears," but should forge ahead mindful of the advice to "Watch out, be brave, and keep alert." *Id.* at 32–33.

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the International Chamber of Commerce in quick succession, one cannot help but be struck by the fact that in the United Nations, staff lawyers have nationalities which are often politically coded, at least in the broadest terms, while at UNIDROIT or the ICC, the lawyers one meets are introduced rather by linguistic expertise and disciplinary specialty.

Of course there are comparativists who work almost exclusively in the domain of public law, and there is a tradition of comparative constitutional law which draws its inspiration directly from the domain of public international law. This tradition is most marked among those who compare federal regimes, particularly the European Union, with both other federal systems and the machinery of public international order.[70] To an extent, these public law comparativists share the interest in governance of their internationalist colleagues—indeed, many are also public international law scholars. But even here, the sensibility of comparativism so familiar from the private law tradition can be dimly made out—there is a project of federal order, about which the scholar may well be an enthusiast, much as the internationalist will have his enthusiasms for particular schemes of world public order. But there is also a distance from the federal project which enters the work precisely through agnosticism about differences in the federal schemes characteristic of different cultures. We are not ascertaining general principles of federalism here. The objective of this comparative work is less to identify the best federalist machinery for universalization than to trace similarities and differences and ask questions of one system which have proven insightful in another. Where the public law comparativist lends a hand in constitution building, it is generally in the mode of generic expertise rather than enthusiastic proselytization. This stylistic difference is even more pronounced in the work of comparativists who come to local public law as one dimension in their understanding of a foreign culture, rather than coming to a particular foreign culture (say, Europe), as one aspect of their study of international or federal governance structures.[71]

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70. *See, e.g.*, Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991); JOSEPH H.H. WEILER, THE FUTURE OF THE EUROPEAN COMMUNITIES IN THE LIGHT OF THE AMERICAN FEDERAL EXPERIENCE (1986); Eric Stein et al., *The Law of the European Communities and the U.S./E.E.C. Relations*, 78 AM. SOC'Y INT'L L. PROC. 262 (1984); Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).

71. See, for example, the chapters on French public law in von Mehren's classic textbook on the civil law system, VON MEHREN & GORDLEY, *supra* note 17, chs. 4–7. *See also* Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279 (1994).

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One consequence of this stylistic difference is that in the American legal academy, the common collegial alliance between internationalists and comparativists remains thin, an alliance of convenience against the parochialism of colleagues or a sharing of boondoggles. From the comparativist perspective, the public internationalist seems philistine, crassly preoccupied with enlisting participation in new-fangled governance structures built on the flimsiest base of cross-cultural understanding. To the internationalist, the comparativist can seem quaint, elitist, irrelevant. At the same time, however, their rather different methodological self-denials, the comparativist of easy solutions or political ambition, the internationalist of cultural commitment, can lead to a similar tone of cautious anxiety, a combination of modesty and self-confidence, of methodological obsession and reticence to talk about oneself, the conviction that one is both marginal and part of a larger and ultimately more significant community, characteristic of the pragmatic cosmopolitan in both fields.

Although comparativists differ methodologically, some more immersed in foreign cultures, others rather more removed, even aloof, they share with the private law tradition a distance from governance. In a way, it is this distance which holds the field together in the face of otherwise quite different methodological commitments. We can see this in the two quite different intellectual tributaries to the tradition of comparativism in the United States: the nineteenth-century philosophical interest in a unified legal science which imported German conceptual methods in a grand theoretical project of systematization, and the early twentieth-century American realist tradition of conflicts jurisprudence, with its emphasis on the pragmatic judicial solution to the technical problems created by overlapping jurisdictions.[72] In the 1950s, these two quite different strands, the one conceptual and universalist, the other pragmatic and case specific, were blended together in the name of functionalism to produce what would become a dominant strand in American comparativism.[73] This tradition sought to em-

72. In this sense, David Cavers and Langdell make odd bedfellows. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960 (1992); Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197 (1991).

73. Among the principal American architects of functionalism were Arthur von Mehren and Donald Trautman at Harvard, who advocated a functional methodology that would explore the "interplay and tension between intellectual structures—legal rules, principles and doctrines—and social, economic, and political needs and realities," asking how different intellectual structures address functionally similar problems, whether and how intellectual structures might produce functionally defective solutions, and how a legal system should adapt when its results are in "severe ten-

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brace the cultures and political interests of particular localities while struggling for a universal philosophical understanding of legal problems and solutions. The combination seemed possible precisely because it eschewed aspirations to govern in favor of understanding

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sion with perceived functional requirements." von Mehren, *supra* note 17, at 47; *see also* ARTHUR T. VON MEHREN, THE CIVIL LAW SYSTEM: CASES AND MATERIALS 565–617 (1957) (analyzing contract law as the product of interaction of (1) notions of the social purpose of legal institutions, which—along with roughly similar experiences and economic structures in the 20th century "suggest that [American, French and German] legal systems will require the institution of contract to serve roughly similar functions and will approach this field of the law with roughly comparable conceptions of policy and social purpose" and (2) history, which produced in Western Europe "the basis for a general law of contractual obligations largely freed from historical anachronisms and capable of being developed in functional terms"). Arthur T. von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009 (1959) (analyzing contract formation problems in terms of social functions—"channeling," "cautionary," "evidentiary," and "deterrent"—performed by formalities such as consideration); ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS (1965) (propounding their influential functional approach to conflict of laws); Arthur T. von Mehren, *An Academic Tradition for Comparative Law?*, 19 AM. J. COMP. L. 624 (1971) (tracing intellectual history of the discipline); VON MEHREN & GORDLEY, *supra* note 17, at 783–970 (analyzing contract law in terms of social functions of and problems posed by autonomous private ordering of production and distribution of resources; observing that civil and common law systems tend to converge on similar solutions to similar functional problems—explaining, for instance, unenforceability of gifts, immoral transactions, and intrafamily agreements on basis that they do not function primarily to coordinate use of economic resources; explaining diversity of legal solutions in terms of common policies based on functional needs and evaluating which pattern of rules most effectively carries out policy; and analyzing legal formalities in terms of their channeling, cautionary, evidentiary, and deterrent functions); Arthur T. von Mehren, *Functional Analysis in Choice of Law: An Evaluation*, 4 DERECHO COMPARADO 199 (1980) (revisiting functionalist choice of law analysis); Donald T. Trautman et al., *Reflections on Conflict-of-Laws Methodology: A Dialogue*, 32 HASTINGS L.J. 1609 (1981) (same).

While American functionalism can be read as the intellectual offspring of an earlier tradition of American legal realism and an even earlier memory of nineteenth-century German-inspired legal science, it also (and sometimes primarily) traces its intellectual origins to the interwar German comparative law academy, in particular the work of Ernst Rabel (who emigrated to the U.S. in 1939), and to Otto Kahn-Freund at Oxford University, *see, e.g.*, Otto Kahn-Freund, *Comparative Law as an Academic Subject*, 82 LAW Q. REV. 40 (1966); Otto Kahn-Freund, *On The Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974), and Rudolph Schlesinger at Cornell, *see, e.g.*, Rudolph B. Schlesinger, *The Common Core of Legal Systems, an Emerging Subject of Comparative Study*, *in* TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 65 (1961); FORMATION OF CONTRACTS, *supra* note 65. On Rabel's turn to functionalist method and its lasting influence on the discipline, see, for example, GLENDON ET AL., *supra* note 8, at 11, and ZWEIGERT & KÖTZ, *supra* note 8, at 60–62 (documenting how European comparativists, led by Rabel, set aside "basic questions of principle" and moved on to concrete research into legal solutions to similar functional problems).

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and the development of expertise. The realist embrace of sociological function could only serve the project of conceptual clarification if it avoided the temptation to become instrumental.[74]

Later generations, who rebelled against this synthesis in various ways, did not dislodge this distanced relationship to governance. At one extreme, those who continue the universalist project, whether in the technical elaboration of universal private law doctrines and dispute resolution mechanisms or in the philosophical search for value and principle, defend their universal aspirations by foregoing any aspiration to govern, by remaining in the field of private ordering or academic understanding.[75] By contrast, those who felt comparative law could not be pursued as a general project but only in relation to specific cultures, who felt the "functionalist" synthesis too dependent upon the diad of civil and common law to the exclusion of other more exotic legal cultures, who criticized mainstream comparative law for Europhilia and advocated a broader universalism supported by detailed study of non-European legal traditions, and who therefore branched off towards area study, nevertheless remained committed to a project of comprehension rather than governance. Indeed, the critique of comparativist Europhilia could only be redeemed in study of the exotic if the scholar were even more careful to avoid any suggestion of imperial ambitions. Bringing Chuck into the discussion requires of the family therapist a more careful and balanced ego suppression than if the therapy were for Betty alone. As a result, even when studying problems of obvious political relevance (different cultural attitudes towards property or human rights), the tendency remains to retreat behind a modest methodological discourse on the difficulty of true understanding, coupled with a soft plea that those interested in governance adopt an attitude of pluralism, objectivity, and open-mindedness.[76] There

74. *See* von Mehren, *supra* note 17, at 44–47 (stating comparative law should focus primarily on understanding and insight); Donald T. Trautman, *Remarks (International Unification of Private Law: The Multilateral Approach)*, AM. SOC'Y INT'L L. PROC. 237, 238–40 (1986) (requesting comparativists turn more to making treaties than practical issues).

75. Mary Ann Glendon is a leading figure in the critique of functionalism in the name of a philosophical search for universal value and principle. *See, e.g.*, MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 5–9 (1987) (arguing law is best understood not as functional response to universal social problems, but as rhetorical practice that both constitutes society and its norms, and interprets social materials, reconstructing social data as legal facts and concepts); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) [hereinafter GLENDON, RIGHTS TALK]; Mary Ann Glendon, *Virtues, Families, and Citizenship, in* THE MEANING OF FAMILY IN A FREE SOCIETY 55 (W. Lawson Taitte ed., 1991); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519 (1992).

76. *See, e.g.*, Alford, *supra* note 68, at 949; Frank E. Vogel, *The Role of the*

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really are more ways to skin a cat, and perhaps all the cats don't have to be skinned.

For the legal intellectual abroad participating in this comparativist tradition, all this ego suppression and careful listening offers two roles: the native informant and the assimilated coworker. Generations of foreign lawyers trained by comparativists in the United States, for example, have been valued here for their information, their perspective, rather than their ideas, and have been encouraged to spend their time studying their own legal systems, working out similarities and differences with ours, rather than taking on topics at the core of our own methodological or political concerns. In such a scheme, only the very exceptional native informant can aspire to become himself a comparativist, and then, for all the lip service paid to learning from one another, the job is clear—go home an agent of cosmopolitan sensibilities in the periphery, an expert in listening to your own legal culture and translating its peculiarities to a universal audience while importing to your own society the sophisticated results of cosmopolitan harmonization.[77]

Shari'a in the Modern Legal Systems of the Middle East, in 37 PRIVATE INVESTMENTS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 14-1 (Carol J. Holgren et al. eds., 1994) (surveying manner in which American business encounters Islamic law of Arab world). Functionalism has been criticized from numerous other directions as well. Some comparativists reject functionalism on pragmatic or historical grounds, arguing that historically specific variations among societies make it impossible to compare legal problems across cultures, and that the focus of comparative analysis should rather be on historical relationships between legal systems. *See, e.g.*, WATSON, *supra* note 61. Others start from a critique of legal realism, rejecting as hopelessly naive its assumption of society as an organic entity with identifiable "needs" and "functions," and arguing that comparative law should focus not on chimerical universal social functions but on legal discourse itself, the languages, ideas, doctrines, and theories in terms of which lawyers and judges argue and explain, which pose unacknowledged difficulties of translation. *See, e.g.*, Fletcher, *Universal and Particular, supra* note 18, at 350 (arguing functional resemblances belie deep "disagreements of instinct and inclination in reasoning about legal problems"). Yet others reject functionalism's claims to objectivity and neutrality by pointing out that the intellectual process by which the "functions" of legal institutions are identified, and legal institutions are compared and evaluated, is inescapably subjective, personal, and contestable. *See, e.g.*, Hill, *supra* note 8, at 101–06. What all these critics share is a denial of the basic claim that the functionalist method enables the comparativist to be "a translator whose knowledge makes possible communication between persons speaking different languages." von Mehren, *supra* note 17, at 47. What is interesting for our purposes is that this denial seems to drive all these critics not toward governance but in the direction of a chastened search for true understanding.

77. Some comparativists have criticized this division of intellectual labor. *See, e.g.*, Mattei, *supra* note 10, at 7 (condemning the American comparative law academy's "nothing to learn attitude"). Others, however, go even farther in the opposite direction, declining to rely on the "foreign lawyer" even as a native informant, either because he or she cannot be trusted to distinguish between formal and (often

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Considered in the broadest terms, a starting point for exploration of comparativism's links to governance might well be the governance projects and aspirations of the international private law tradition. Comparativists of many stripes, from those most closely associated with the study of European private law (and the comparison of common and civil law) to those pursuing more exotic area study (perhaps informed by anthropology or modernization theory), from comparative legal historians to the technical and pragmatic proponents of legal harmonization or the export of legal institutions to emerging markets, from comparative federalists to the many comparative projects within international economic law, share with international private law an aspirational distance from governance and a preference for seeing cultural differences through the optic of facilitative understanding rather than that of management. This shared sensibility differentiates them from public law internationalism.

B. Comparativisms Technical and Cultural

I have said that comparative law, taken as a whole, relates to what I have been calling governance primarily through distance, denial, and avoidance, a characteristic it largely shares with private international law. The rethinking of comparative law I am proposing would begin by uncovering connections to governance which may underlie this outer pattern of denial. Precisely because these

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hidden) operative rules in the legal system, *see, e.g.*, Sacco, *Legal Formants (Part I)*, *supra* note 9, at 30 ("[I]n order to have complete knowledge of a country's law, we cannot trust what the jurists of that country say, for there may be wide gaps between operative rules and the rules that are commonly stated."), or because the metropolitan comparativist is perfectly capable of investigating and understanding the foreign legal system unassisted, thank you very much, *see, e.g.*, ZWEIGERT & KÖTZ, *supra* note 8, at 31 ("It is only when one has roamed through the entire foreign legal system without avail, asking a local lawyer as a last resort, that one can safely conclude that it really does not have a solution to the problem."). This positioning of the Western intellectual as the source of theoretical models and energy, and the Third World scholar as the source of evidence and raw material for theoretical analysis, is, of course, familiar from other encounters, whether in public international law, international feminism, postcolonial studies, or elsewhere. *See, e.g.*, Joseph Oloka-Onyango & Sylvia Tamale, *"The Personal is Political," or Why Women's Rights Are Indeed Human Rights: An African Perspective on International Feminism*, 17 HUM. RTS. Q. 691 (1995) (providing polemic against Western feminism and human rights discourse, which reserves to Western intellectuals job of theory building and restricts Third World woman to providing evidence or confirming Western images of the "other"); David Slater, *Contesting Occidental Visions of the Global: The Geopolitics of Theory and North-South Relations*, 4 BEYOND LAW: MAS ALLA DEL DERECHO 97, 113–15 (1994) (complaining of similar division of intellectual labor in postcolonial studies generally).

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connections are not on the surface, it would be surprising if comparative law had organized its own internal subdisciplines and methodological disputes neatly around differing types of participation in governance, just as it would be surprising if the most salient political divisions in the field corresponded neatly to different underlying strategies of engagement with governance. It is altogether more likely that broad disciplinary subgroups, with distinctive methods or politics or geographic emphasis would develop somewhat different strategies of avoidance and distance from governance.

As a result, going beyond generalizations about comparativism's affinities with the private law tradition requires more than a reading of comparativism's own internal divisions and political commitments. In this section, I propose a rough typology of disciplinary subdivisions within comparative law to suggest, in broad terms, their differing strategies of disengagement from governance. In the next section, I consider conventional approaches to the "politics" of comparative law which, like methodological distinctions within the discipline, map only very dimly onto patterns of participation in governance. In the last section, I suggest the broad governance projects in which comparativists of various political leanings and methodological or subdisciplinary commitments participate.

Like many mature academic disciplines, comparative law has developed a range of internal analytic styles and methodological debates. Indeed, to an outsider like myself, it is quickly apparent that many of the methodological debates familiar from elsewhere in the legal academy have found a home as well in comparative law. Like other fields, this group of scholars has a history together which has resulted in elaborate internal hierarchies, structures of influence and controversy. Without rehearsing these complex internal disciplinary mechanics, it seems to me that comparative law work, at least in the North American tradition, can be rather easily divided into three broad geographic categories and two broad methodological styles.

Geographically, we find work predominantly concerned with the Western tradition and differences within it (say between civil and common or capitalist and socialist law), work focused on non-Western cultures (typically studied in their specificity rather than in explicit relation to the civil/common or capitalist/socialist traditions of Western law) and work which styles itself universal or global in its reach. Comparativists tend to root themselves geographically, with the result that these three geographic focal points have developed into disciplinary subfields which also differ in method and style. I suspect that we could learn a lot about a comparativist's relationship to governance by exploring further the geographical

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images in their work: What do they mean by "Africa"? Does their map have a chronology, a progress narrative of new and old, a direction? Are differences within Europe understood differently from those between Europe and non-Europe?[78] For the moment, we can say that comparative work focused on the Western tradition distances itself from issues of governance somewhat differently than work concerned primarily with understanding non-Western cultures, or work that positions itself geographically in more universal terms. The issues of governance from which it is most concerned to keep distant are also somewhat different.

At the same time, for all the discipline's internal divisions among historicists, idealists, functionalists, and so forth, at the broadest level of intellectual style we can differentiate two types, which I think of as "technocrats" and "culture vultures." The technocrat is more overtly concerned with ongoing projects of harmonization or modernization which require comparativist expertise. The culture vulture is more likely to stress history and cultural specificity, and to think of him or herself less as an expert than as an intellectual. The division, or, if you prefer, continuum, that I have in mind is not that between theory and practice, nor that between those within and outside government bureaucracies. Both technocrats and culture vultures may be interested in theory or practice, although the theoretical and practical preoccupations of the technocrat (perhaps economics, public choice, or sociology) may be quite different from those of the culture vulture (perhaps history, anthropology, or social theory). Both may work for the state, although the culture vulture is more likely to be found in a university, the technocrat a staffer, perhaps for a legislature, whether national or international. The difference is one of style or sensibility, of working method and vocabulary. A crude division, to be sure, but it captures something of the styles available to comparativists with different geographical focal points and differentiates two strategies for disengagement from governance.

These differences in geography and professional style suggest a preliminary map of comparative projects:

Professional Style: Geography:	Technocratic	Culture Vulture

78. *See, e.g.*, Kennedy, *supra* note 53, at 383–85.

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Universal	International Economic Law	Universal Private Law/Universe of Legal Families
First World	Harmonization	Classic Comparative Law
Exotica	Development	Area Studies

It is perhaps easiest to see the different modes of distancing oneself from governance in the contrast between technocrats and culture vultures. In the broadest terms, technocrats distance themselves from governance in the language of autonomous expertise, culture vultures in that of erudition.

International economic law—the bundle of institutions and legal doctrines structuring international trade and finance, from the GATT through national anti-dumping regimes—is home to a range of comparativist projects.[79] Much of international economic

79. Comparativist projects of international economic lawyers cover a broad range, from world trade institution-building projects which view the GATT as a centralizing legal system and tend to suppress differences among legal cultures, to projects that view international trade institutions as a forum or process of decentralized bargaining and tend to accommodate cultural differences as comparative advantage. Examples of the former include Phillip R. Trimble, *International Trade and the "Rule of Law"*, 83 MICH. L. REV. 1016 (1985) (reviewing JOHN H. JACKSON ET AL., IMPLEMENTING THE TOKYO ROUND (1984)). Examples of the latter include JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989); JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1990); JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (3d ed. 1995); and Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOK. J. INT'L L. 31 (1992). *See also* KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970); ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (2d ed. 1990); ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW: INTERNATIONAL AND DOMESTIC FOREIGN TRADE LAW AND FOREIGN TRADE POLICY IN THE UNITED STATES (1991); Wilhelm Roepke, *Economic Order and International Law*, 86 REC. DES COURS 203 (1954); George Schwarzenberger, *The Principles and Standards of International Economic Law*, 117 REC. DES COURS 1 (1966); Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477 (1994); STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS (Paul R. Krugman ed., 1986); JAGDISH BHAGWATI, PROTECTIONISM (1988); Jagdish N. Bhagwati, *Challenges to the Doctrine of Free Trade*, 25 N.Y.U. J. INT'L L. & POL. 219 (1993); Daniel K. Tarullo, *Logic, Myth and the International Economic Order*, 26 HARV. INT'L L.J. 533 (1985).

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law—the definition of "dumping" or "subsidy," the equation of regulatory nontariff barriers during negotiations over tariff concessions, the identification of departures from agreed tariff levels—depends upon defining a distinction between a baseline of free market trade and governmental intervention.[80] Difficulties arise because this distinction looks quite different in various legal cultures—for example, is governmental licensing of retail outlets part of the background market structure or an intervention? Answering such questions requires comparative analysis of various sorts—to establish a constructed market price against which dumping can be measured, to mesh, or "interface" different regulatory regimes in application of WTO and GATT commitments, etc.[81] Although a great deal of this work relates the national frameworks of OECD countries to one another, international economic law is meant as a universal project—the standards deployed to measure dumping in Indonesia no different from those applied to Canada.

The perception that economic interdependence is growing, coupled with the new mobility of capital relative to other productive factors, has fueled interest in regulatory harmonization.[82] If na-

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80. *See, e.g.*, Ross Denton, *(Why) Should Nations Utilize Antidumping Measures?*, 11 MICH. J. INT'L L. 224 (1989); Brian Langille, *General Reflections on the Relationship of Trade and Labor (Or: Fair Trade is Free Trade's Destiny)*, *in* FAIR TRADE AND HARMONIZATION, PREREQUISITES FOR FREE TRADE? 231 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996); Katherine van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987 (1995).

81. The idea of an "interface" mechanism has been developed primarily by John Jackson. Jackson argues that because harmonization, international minimum standards or mutual recognition of national regulatory regimes are inadequate to deal with differences in cultures, national practices, levels of development, religions, ideas about morality, and so on, what is needed is an "interface" mechanism that recognizes and accommodates these irreducible differences. The interface concept

> contemplates that governments face the notion that societies will be different, and not try to impose the same stamp on all systems in the world. Instead, governments should understand that the relationship between different economic and cultural systems in a trading and interdependent environment creates certain tensions. This in turn is a role for cooperation among international institutions to build a certain kind of buffering mechanism. In an interface situation, arguably neither country is doing anything that is wrong or evil or unjust, but both are conducting their affairs in their own way. However, the way country A goes about its business tends to affect country B, and vice versa. Therefore, we have to design a mechanism to facilitate the interface. What can that mechanism be? That's the tough question! Maybe it is some kind of a complaint procedure. Maybe it is even some kind of a border barrier, a small tariff, or something of that type.

John H. Jackson, *"Managing Economic Interdependence"—An Overview*, 24 LAW & POL'Y INT'L BUS. 1025, 1030 (1993).

82. Like international economic law, the regulatory harmonization literature is

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tional environmental or consumer protection or labor regimes seem to be undercut by increased foreign trade, one response has been to search for common standards across markets. This work also employs comparativists who can work out differences and identify similarities among different national schemes for, say, protecting intellectual property, and who can then participate in formulating possible common approaches. This sort of comparative work has been actively pursued within the European comparativist academy through the regulatory initiatives of the E.U., but exists in North America as well, particularly among those specializing in international aspects of various national regulatory regimes, like taxation or labor law.

The study of non-Western legal cultures also hosts a range of technocratic comparativist projects, most of which are concerned with identifying the legal prerequisites to economic development. The traditions of "law and development" or "modernization" in the 1960s and 1970s[83] have been followed by initiatives aimed at facili-

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populated by a range of comparativist projects, ranging from those advocating federal-type regulation and the search for a single, best, harmonized regulatory strategy, to those recognizing or accommodating a range of regulatory solutions in the name of regulatory competition, mutual recognition, or a race-to-the-bottom. For a general introduction to this literature, see Joel P. Trachtman, *International Regulatory Competition, Externalization and Jurisdiction*, 34 HARV. INT'L L.J. 47 (1993), and FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996) (compiling various viewpoints in two useful volumes).

83. Major works that built the "law and development" movement include Marc Galanter, *The Modernization of Law, in* MODERNIZATION: THE DYNAMICS OF GROWTH 153 (Myron Weiner ed., 1966); Kenneth Karst, *Law in Developing Countries*, 60 LAW LIBR. J. 13 (1967); Lawrence M. Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11 (1969); Henry J. Steiner, *Legal Education and Socio-Economic Change: Brazilian Perspectives*, 19 AM. J. COMP. L. 39 (1971); Robert Seidman, *Law and Development: A General Model*, 6 LAW & SOC'Y REV. 311 (1972); David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1 (1972); Thomas M. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?*, 1972 WIS. L. REV. 767; and ROBERT SEIDMAN, THE STATE, LAW AND DEVELOPMENT (1978). The familiar self-doubts and reassessments of the movement are reflected, *inter alia*, in David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062. More recent revivals, doubts, and departures include John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); Anthony Carty, *Towards a Theoretical and Sociological Framework for a Study of the Right to Economic Self-Determination of Peoples, in* INTERNATIONAL LAW AND DEVELOPMENT 45 (Paul de Waart et al. eds., 1988); Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991); LAW AND DEVELOPMENT (Anthony Carty ed., 1992); David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407 (1994); and Richard

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tating the emergence of so-called transitional societies into the international market.[84] Each of these projects has had a comparative dimension—in identifying the legal structures which have been or remain present in various developed or post-transition economies, comparing these to the legal structures available in the developing or transitional world, and identifying the most viable first-world legal implants for export. Comparativists work at identifying the best regulatory regime for emerging securities markets, the importance of judicial review for modernization, the most viable constitutional court procedures, and so on.

There is no question that technocratic comparative law, whatever its geographic orientation, seems more closely associated with the issues and institutions of governance than culture vulture comparativism. Nevertheless, even the technocratic comparativist stands somewhat aloof and apart from government itself, primarily by figuring him or herself as an expert or staffer. For the lawyer as technical expert, there are a number of well-trodden ways to explain one's independence from the political machinations of government. Perhaps the political questions have been resolved elsewhere—in parliament, or diplomatic negotiation. The expert may seem to work only within the confines of bargains others have struck, implementing a commitment to tariff reduction or market viability. For some technocrats, the point of expertise is that it is directed solely at illuminating the conditions under which uniformly sought goals can be achieved—development or efficiency or growth. For others, the key point is that expertise as a whole is oriented against corporatist local politics and entrenched interests in the name of a rational

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Bilder & Brian Z. Tamanaha, *Book Review*, 89 AM. J. INT'L L. 470 (1995).

84. The current orthodoxy of neoliberal models of economic and legal organization and projects of wholesale export of American and Western European legal institutions is reflected in (and, in part, constituted by) the policies of the leading international financial institutions and the work of such organizations as the Harvard Institute of International Development. *See, e.g.*, WORLD BANK, WORLD BANK DEVELOPMENT REPORT: FROM PLAN TO MARKET (1996); WORLD BANK, EAST ASIAN MIRACLE REPORT (1993); JEFFREY SACHS, POLAND'S JUMP TO THE MARKET ECONOMY (1993). For perspectives questioning neoliberal orthodoxy, see Anthony Carty, *Liberal Economic Rhetoric as an Obstacle to the Democratization of the World Economy*, 98 ETHICS 742 (1988); Thomas J. Biersteker, *Reducing the Role of the State in the Economy: A Conceptual Exploration of IMF and World Bank Prescriptions*, 34 INT'L STUD. Q. 477 (1990); R. WADE, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION 8–34 (1990); ALICE AMSDEN, ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION (1989); and ALICE AMSDEN ET AL., THE MARKET MEETS ITS MATCH: RESTRUCTURING THE ECONOMIES OF EASTERN EUROPE (1994).

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general will.

Each of these technocratic stances is familiar from comparative work associated with international economic law, projects of harmonization, and development. The comparativist who identifies a nontariff barrier or constructs a market price for Indonesian lumber is implementing a broader multilateral deal struck by politicians, embodied in the GATT, and ratified by the legislature. In this sense, he is not governing. The comparativist who prepares the background papers for an effort to harmonize intellectual property law in Europe is searching for the "best practice," the most efficient, most administrable regime. The comparativist developing model securities codes for Eastern Europe is less governing than facilitating the disestablishment of locally entrenched ex-nomenklatura in favor of a more rational scheme of capital accumulation from which everyone will benefit.

The governance with which the technocratic comparativist wishes to be disassociated is the messy politics of intersovereign negotiation, national parliamentary ideological conflict, and questions of distribution, involving winners and losers rather than a more efficient pie. And this is the governance associated with public law internationalism. It is easy to get a sense for this difference by considering how a particular question, say global environmental protection, would look to the public law internationalist and the technocratic comparativist embarked on a project of harmonization—that point at which the internationalist and the technocratic comparativist might seem to have the most in common. For the internationalist, the issues would be boldly political—bargains between North and South, regimes to structure bargaining and enforce results, the emergence of global norms and commitments.[85] The comparativist participating in a harmonization project would

85. *See, e.g.*, WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987) ("Brundtland Report"); Abram Chayes & Antonia Handler Chayes, *Adjustment and Compliance Processes in International Regulatory Regimes, in* PRESERVING THE GLOBAL ENVIRONMENT: THE CHALLENGE OF SHARED LEADERSHIP 280 (Jessica T. Mathews ed., 1991); Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993); PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT (1992); THE INTERNATIONAL POLITICS OF THE ENVIRONMENT: ACTORS, INTERESTS, AND INSTITUTIONS (Andrew Hurrell & Benedict Kingsbury eds., 1992); Ileanna M. Porras, *The Rio Declaration: A New Basis for International Cooperation, in* GREENING INTERNATIONAL LAW 20 (Philippe Sands ed., 1993); LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK (1994); PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW: FRAMEWORKS, STANDARDS AND IMPLEMENTATION (1995); VED P. NANDA, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY (1995).

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more likely be concerned with finding out exactly who was doing what, comparing technical solutions, implementing a framework agreement.[86]

Of course, the comparativist who participates in these technocratic projects might forswear even the role of expert, claiming simply to be providing information about cultural differences, best practice and the history of intercultural legal influence. This stance, however, is far more familiar among culture vultures, whose distance from governance is marked in the language of erudition rather than expertise. We find culture vulture comparativists of global orientation pursuing a variety of projects, from elaborating the doctrines of a potentially universal private legal order[87] to developing taxonomic criteria for identifying and studying "law" across all cultures.[88] Both of these inquiries lead toward the philosophy of law: either by identifying the core doctrines necessary for order outside the state, or defining the social phenomena which can properly be termed law. Culture vulture comparativists write about

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86. *See, e.g.*, DAVID VOGEL, NATIONAL STYLES OF REGULATION: ENVIRONMENTAL POLICY IN GREAT BRITAIN AND THE UNITED STATES (1986); SUSAN ROSE-ACKERMAN, CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES (1995); EUROPEAN ENVIRONMENTAL LAW IN COMPARISON: OPTIONS FOR TRANSITION (Gerd Winter ed., 1996); Robert E. Hudec, *Differences in National Environmental Standards: The Level-Playing-Field Dimension*, 5 MINN. J. GLOBAL TRADE 1 (1996); COMPARATIVE ENVIRONMENTAL LAW AND REGULATION at v–xix (Nicholas A. Robinson ed., 1996) (looseleaf service); William A. Tilleman, *Environmental Appeal Boards: A Comparative Look at the United States, Canada, and England*, 21 COLUM. J. ENVTL. L. 1 (1996).

87. *See, e.g.*, Édouard Lambert, *Conception générale et définition de la science du droit comparé, in* I CONGRÈS INTERNATIONAL DE DROIT COMPARÉ, PROCÈS-VERBAUX DES SÉANCES ET DOCUMENTS 26 (1905) (advocating a universal private law of mankind). The broad universalizing hopes of this earlier generation were later replaced in Europe by a mandarin academic practice of private law harmonization under the *aegis* of such institutions as UNIDROIT, which has in turn largely been displaced by a narrower, technocratic project of creating a universal law for international business. *See, e.g.*, ZWEIGERT & KÖTZ, *supra* note 8, at 25 ("In the past, enthusiasts have planned to unify the law of the whole world; people now realize that only the specific needs of international legal business can justify the vast amount of energy which is required to carry through any project for the unification of law.").

88. René David is the most prominent of the universal taxonomists. *See, e.g.*, DAVID & JAUFFRET-SPINOSI, *supra* note 60, at 15–24 (dividing world of legal families into Romanistic-Germanic, Common Law, socialist, and "Other"). As comparativists have departed from David's fourfold taxonomy for various reasons, the family structure has become more complex. *See, e.g.*, ZWEIGERT & KÖTZ, *supra* note 8, at 75 (classifying families as Romanistic, Germanic, Nordic, Common Law, socialist, Far Eastern, Islamic, and Hindu). Finally, for some comparativists the family structure fades into a set of sociological, rather than geographical or historical, categories. *See, e.g.*, Mattei, *supra* note 10 (classifying legal systems into categories of "political," "traditional," and "professional" law).

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these exercises as intellectual projects and tend to explain cultural differences as local variations on universal human or market needs. This general stance seems to have been developed by the tradition of classic comparative law, which focused on relations among Western legal cultures (particularly common and civil law),[89] the history of Roman law's reception,[90] or the reception of common law pragmatism and American style adjudication or legal practice in civil law settings.[91] Some culture vulture classicists pursue historical study of the origins and structure of the West's legal specificity.[92] Others are more concerned with contemporary practices and institutions, again primarily of private law.[93] All are concerned with what is unique in the Western legal tradition, and with understanding which differences within that tradition can be sustained without threatening what makes the West special.

For this whole group of comparativists, nothing could be farther from their mind than governance. They might be making an argument about what is necessary to sustain the West against the rest, or about what is universally human, but it is an intellectual argument for an intelligentsia, a matter of philosophy or knowledge, not

89. The work of David is a good example. *See, e.g.*, DAVID & JAUFFRET-SPINOSI, *supra* note 60. Within classic comparative law there are those who engage in a mandarin practice that leaves all cultures intact, emphasizing the historical development of legal families and the accidental or professional origins of legal rules, and there are those who focus on technical solutions to common functional problems, emphasizing the efficacy of legal transplants and reforms to generalize the "best" solutions. In the former group we find David, Watson, and others. *See, e.g.*, René David, *On the Concept of "Western" Law*, 52 U. CIN. L. REV. 126 (1983); Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121 (1983); WATSON, *supra* note 61. In the latter group we find von Mehren and Mattei, along with more assertive functionalists such as Zweigert and Kötz and liberals such as Wieacker. *See, e.g.*, VON MEHREN & GORDLEY, *supra* note 17 (functional analysis of civil law); Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3 (1994) (efficacy of transplants); ZWEIGERT & KÖTZ, *supra* note 8 (universalizing functionalism); FRANZ WIEACKER, PRIVATSRECHTSGESCHICHTE DER NEUZEIT (2d ed. 1967); Wieacker, *supra* note 12 (providing broad-gauged philosophical history of European private law stressing virtues and necessity of Western liberal civil rights and private law order).

90. *See, e.g.*, Franz Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 B.C. INT'L & COMP. L. REV. 257 (1981); Glenn, *supra* note 63, at 265–69 (characterizing European reception of Roman law as act of deliberate alliance by scholars and courts, involving common commitment to idea of law as open-ended, ongoing process of inquiry tolerant of numerous, nonbinding sources of "persuasive authority").

91. *See, e.g.*, GLENDON, RIGHTS TALK, *supra* note 75, at 145.

92. The best known example is probably HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

93. Arthur von Mehren is a leading example. *See supra* note 73 and accompanying text.

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politics or power. These comparativists present themselves as academics obeying only the dictates of scientific rigor, objective analysis, and so forth. To polemicise would vulgarise. The governance from which they distinguish themselves is not merely the institutional will to power, the committed world of subjective politics and ideology, the normative impulse to control or punish, but also the quotidian profession of practical management and technical expertise. For these comparativists, even their technocratic cousins may have gone too far.

We can see this difference most profoundly in the difference between culture vulture and technocratic comparativists whose geographical orientation is to the world outside the West. For the comparativist interested in area studies, by which is meant the study of legal systems other than European civil and Anglophone common law, the project is one of sustained cross-cultural inquiry—listening and reading carefully, noting and explaining differences in historical, local, contextual terms, etc.[94] Area studies

94. The area studies tradition differs in different regions. To get a sense for the whole, try JOHN H. BARTON ET AL., LAW IN RADICALLY DIFFERENT CULTURES (1983). Many of the moves in area studies were first made in the study of Russian law. *See, e.g.*, HAROLD J. BERMAN, JUSTICE IN THE U.S.S.R. (1963); Harold J. Berman, *Soviet Family Law in the Light of Russian History and Marxist Theory*, 56 YALE L.J. 26 (1946); William E. Butler, *Justice in Russia: Soviet Law and Russian History*, 42 EMORY L.J. 433 (1993) (tribute to Harold Berman).

On East Asia, the work with which I am most familiar would include William P. Alford, *How Theory Does—And Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8 (1994); William P. Alford & Yuanyuan Shen, *Limits of the Law in Addressing China's Environmental Dilemma*, 16 STAN. ENVTL. L.J. 125 (1997); William P. Alford, *Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China*, 72 CAL. L. REV. 1180 (1984); William P. Alford, *Double-Edged Swords Cut Both Ways: Law and Legitimacy in the People's Republic of China*, 122 DAEDALUS 45 (1993); William P. Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915 (1986); William P. Alford, *Keeping Up with the Jones (Standards): A Tribute to Professor William C. Jones*, 74 WASH. U. L.Q. 541 (1996); and William P. Alford, *Looking Beyond: Placing Area Studies Front and Center in Policy, Academia, and Beyond*, HARV. ASIA PAC. REV. (1996–97) <http://www.hcs.harvard.edu/~hapr/wtr9697.html>.

On China and Hong Kong, see Janet E. Ainsworth, *Categories and Culture: On the "Rectification of Names" in Comparative Law*, 82 CORNELL L. REV. 19 (1996); THOMAS CHIU ET AL., LEGAL SYSTEMS OF THE PEOPLE'S REPUBLIC OF CHINA (1991); ENCYCLOPEDIA OF CHINESE LAW: NATIONAL AND REGIONAL LAWS OF CHINA (Chris Hunter ed., 1993); PETER WESLEY-SMITH, AN INTRODUCTION TO THE HONG KONG LEGAL SYSTEM (2d ed. 1993); PETER WESLEY-SMITH, THE SOURCES OF HONG KONG LAW (1994); Jin Huang & Andrew Xuefeng Qian, *"One Country, Two Systems," Three Legal Families, and Four Legal Regions: The Emerging Inter-Regional Conflicts of Law in China*, 5 DUKE J. COMP. & INT'L L. 289 (1995); VICTOR H. LI, LAW WITHOUT LAWYERS, A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES (1978);

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comparativists tend to be the most modest about their enterprise. At stake is not comprehension of the universal in law, but simply empathetic understanding of a different society. Culture vulture comparativists interested in exotica are much more likely to see their project as inevitably unfinished, a continual process of trying to understand. Here also is a distance from governance, although now the governance to be avoided is colonialism or imperialism, reinterpreted less as political or institutional projects than as the quite personal sins of arrogance or undue ambition. Viewed from the culture vulture's vantage point of an infinitely extending project of incomplete knowledge, governance always requires premature

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CHINA'S LEGAL REFORMS (Stanley B. Lubman ed., 1996); Stanley B. Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities and Strategy*, 39 AM. J. COMP. L. 293 (1991); Stanley B. Lubman, *Western Scholarship on Chinese Law: Past Accomplishments and Present Challenges*, 22 COLUM. J. TRANSNAT'L L. 83 (1983); Stanley B. Lubman, *Emerging Functions of Formal Legal Institutions in China's Modernization*, 2 CHINA L. REP. 195 (1983); LEGAL ASPECTS OF DOING BUSINESS IN CHINA (Jerome A. Cohen ed., 1983); Jerome A. Cohen, *China's Changing Constitution*, 76 CHINA Q. 794 (1978); Jerome A. Cohen, *Continuity and Change in China: Some "Law Day" Thoughts*, 24 S.C. L. REV. 3 (1972); CONTRACT LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (Jerome A. Cohen ed., 1988); ESSAYS IN CHINA'S LEGAL TRADITION (Jerome A. Cohen et al. eds., 1980); BASIC PRINCIPLES OF CIVIL LAW IN CHINA (William C. Jones ed., 1989); WILLIAM C. JONES, THE GREAT QING CODE (1994); and William C. Jones, *An Approach to Chinese Law*, 4 REV. SOCIALIST L. 3 (1978).

On Japan, see FRANK UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (1987); LAW AND INVESTMENT IN JAPAN: CASES AND MATERIALS (Yukio Yanagida et al. eds., 1994); DANIEL F. HENDERSON, FOREIGN ENTERPRISE IN JAPAN: LAW AND POLITICS (1983); JAPANESE CONSTITUTIONAL LAW (Percy R. Luney & Kazuyuki Takahashi eds., 1993); JOHN O. HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX (1991); and Anita Bernstein & Paul Fanning, *"Weightier than a Mountain": Duty, Hierarchy, and the Consumer in Japan*, 29 VAND. J. TRANSNAT'L L. 45 (1996). For a review of recent Western scholarship on Japanese law, see Harald Hohmann, *Modern Japanese Law: Legal History and Concept of Law, Public Law and Economic Law of Japan*, 44 AM. J. COMP. L. 151 (1996).

Islamic law is a rising area studies field. *See, e.g.*, Frank E. Vogel, *The Islamic Legal System of Saudi Arabia: A Primer for U.S. Business*, 11 MIDDLE E. INSIGHT 93 (1995); Frank E. Vogel, *Prospects for a Restatement: The Codification of Commercial and Contract Law in Saudi Arabia*, *in* COMMERCIAL LAW IN THE MIDDLE EAST (G.L. Ruttley & C. Mallat eds., 1995); Frank E. Vogel, *Is Islam Compatible with Democracy? A Comparative Perspective*, *in* UNDER SIEGE: ISLAM AND DEMOCRACY 93 (R.W. Bulliet ed., 1994); J.N.D. Anderson, *Conceptions of Law: Islamic and Western*, *in* COMPARATIVE LAW OF ISRAEL AND THE MIDDLE EAST: A READER 1 (Nicholas N. Kittrie et al. eds., 1971); PERSPECTIVES ON ISLAMIC LAW, JUSTICE AND SOCIETY (R.S. Khare ed., 1987) (numerous chapters from this book were cited in articles I found); NORMAN CALDER, STUDIES IN EARLY MUSLIM JURISPRUDENCE (1993); LAW AND ISLAM IN THE MIDDLE EAST (Daisy Hilse Dwyer ed., 1990); ISLAMIC LAW AND JURISPRUDENCE (Nicholas Heer ed., 1990); Ann Elizabeth Mayer, *Law and Religion in the Muslim Middle East*, 35 AM. J. COMP. L. 127 (1987); Bernard Weiss, *Law in Islam and in the West: Some Comparative Observations*, *in* ISLAMIC STUDIES PRESENTED TO CHARLES J. ADAMS 239 (Wael B. Hallaq & Donald P. Little eds., 1991).

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closure. There is always the danger that any well-conceived universalist project, even an intellectual one, may turn out to be insufficiently sensitive to exotic cultural differences, just as there is always the danger that local cultural expressions in the periphery will verge toward the nationalist, themselves insensitive to the particularity of Western values. The culture vulture can only try to warn, caution, and inform. Nothing could be farther from the sensibility of the technocratic comparativist pursuing development, modernization, or the transition to democratic market capitalism. Where the technocratic comparativist distances himself from governance in the name of universal projects and the specialized role of the expert with technical knowledge, the culture distances himself from governance precisely by forswearing the universalizability of governance projects in the name of a deeper understanding of difference. His is the distance of the intellectual, not the technocrat.

The governance projects which the culture vulture comparativist avoids in the periphery are precisely those taken up by the public law internationalist. A good example would be the quite different responses comparativists and public international lawyers have to an issue like female genital mutilation, or FGM. For the public law internationalist, FGM presents a basic challenge to the structure of public law. FGM is often practiced consensually by individuals within a private domain, and yet seems to conflict with universal human rights norms which have been agreed by states. For public international lawyers, FGM raises a basic governance problem—does cultural variation place a limit on the aspiration to global normative order? The project is to figure out how the normative fabric can be sustained and extended in the face of this cultural challenge. For some the answer is simply to respect (and seal off within the state) the domain of cultural difference, for others the answer is to strengthen the enforcement of human rights norms, for still others, a middle way seems best, perhaps sneaking up on local cultural practices through redefinition of the problem as a health issue, by providing support for local feminists struggling against the practice through the mechanisms of international "civil society," etc. For public international lawyers confronting FGM, the basic question is "What are we going to do about it?"[95] Quite differ-

95. Examples of human rights norms enforcers include Mary M. Sheridan, Comment, *In Re* Fauziya Kasinga: *The United States Has Opened Its Doors to Victims of Female Genital Mutilation*, 71 ST. JOHN'S L. REV. 433 (1997) (characterizing FGM as violation of international human rights law, calling its cultural justifications unpersuasive, and applauding United States's extension of refugee status to FGM "victims"); and Bernadette Passade Cisse, *International Law Sources Applicable to Fe-*

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ent the voice of the area studies comparativist, for whom FGM needs to be addressed not because it presents a conflict between local and global order, between culture and governance, but because it has become an issue in the governance community. Rather than wondering "what shall we do," the comparativist will write to answer the question "How can I make them understand?" A comparativist article on FGM will not likely end with a policy proposal—the point is far more likely to be "it's much more complicated than you thought."[96]

Common to all these comparativisms, of both expertise and erudition, is a stance which we might term "cosmopolitanism," always complexly distanced from what it pictures as governance. Governance is the domain of ideology and political choice, the work of national elites jockeying for position, all dirty stuff for a cosmopolitan. Those who govern are ambitious men, subjective in their political commitments, seeking illegitimate rents and dominion in

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male Genital Mutilation: A Guide to Adjudicators of Refugee Claims Based on a Fear of Female Genital Mutilation, 35 COLUM. J. TRANSNAT'L L. 429 (1997) (urging application of international human rights norms to FGM). In a similar tone, an example of a strong polemic against "sealing off" FGM within the state is found in Anna Funder, *De Minimis Non Curat Lex: The Clitoris, Culture, and the Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 417 (1993) (resisting use of "culture," "cultural relativism," or "cultural autonomy" to immunize violence against women, including FGM, and other forms of domination of women, from scrutiny of the "international"). Public internationalists choosing a "middle course" include a wide array of often conflicting political projects. *See, e.g.*, Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995) (urging a black feminist human rights strategy for eradication of FGM that seeks to build cross-cultural solidarity between African-American and African feminists, through deeper understanding of complexities and contradictions of Western feminist's engagement with African cultural practices); Arthur C. Helton & Alison Nicoll, *Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of In Re* Fauziya Kasinga *and Prospects for More Gender Sensitive Approaches*, 28 COLUM. HUM. RTS. L. REV. 375 (1997) (advocating grassroots local engagement to outlaw and eradicate "abhorrent" practice of FGM).

96. Although the large majority of writing on FGM is in the "public internationalist" register of struggling to discover how the normative fabric can deal with the cultural challenge of FGM, some writing can be found closer to an "area studies" tradition of tentative, modest inquiry. See, for example, Eugenie Anne Gifford, *"The Courage to Blaspheme": Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN'S L.J. 329 (1994), which, despite its title, explores the complexity of Western feminists' engagement with FGM in a tone emphasizing the tentativeness and unfamiliarity of—and yet the necessity of finding—a new voice or register in which to understand and resist FGM. In making her plea for a new understanding of FGM, Gifford stresses the difficulty of comprehending the "other" and deploys two intriguing comparative examples intended to destabilize Western feminists' assumption of their own nonimplication in FGM (comparing African and American FGM practices and comparing FGM to breast implants). *See id.*

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an unseemly struggle to distribute yesterday's pie rather than working together to bake a larger pie tomorrow. For the cosmopolitan, values are universal and humanist, projects rational and pragmatic, knowledge—of the self as of the other—good for its own sake. The cosmopolitan knows he lives in a world which others rule, but has carved out a niche and made it virtuous. His objective is to expand options rather than offer solutions. We see this broad humanist tradition in both the technocrat only trying to get things right and in the culture vulture straining to hear the murmurs of cultural difference. This is cosmopolitanism in the sense of the "family of man," of universal pragmatics, and of the depoliticized world of market finance and trade. What we see in differences between technocrats and culture vultures or across comparativists' different geographic orientations, are differences within a common sensibility—different ways of picturing the governance to be elided and different images of the virtuous cosmopolitan self.

C. The "Politics" of Comparative Law

It might appear that we could begin to get beneath these various distancing strategies, to explore the governance dimension of comparativist projects, by asking about the politics of comparative law. For example, if we think of public law internationalists largely as liberals in the American sense, should we think of North American comparativists as conservative? The focus on private ordering and the distance from government might suggest this, but it turns out that each of these comparativist projects has been pursued in a range of political orientations, with, for example, greater and lesser enthusiasm for the separation of private law from politics, or greater and lesser enthusiasm for centralized public law regulation. These projects have been pursued with attitudes towards the culturally different easily recognizable in the American political lexicon as both liberal and conservative. Although most North American comparativists see themselves as part of the intelligentsia's center-left political consensus across the cells in my taxonomic table, we find a layering of positions broadly recognizable as "left" and "right" in the American legal academy. Indeed, methodological or geographic positions are often experienced in vaguely political terms. Whatever engagement comparativists have with governance comes across the full spectrum of respectable academic political positions.

Taken at first blush, the technocratic traditions might seem more "left" than the culture vulture traditions, just as public international law initially seems to the left of all these comparativist traditions. If we think of international economic law as a field of

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internationalist regulation and institutions like the GATT, and universal private law as a field structured to oust public institutions at the national and international level from regulation of private commercial relations which cross borders, international economic law seems to the left of universal private law. Similarly, harmonization, a project of refining public interventionist mechanisms, seems to the left of a classic comparative law which focuses on the relatively apolitical, even ad hoc, development of private legal regimes by legal professionals. The traditions of law and development and modernization seem similarly to the left of an area studies tradition which seeks to understand foreign legal systems so that we might more easily do business with them. In this loose sense, it is possible to experience being a technocratic rather than a culture vulture comparativist as in some sense a political commitment or expression.

It turns out, however, that technocratic and culture vulture comparativist projects can also be internally divided between left and right. If we take attitudes towards centralization and decentralization or the degree of respect for cultural difference as proxies for an academic left and right, the political map becomes more complex. We now find a layering of left and right within each comparativist tradition. The technocratic styles turn out to be divided between approaches oriented to centralization, the state, public regulation, and paternalist or redistributive solutions, on the one hand, and, on the other, to the market, private solutions, individualism, efficiency, and decentralization. This split cuts across another divide between those more open to the maintenance of different legal cultures and those more aggressive about assimilation and standardization or about reducing the residual zone of tolerable cultural difference.

Thus, although international economic law relies more on regulatory institutions than does universal private law, relative to public international law its institutions are quite deregulatory in structure and spirit.[97] Indeed, international economic law often presses against political or economic differences which can be reinterpreted as protectionist policies, reducing cultural differences to matters of consumer taste. This is largely the style of GATT rules identifying and suppressing nontariff barriers, subsidies, or dumping, encouraging regulatory competition, and enforcing prohibitions on unfair competition (including public monopolies and procurement rules).

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97. *See* Daniel K. Tarullo, *Logic, Myth, and the International Economic Order*, 26 HARV. INT'L L.J. 533, 533–35 (1985); Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 579–601 (1987).

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But the international economic law system also can seem a quite decentralized thing, a politically disengaged process of ongoing interstate bargaining in a marketplace of national regulations. In this mode, international economic law is able to reinterpret and embrace a broad range of cultural and political differences as matters of divergent strategic advantage and to present itself as providing a channel through which a variety of actors, both public and private, can engage in an open-ended process of bargaining in the spirit of free trade and open markets. In this style, GATT dispute resolution mechanisms and tariff rounds might embrace both state and market traders, transfer as well as market prices, bartering as much as trade, soft as well as hard currencies, providing appropriate interface mechanisms through which all these different trading conditions might be reinterpreted as arm's-length transactions and therefore bargained against one another at as-if market prices.

Similarly, comparativists interested in harmonization range in their approach to differences among national regulatory regimes for consumer protection, environmental legislation, labor standards, and the like, between a federalist displacement of conflicting national rules, and a more market-oriented, lowest common denominator/race to the bottom/mutual recognition tradition. As one might expect, this difference often, although by no means always, parallels a lesser and greater tolerance for the range of existing differences: federalist harmonizers are comfortable with a narrower range of national regulatory alternatives than those in the mutual recognition tradition are. Those working in a technocratic style on the laws of societies outside the developed West range between the traditions of modernization or law and development on the one hand, and those of legal export, conditionality, and the neoliberalism now fashionable in the global financial institutions, on the other. The conditionality/neoliberal tradition often, though not always, proposes a narrower range of plausible national styles than those working in the traditions of development and modernization. We might put all of this together in the following way:

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Technocratic Professional Style:

	International Economic Law	
GATT as legal system WTO institutions Differences suppressed		GATT as decentralized bargain and ongoing process Differences accommodated
	Harmonization	
federal regulation One best approach		lowest common denominator mutual recognition regulatory market Many possible approaches
	Development	
modernization dependency cultural specificity Many ways		legal export neoliberalism universalism One way

It is easy to intuit that these choices between technical alternatives are ideological, political, and cultural choices as much as technical ones. The alternatives are entirely familiar from other political debates and I have aligned the alternatives to reflect a loose association with the political left and right. To reflect this political sensibility, the columns are aligned according to the degree of enthusiasm for public regulation and centralization. Clearly, if we keyed the columns for tolerance of cultural difference, the line-up would look somewhat different. As in other fields, the technocratic left

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finds it easier to embrace cultural difference when it is not about decentralizing public power at home, in the first world. The technocratic right finds cultural differences easiest to embrace as an antidote to central governmental power or when they can be rethought as differences in market strategy.

So long as we focus on attitudes towards public governance structures and centralization, the technocratic traditions are likely, on the whole, to seem more left wing than the culture vulture comparativists. Most culture vultures are far less interested in government and more likely to focus on understanding things the way they are or have been. The culture vulture is largely not an administrator or manager. As for many other cosmopolitan intellectuals, an interest in things foreign, a commitment to the importance of globalization, to the international component of so many contemporary problems, or stubborn insistence on the fact that people elsewhere do things differently, operates for culture vulture comparativists as a political commitment of sorts. Choices about particular technocratic regimes seem details, mopping-up operations, when the really significant point is not to be left or right, but to avoid being parochial.

In this atmosphere, the more important marker of academic politics for culture vultures is not attitudes towards centralization, but tolerance for cultural difference—the left more invested in maintaining or respecting difference, the right more open to assimilation. By putting cultural attitudes out front, ahead of attitudes towards centralization and the role of the state, the culture vulture can appear to be on the left when compared broadly with the technocratic comparativist. Simply to be more interested in culture than issues of social order can mark a political orientation, regardless of a scholar's actual position on either set of issues. Intuition suggests that the technocrat is more likely to want to alter, rearrange, or assimilate a foreign culture than someone who simply hopes to understand. Understanding, being more distant from ambitions to governance, seems more likely to leave the foreign culture alone, giving culture vultures a left of center patina.

The move from technocratic comparativism to culture vulturism thus reorients the political vocabulary from governmental centralization to attitudes about cultural diversity. This shift itself seems political and left of center, even if a particular culture vulture is otherwise easily recognizable as far to the right of his or her technocratic colleague. This shift in perspective also alters what is meant, at least most saliently, by the term "culture." Public law internationalists are likely to see culture in the exotic and inassimilable practices below the waterline of sovereignty, within the nation,

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before the arrival of modernism, in practices such as female genital mutilation, *fatwas* against prominent novelists, or unofficial government condonement of rampant software piracy, whereas comparativists, by and large, have a more capacious understanding of legal culture, embracing the full range of legal or law-like social institutions and practices, some of which may be international or transnational and may as well be modern as traditional. One result is that comparativists seem more comfortable than internationalists with culture. A similar difference in perspective can separate the technocratic and culture vulture comparativist. For the technocrat, legal culture often means the inassimilable remainder after successful projects of harmonization or the baseline conditions of comparative advantage after governmental interventions have been stripped away. For the culture vulture, legal culture is a more inclusive category, and the harmonization project may itself be figured as the reception of a different legal culture, rather than the working out of a cosmopolitan expertise. This easy willingness to see culture everywhere also codes the culture vulture to the left of the technocrat and can be understood to place the comparativist tradition as a whole to the left of public law internationalism.

But if we look more closely at culture vulture attitudes towards the culturally different, we again find a broad political range, from worshipful preservation of the exotic through pluralism to assimilationism. Area studies comparativism ranges between cultural/historical schools and a "doing business with" tradition; classical comparative law between historicist and functional tendencies; international private law between technical projects of codification and efforts to engage in more public exercises of harmonization; universal comparative law between taxonomies which move from North to South or West to East, measuring differences from the familiar, and those which categorize even Western legal forms in terms familiar from a universal humanist reading of anthropology or social theory. We might fill in the right hand column of the original typology as follows:

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Culture Vulture Tradition:

	Universal Private Law Universe of Legal Families	
leave national differences intact		standardize national policy differences to reduce trader risk
Global taxonomy: professional/ traditional/ religious		Global taxonomy: civil/common/ socialist/other
technical restatement and sovereignty of the parties		systematic harmonization and codification
commercial arbitration		judicial enforcement

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	Classic Comparative Law	
mandarin practice leaves all legal cultures intact		supports reform to generalize best local solutions
historicism legal cultures or "families"		functionalism different technical solution to common problems
accidental/ professional origins for legal rules		efficacy of transplants
	Area Studies	
principled pluralism: local cultures inform the universal		pragmatic pluralism: local cultures limit the universal
cultural/historical anthropology		"doing business with" sociology/ economics pragmatic pluralism

Like the various technocratic comparativist styles, culture vulture projects differ in their left-right alignment depending upon whether we focus on openness to cultural difference or on attitudes towards centralization and public regulation. I have aligned the columns to reflect loose left-right affiliations by stressing attitudes towards cultural difference over attitudes towards centralized governmental authority: exactly the reverse of the priority given these two factors in developing the political sensibilities of the technocratic comparativist. Culture vulture comparativist projects we think of as left of center in their attitude toward foreign cultures appear in this typology to be less enthusiastic about centralizing projects of reform which would forge or spread a universal legal culture. The relatively more right of center cultural comparativist may have far more enthusiasm for assimilationist reform, perhaps because it is more likely to be carried out through private than through public ordering. The definition of culture also shifts. Those to the right are more likely to see culture in the exotic and inassimilable, those to

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the left to experience legal culture as embracing things modern and global as well as local and traditional.

These political positions to not translate smoothly into differing modes of participation in governance. Although coded in political terms, these academic postures or styles are far more significant relative to one another, as auxiliary means to differentiate one comparativist from another, and comparativism as a whole from public law internationalism. In that, they track quite closely the various styles by which comparativists distance themselves from governance. For culture vultures, not to be a technocrat—to forswear the quotidian and compromised world of the expert for the rigors of science or the compassions of intellection—is a political experience. Technocratic comparativists can experience their insistence on the perquisites and immunities of expertise against the public law internationalist, or their determination to make the musings of the culture vulture practical, as personal political commitments. Indeed, the range of attitudes about culture and government within the relatively isolated field of comparativism makes the comparativist a good academic centrist—able to find a basis for empathy with the range of respectable academic political commitment without engagement in governance. The comparativist, in this sense, can imagine him or herself as the last honest man. But these layers of political left and right are not helpful in unpacking the participations in governance which lie beneath this stance of disengagement, for these political codings are simply restatements of that distanced posture. This is particularly true in this age of expanding technocratic governance, in which the "I am not the government" posture of the comparativist has increasingly become the voice of international governance in the hands of the transnational judge or government official.

D. The Governance Projects of Comparative Law

Let me propose three starting points for a broader exploration of participation by comparativists, both culture vultures and technocrats, in what we might broadly call the project of international governance. These common starting points cross attitudes toward public regulation, the state or centralization, and toward cultural diversity. First, in relation to other internationalist fields and projects, comparativists act as the diversity department, reassuring either that cultural differences can be accommodated or that they may remain safely (even pleasurably) exotic. Second, comparativists play a role, both practical and ideological, in the construction and defense of an apparently depoliticized private law.

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Third, comparativists participate in the broader legal academic project of explaining, apologizing for, and stabilizing elite understanding of the "quasi-autonomous" role of law in society, as a force at once effective in society yet safely removed from political or ideological manipulation.[98] Each of these projects is made easier precisely by comparativism's trademark posture of distance from power and range of apparent political sympathies. In sketching these hypotheses about the governance functions of comparativism, my intention is to suggest avenues for inquiry which would cross the range of personal political projects or methodologies comparativists bring to the table.

1. The Diversity Department: Assimilation and Exoticization

Internationalists often find their governance projects questioned or challenged by reference to cultural differences: How can human rights be universal when some cultures value groups more than individuals, others men more than women, and so on? What about global protection of intellectual property when cultures identify and value originality differently? These challenges often blur two issues: the claim that global culture is itself a culture, in struggle with the cultures of those it would govern, and the claim that some cultural differences are too large either to be bridged through international governance, even by consensual norms agreed by sovereigns of internationalist will, or to be contained beneath the waterline of existing sovereign boundaries. Although public law internationalists have their own tradition of responding to such challenges, the presence of comparativist study is helpful. In a very general way, the presence within the intelligentsia of a special culturally attuned discipline might help reassure that, although problems of cultural difference are not directly within the internationalist's domain, they are certainly important. The internationalist critic might be directed to comparative study to assess whether cultural differences really do pose an insurmountable challenge to international governance. When the critic gets there, he or she will find the cosmopolitan comparativist sharing an identification of culture with the local, rather than the global, and with the project of understanding, rather than the project of governance.

Comparativists generally make two sorts of arguments, explicitly or implicitly, about cultural differences between nations: First,

98. *See* Duncan Kennedy, A CRITIQUE OF ADJUDICATION, FIN DE SIECLE (1996); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209, 214–20 (1979).

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that cultural differences are not that big a deal and one might safely assume that they will either stay below the waterline of sovereignty, perhaps within the realm of personal preferences, or will yield softly to the pressures of assimilative globalization; and second, that they are a big deal and may well limit the ambit of universal or internationalist governance.[99] To a certain extent, of course, these two arguments (as we might expect) vary with geography—it is often said that human rights simply run into the wall of cultural relativism in Chad, Beijing, or Rangoon, but that differences, say, between civil and common law traditions, are more fanciful than real. But it is not always this way. One often finds area studies explaining that Chinese ways of protecting property, properly understood, will fit into the GATT scheme very nicely, that African and Asian empires invented the Universal Declaration of Human Rights centuries before the West thought to draft it up, and, on the other hand, that German and British administrative or French and American judicial styles are simply too different to be readily compared, let alone harmonized.

Both arguments are helpful to the internationalist, just as the photographer need not worry whether Uncle Chuck stays in the kitchen or joins Aunt Betty by the lake or whether Betty presents as wench or dowager. The important point is that in each case it be one or the other. What the photographer doesn't want is Betty to lose her composure, or Betty and Chuck to get in a fight about who should be where, or Chuck to start questioning the photographer's

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99. *See, e.g.*, Sacco, *Legal Formants (Part I)*, *supra* note 9, at 3 (discussing comparativism's contribution to legal uniformity).

> When the comparative study of law does contribute to achieving this uniformity, one of the principal instruments by which it does so is by showing that certain differences among legal systems are merely apparent. That is a genuine contribution and one which is cognitive and critical and in this sense scientific. The task is performed by recognizing similarities in old laws rather than by enacting new uniform laws.

Id. (footnote omitted); *cf.* WILLIAM ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION (1995).

Leopold Specht provides an interesting critical work in this tradition by using the American legal realist analysis of the nature and function of property rights to analyze the Soviet economy and its successor. *See* Leopold Specht, The Politics of Property: Soviet Property as a Bundle of Rights (1994) (unpublished thesis, Harvard Law School) (on file with author). Specht critiques the conventional view that a state owned and centrally planned economy is the polar opposite of a market economy, showing that the Soviet system is better understood as a structure for transactions among entitlement holders. *See id.* Specht further argues that the Soviet enterprise, which we can understand as combining familiar legal elements with an unfamiliar social function, was the key actor in both the command system and under restructuring. *See id.*

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motives, or one of the subjects to pull out his or her own instamatic. Here, we can easily imagine a role for the helpful family therapist. After a therapeutic intervention, Chuck may come to join Betty in the photograph or may realize that he would rather go bowling while Betty looks at the lake. Betty may decide to dress as a matron or mistress. Whether the therapist pushes for one or another outcome or remains calmly neutral, he or she may still assist the photographer in settling the shot.

The calm sense throughout comparativist work that one can distinguish the familiar or neighborly from the exotic greatly simplifies the governance endeavor and might easily be reinterpreted by an internationalist to mark the borders of the assimilable, the civilized, or the liberal.[100] The internationalist can leave culture

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100. The standard comparativist taxonomies are based on a distinction between the Western legal families and a residual "others" category into which Islamic, Hindu, Far Eastern, and sometimes African law are thrown together. *See, eg.*, DAVID & JAUFFRET-SPINOSI, *supra* note 60 (grouping Islamic law, Indian/Hindu law, Far Eastern law, and the laws of Africa and Madagascar together as "autres conceptions de l'ordre social et du droit"); ZWEIGERT & KOTZ, *supra* note 8 (presenting "The Far Eastern Legal Family," Islamic and Hindu law as "Other Legal Families"). One commentator observes:

> The idea of "legal families," for example, whatever its difficulties, suggests that different state legal systems, or central elements of legal doctrine within them (including styles of developing and presenting doctrine, and of legal reasoning and interpretation), can be treated as having sufficient similarity to make comparison fruitful. At the same time, it suggests that these comparable systems or system elements treated as a group can be distinguished from others treated, for certain analytical purposes, as qualitatively more remote.

Roger Cotterrell, *The Concept of Legal Culture, in* COMPARING LEGAL CULTURES 13, 13 (David Nelken ed., 1997).

Tokarczyk provides an interesting perspective on the ability to draw a line between the exotic and the assimilable, and on where to draw the line. He writes that an "openness" towards external (foreign) laws and legal doctrines is both a major premise of comparative law and a requirement for national survival in the long run, and that the "hermetic, isolationist character of the policy of states belonging to the so-called political camps or of some religious families of law rejecting ecumenical ideas (e.g., Islamic or Hindu)" both hampers the development of comparative law and dooms such cultures to annihilation. Tokarczyk, *supra* note 11, at 960–61. He writes:

> Lack of openness, contrary to the requirements of the needs of societies, has annihilated many a culture and civilization and quite a number of legal systems considered powerful under circumstances favourable for them. In the contemporary times when quick exchange of information is almost an absolute necessity, a national legal thought claiming to be self-sufficient, closing within itself, is usually doomed, sooner or later, to petrification, dogmatism and lagging behind the pace of world change representing development and progress, which are still highly valued. Openness of national legal thought to external inspiration is the condition of a high level of law and—at the same time—of its more definite acceptance by the social circles

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alone, can remain agnostic about whether Rwanda is run by Hutus or Tutsis or some multiethnic combination, whether the state formerly known as Yugoslavia remains intact, so long as the result, one way or the other, can be read. Comparativist study can return the internationalist to the project of governance a wiser fellow: an international lawyer must be careful to limit ambitions in the face of the exotic or the unstable, but may proceed elsewhere. At the same time, comparativists play a role in constructing perceptions of cultural difference—in identifying for themselves and for the public internationalists what is the "same" and thus generates no anxiety about "culture," and what is "different" and needs either to be assimilated or excluded. The definition of what is, and is not, "comparable" is a fundamental and continuing operation of all comparative work.[101]

The idea here is not that the comparativist serves the internationalist directly, as a native informant ferreting out elements in the foreign culture which might yield to internationalist pressure, or warning the public international lawyer to steer clear of local hot spots. The comparativist is more helpful speaking to Betty and Chuck than ratting on them to the photographer. If comparativists at the core and periphery come to understand the map of assimilable and inassimilable legal cultures similarly, they may have made

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> in which it is in force. This these is confirmed by the historical vicissitudes and the influential power of some currents of legal thought, such as liberal, Christian or socialist, which have been relatively open and flexible, and hence most long-lasting.

Id. at 961.

101. *See, e.g.*, von Mehren, *supra* note 17, at 43 ("Basic to all comparative work are knowledge and understanding of discrete areas of human and social experience that have enough in common to permit a meaningful comparison."). Roman Tokarczyk observes that comparative study consists in "bringing together relatively similar features of at least two objects in order to state the identity, similarities and differences occurring between them." Tokarczyk, *supra* note 11, at 959. The comparativist's work of comparison "proper" is preceded by an implicit, foundational comparison which indicates whether the materials are sufficiently "similar" to be comparable; and of course, as Tokarczyk recognizes, the choice of what material to compare is "almost always more or less arbitrary or one-sided, leaving quite a lot of room for permeation of subjectivism." *Id.* One implication is that comparative law reflexively influences the internationalist intellectual's understanding of the "self," that is, the principal legal systems making up the Western core of the international system, by presenting an idea of how it is (or they are) different from "others." *See, e.g.*, Brad Sherman, *Remembering and Forgetting: The Birth of Modern Copyright Law*, *in* COMPARING LEGAL CULTURES 237 (David Nelken ed., 1997) (arguing that (1) early international copyright treaties presupposed and required representation of domestic law, spurring comparative research into commonalities which then helped to constitute domestic law, and (2) comparative research led to reinvention of British copyright law as always having been unique).

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a therapeutic contribution. For example, Jorge Esquirol suggests that comparative law has played a role, both in Latin America and in Europe and North America, in settling an image of Latin American legal consciousness as European-in-exile, a liberal sensibility stranded in an illiberal society.[102] This common understanding provides the basis for a set of common political projects to protect the European sensibilities of Latin American jurists as a basis both for cross-cultural cosmopolitan governance and defense of what is unique in the Latin American legal tradition. Here the comparativist facilitates governance by calming the threat that internationalist cosmopolitanism will itself be seen as a culture in struggle with what it would prefer to see as the terrain for engagement.

We could think about this role in either social or psychological terms. From a social point of view, the comparativist intellectual can be thought to pursue an ideological project, developing lenses through which the center will interpret the periphery, the law will interpret society, the global will interpret the local, as well as roles through which the periphery, the social, the local, can express its identity. The impact of this work might be felt in the self confidence of the internationalist, or in the strategy of the culturally remote. Both global and local can learn from the comparativist. In this story, the comparativist assists the local intellectual by elaborating a choice between assimilation and national cultural sovereignty, and reassuring that either way local culture will remain outside the predations of government. Perhaps this "local" can be part of the European legal "family" with its own distinctive personality,[103] or perhaps it would rather remain apart. The comparativist clarifies the choice.[104] In this, the comparativist assists the internationalist

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102. *See* Esquirol, *supra* note 1.

103. *See, e.g.*, Makau Wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339 (1995) (advocating an African human rights regime with a distinctive personality within the broad Western liberal human rights tradition).

104. Kéba M'baye's chapter on African Law in the International Encyclopedia of Comparative Law is a good example of a comparativist providing local intellectuals with the material to make this choice. *See* Kéba M'baye, *The African Conception of Law*, 2 INT'L ENCYCLOPEDIA COMP. L. 138 (1973). M'baye portrays African law as sufficiently unique and distinct to support nationalist exceptionalism and pan-African solidarity: he sees a single African family of law in the immemorial rules of customary African law, expressed by religion and morality and populated by kinship groups, elders, spirits, and living ancestors. He makes this distinctive African idea of culture and the history of law available to be enlisted in nationalistic projects of decolonization, development, and unity. At the same time, however, he portrays African law as shot through with enough historical impositions of and functional similarities to Eu-

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by developing the alternatives of assimilation and exclusion for particular cultures while solidifying an ideological picture of international governance "above" cultural differences, either absorbing or avoiding them.[105] The civil/common law distinction becomes a model for an assimilated difference, like German beer or French food or Spanish dancing or American movies, utterly compatible with participation in a global governance regime. Clitoridectomy, plagiarism, or religious fundamentalism become models for differences which simply cannot be assimilated—they must be either left alone or the universal must own up to offering an alternative cultural value as the shocked conscience of civilization itself.[106] Some of the ideological work is done simply by defining what culture is—slipping between images of culture as a set of harmless residual differences after assimilation and as a set of exotic inassimilable local commitments.

All this suggests possible avenues for further exploration. The existence of a disciplinary division between the culture department and the government department reinforces the idea within the intelligentsia that questions of governance and culture are quite different. At the same time, the comparativist's inclination to distinguish the assimilable from the exotic helps stabilize a governance project which can accommodate either but might be threatened were culture to appear in any other form—if, for example, the culture of governance were itself to become an issue, outside the limited role of voice for a general and universal civilization.

We might also think of the comparativist's role in psychological terms. In such a conception, the comparativist plays a role in the

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ropean law to support the choice of assimilation and Westernization. He stresses—paradoxically—both African law's openness to external influence (and the antiquity of its engagement with Christian and Islamic influences), and its enduring immobility and insularity. Finally, he seems to recognize his role in elaborating the African intellectual's choice between assimilation and exceptionalism, by suggesting that a postcolonial African law will involve each country choosing the legal models and rules, whether Western or African, best suited to achieve the national priorities of development and modernization in its particular circumstances.

105. Tennant's inquiry into the use by international officials of terms such as "noble" or "ignoble," when discussing the images of indigenous peoples, is an excellent study of this phenomenon. The ignoble is to be assimilated through development, whereas the noble is to be preserved, like wildlife. *See* Tennant, *supra* note 20, at 6–12.

106. *See* Porras, *supra* note 44, at 298–99 (discussing normative bind of writing about terrorism in international intelligentsia where one seems either to have to denounce it or to be understood as favoring it). Engle develops a similar idea in the case of women: it seems that women's rights must either conflict with the universal rights or be assimilated to them. *See* Engle, *After the Collapse*, supra note 46, at 144.

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libidinal economy of the internationalist, assisting in the management of his desire by rendering the other either available or exotic. The photographer's fears about his own identity, his voyeurism, his authoritarianism, his passivity, his solitude, all need to be calmed by externalization onto objects either willing or unavailable. The assimilable can safely be photographed, even seeks out the camera, the exotic can be safely left (and enjoyed) to one side. In this image, comparativist work might be read as a symptom of the global intellectual's strategy of identity formation and stabilization. Fear and desire at the heart of governance can be made compatible with the internationalist's autonomy by projection onto an other who can then be dealt with either by routinization (they are just like us, this difference is like all others, don't worry, I know them well, you too can know them without losing control) or exclusion (they really are different, understanding and engagement are almost impossible, available only to the intrepid, the exceptional, the libertine, the comparativist, whose reports can be read as pornography from the frontier).[107]

There may be a parallel interpretation of the comparativist's role in the libidinal economy of the local intellectual who struggles for a way to engage the universal and pragmatic claims of the internationalist.[108] In psychological terms, comparative study might reassure the local intellectual either that the desire to assimilate can be safely indulged (the internationalist is, after all, only a mirror) against a cultural remainder (you will always be able to be an African international lawyer, wearing different outfits and eating different food), or that the desire to annihilate the colonialist can be safely contained, as a national culture protected by sovereignty (you can always go home to an establishment locked in a posture of victimization, rebellion, and difference).[109] The ongoing work by

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107. For an example of assimilation by "routinization," see Setsuo Miyazawa, *The Enigma of Japan as a Testing Ground for Cross-Cultural Criminological Studies, in* COMPARING LEGAL CULTURES 195 (David Nelken ed., 1997) (rejecting explanations of Japan's anomalously low crime rate as product of exotic, uniquely Japanese phenomena such as "reintegrative shaming," explaining it instead in familiar and routine language of rational actors responding to social incentives).

108. One way non-Western legal scholars have tried to engage the international's claims is by claiming, on behalf of their own locality, a place in international law's narrative of its own development. T.O. Elias's retelling of the history of international law to claim that Africa contributed to the development of customary international law is an example. *See* TASLIM OLAWALE ELIAS, AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW (1972).

109. M'baye's chapter on African law can be understood as providing material for this choice. *See* M'baye, *supra* note 104. The parallel in public international law would be Berman's work on the images of the primitive which animate international

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James Gathii and Bhupinder Chimni to catalog approaches taken by third-world intellectuals to the universal and pragmatic claims of internationalism develops these ideas in novel and interesting ways.[110] For both Africa and India, they have uncovered a parallel set of alternatives: local intellectuals ranging between reconstructing their own traditions as always already assimilated and asserting a cultural nativism as the only alternative to participation in global initiatives. At the same time, Lama Abu-Odeh's work on Islamic legal culture struggles against this tradition, refusing to accept the alternatives of exoticism or assimilation.[111] She does so by insisting on the presence within Islamic societies and within the subjective identity of those brought up there of both traditional and modern elements, of assimilation and exoticism, confounding efforts to categorize Islam from the center as either the one or the other. It is in this way that a more general embrace of "hybridity," the presence of the first world in the third and the third world in the first, associated with some "postcolonial" writing might shake the frame of comparativist study.[112]

2. *Building a Depoliticized Private Law*

Comparativists play their most direct role in international governance when they help build the regime of international private law. It is here that the comparativist project blends most easily into a concrete legal practice in ways which involve both culture vultures and technocrats, elaborating rules, manning institutions devoted to the restatement and reform of private law rules, developing

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legal materials—which Berman interprets largely in psychological terms as "projections"—and the protagonist positions which that very literature makes available for intellectuals from other traditions. *See* Berman, *supra* note 19, at 355–58; Berman, *supra* note 45, at 830–32.

110. *See supra* notes 54–55 and accompanying text (discussing works of Gathii and Chimni).

111. *See* Abu-Odeh, *supra* note 51, at 1530. Lama Abu-Odeh's essay, *Feminism, Nationalism and the Law: The Case of Arab Women*, begins by showing the varying treatment of Arab criminal codes accord fathers and brothers who kill daughters and sisters for sexually dishonoring the family name. The variations fall on a spectrum of Arab nationalist compromises between the traditional endorsement of honor crimes and the Western legal view that excuses only crimes of passion. The interpretation of the various provisions responds not to national differences but to an ideological tension masked by nationalist rhetoric. She argues that this legal regime at the same time produces and controls a culture of sexual opposition in the Arab world. *See id.*

112. For work in this tradition outside of law, see NATION AND NARRATION (Homi K. Bhaba ed., 1990); ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (Sherry B. Ortner et al. eds., 1995); THE POST-COLONIAL STUDIES READER (Bill Ashcroft et al. eds., 1995).

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a scholarly consensus on the most reasonable or workable rules, resolving disputes through arbitration or the provision of legal opinions, advising legislators in the periphery on how such matters are handled in the most advanced economies or advising at the center on the applicability of common commercial rules in peripheral settings.

The private law elaborated by comparativists in these ways constitutes an international regime of sorts, outside the realm of sovereignty. Unlike the public international law scheme, it is built not on sovereign consent or the expression of sovereign political will, but outside the realm of sovereignty, disconnected from government, in the realm of private actors and commercial transactions. The regime-building projects in which comparativists are most likely to play a role are, if anything, more cosmopolitan than public international law, involving the creation of an international commercial terrain disconnected from national legal cultures through the unification of contract law, the development of commercial dispute resolution mechanisms for international transactions which do not rely on national judicial machinery, the elaboration of private law rules for transactions which can be agreed outside the context of national contract law, and so forth.[113] This work proceeds both as harmonization among industrialized economies and export of private law machinery to the periphery. We find many technocratically inclined comparativists at the forefront of efforts to

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113. See, for instance, the contract law unification work of the Commission on European Contract Law, or work on international commercial arbitration and party autonomy by such writers as René David and Arthur von Mehren. *See* THE PRINCIPLES OF EUROPEAN CONTRACT LAW, PART I: PERFORMANCE, NON-PERFORMANCE AND REMEDIES (Ole Lando & Hugh Beale eds., 1995); RENÉ DAVID, L'ARBITRAGE DANS LE COMMERCE INTERNATIONAL (1982); von Mehren, *supra* note 17. Arthur von Mehren has written that

> [i]nternational commercial arbitration involves the constitution through an exercise of private autonomy of a private tribunal with its own procedural and even substantive rules of law. Acceptance of the principle of private autonomy does not ineluctably require that a legal order also accept privately created and sustained dispute-resolution mechanisms. Indeed, private ordering that occurs within the legal context of a politically and socially organized society differs in significant respects from private ordering that in a sense aspires to create its own legal order. Unlike the former, the latter displaces procedural and institutional arrangements designed to ensure the integrity of private ordering as a process. Moreover, this expression of private autonomy significantly reduces—or even removes—society's formal control over the development and adaptation of substantive rules and principles that regulate significant areas of economic intercourse.

Arthur Taylor von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence*, 46 LA. L. REV. 1045, 1045 (1986).

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build an interoperable private law system in post-socialist societies and developing nations seeking to participate in the neoliberal international market.

The fact that this regime differs from the traditional public law regime in this way, standing outside the project of sovereignty rather than among or above sovereigns, allows the comparativist the sense that all this regime-building activity can remain compatible with a distance from the messy business of government, if for no other reason than that private law is thought to be less political than public law. In a way, the whole point of constructing an international commercial legal system removed from particular national legal cultures is to reduce the risks posed for those who trade by the intrusion of politics, policy, and the whims of national government into the law governing their contracts. If an international commercial transaction can be legally constructed in a regime detached from local legal cultures, in a place without public policy, the risks from prejudiced national public policy, intercultural misunderstandings, national elite rent seeking, or biased judiciaries can be diminished.

This distance from government would be threatened were the same thing to be attempted through the sovereignty-based regimes of public international law.[114] In this vision, the liberation of commercial energy from politics and national cultural prejudice can only succeed in a government-free space, governed only by the wills of the parties, made comprehensible to one another through a set of standardized terms and education in a common commercial spirit. There is both institutional and ideological work here for the comparativist. On the one hand, the development of a system of rules which can be communicated and administered by commercial actors without the engagement of governments is an elaborate governance project. On the other, it takes continual work to define the allocative consequences of such a scheme of rules as in some sense not political.[115]

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114. *See* Wilhelm Roepke, *Economic Order and International Law*, 86 REC. DES COURS 203 (1954).

115. Comparativists often claim, quite explicitly, that private law and their engagement with it, whether in the register of understanding or harmonization, exist in a zone insulated from politics. The Glendon casebook provides a good example. The book's brief history of the Civil Law (chapter 1) identifies private law with endurance, continuity, stability, and universality, and public law with politics, discontinuity, particularity, and nationalism. *See* GLENDON ET AL., *supra* note 8, at 44–64. This image rests on an assumption that the social needs served by private law know no geography or history, while the conditions of government are changeable; this made it possible for Roman private law to be received while Roman public law had little

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The professional identity of the comparativist is suited to both the institutional and ideological projects. To the extent a comparativist's knowledge of local legal cultures has been hard won precisely by foregoing his ambitions to governance, to subjectivity, to policy in favor of a scholarly neutrality, he seems a perfect fit for the development of an international private law regime outside both local culture and political choice. At the same time, the scholarly projects of comparativism are often suited to the ideological project of casting international private law rules as apolitical. Arguing that legal institutions arise out of ad hoc borrowings, musings by autonomous legal professionals, a universal functional pragmatics, or simply by accident, is another way of saying they do not arise from (or carry forward) particular political choices.[116] In this sense, the

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role to play in the public law of the evolving nation state. *See id.* at 53. It also allows the authors to explain the gradual displacement of private law by public law in twentieth- century civil law systems as the result of changes in the political sphere, while still retaining the unchanging core of private law (persons, property, and obligation) as the heart of civil law legal systems and the focus of comparative research. *See id.* at 61–62. By this strategy, even while acknowledging the interpenetration of the private and public spheres (for example, the discussion of the Code Napoleon's ideological and constitutional functions, *see id.* at 53), the authors are able to isolate private law, continuity, and universality from politics, instability, and particularity.

A second example is the prominent Italian comparativist, Rodolfo Sacco. For all his sophistication about the interpenetration of law and politics, Sacco makes his own contribution to comparative law's general sense that the core of private law is apolitical. In responding to the Marxist critique of law as mere expression of the material relations of production, Sacco protests that "many legal rules survive revolutions precisely because they do not represent any value, do not correspond to any ideology, are foreign to any moral system and respond to an elementary necessity of social organization," and that "[t]he choice of class, ideology and value do not free the society from the organizational necessities that stand over it and do not influence its choice of one solution or another." Sacco, *Legal Formants (Part II)*, *supra* note 9, at 392–93. Sacco does not restrict this sort of reasoning to bare organizational necessities such as choosing a side of the road to drive on; he goes on to argue that most of private law is politically neutral, and that this neutrality explains both the similarities and differences between legal systems.

> There are, indeed, legal morphemes which immediately reflect class interest, or, in general, a political decision based on interests or values. An example would be the nationalization of the ownership of the industrial means of production. Other legal morphemes are neutral with regard to class interest. Nearly all the law with which we are familiar falls into that category. The neutrality of these morphemes explains the survival of Roman rules and institutions in feudal, free market and socialist law. . . . Conversely, the neutrality of legal morphemes explains why societies with a similar economic base can have rules and institutions that are irreducibly different in the way that certain common law institutions are irreducibly different from those of the civil law.

Id. at 393–94.

116. Comparativists who write about the development of law as the result of

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comparativist's theoretical or historical work supports the claim that technocratic activities on behalf of a universal private law remain detached from governance. This apparent detachment in turn reinforces the apolitical tenor of the private law which emanates from comparativist projects. We do not expect international contract law by and large to involve political choices, in part because it has been put together by comparativist intellectuals far removed from the political.

For all this apparent distance from the regimes of public international law, as it turns out, the international private law regime elaborated by comparativists has come to resemble quite closely the overtly governmental structures developed by public law internationalists. Public international law governance is also a relatively dispassionate affair, in part because so much of international public law, its horizontal, contractual sensibility, has been developed by analogy to private law. The subtlety of comparative law's relation to governance, and of public international law's relation to culture, are underscored by the observation that the very legal categories that make up the core of comparative law's "private law" self-image also

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borrowings and autonomous professional musings characterize these processes, either implicitly or explicitly, as apolitical. *See, e.g.*, Watson, *supra* note 89, at 1151–57 (emphasizing power and autonomy of legal culture); WATSON, *supra* note 61 (characterizing Western legal development as primarily the product of ad hoc borrowing and adaptation); Sacco, *Legal Formants (Part II)*, *supra* note 9, at 394–98 (describing change in legal formants as primarily a matter of borrowing and imitation by legislators, scholars, and judges); von Mehren, *supra* note 17, at 44–45 (characterizing the development of civil law as the product of generations of scholars, and the common law as a product of a strong and cohesive legal profession).

Arguing that law responds to universal functional needs usually also implies that legal institutions are (more or less) apolitical, and many functionalist comparativists make this claim explicitly. *See, e.g.*, ZWEIGERT & KÖTZ, *supra* note 8, at 36 (arguing that so long as we stick to relatively "unpolitical" parts of private law—avoiding politicized areas such as family and succession, "we find that as a general rule developed nations answer the needs of legal business in the same or a very similar way"). Jonathan Hill explains this in the following way:

> The comparatist is a mechanic, who has the job of finding the parts which will make the engine run more smoothly. Accordingly, proposals for reform either operate purely on the technical level—offering a simpler or more elegant way of achieving the same practical solution to a problem—or involve only tinkering with relatively minor points of detail. As a result of limiting the scope of their inquiry to narrow and often very tortuous issues, . . . comparatists see their task as being essentially unpolitical, or neutral.

Hill, *supra* note 8, at 106–07 (citations omitted). In Hill's view, this apolitical self-image has distinct political implications: because functionalists focus on discovering technical solutions that are the best "here and now for national society as it is," they "almost inevitably reach conclusions which are conservative." *Id.* at 106.

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make up the core of public international law's "public" self-image. The central concerns of comparative law are the three categories of personal status, property, and obligations that are thought to make up the essential core of private law. These three categories also form the core of the modern public international law procedural regime: persons (recognition doctrine, subjects of international law); property (sovereignty, territoriality); and obligations (state responsibility). What differentiates the two is that comparativists consider these categories to constitute a quintessentially private form of ordering, while public internationalists consider them to constitute a quintessentially public order. Both see them as the basic building blocks of order in a community of actors conceived as atomistic individuals.[117] In even the most positivist century, most careful to root international government in sovereign consent, the sources of public law have always included, alongside treaties and custom, "general principles" of law derived from comparative study of the legal cultures of "civilized" societies.[118] Comparativists have always played a role in this particular corner of international government.[119] In the last decades, moreover, public international law

117. For standard stories of the private law analogy in public international law, see, for example, HOLLAND, STUDIES IN INTERNATIONAL LAW 152 (1898) (describing law of nations as "private law 'writ large'"), and SIR HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1927).

118. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, § 1(c), which directs the court to apply "the general principles of law recognized by civilized nations."

119. Interestingly, some comparativists propose criteria for recognizing such general principles that reflect their own disciplinary commitment to party autonomy or functional pragmatics, while simultaneously distancing themselves from the governance projects of public international law. Arthur von Mehren, for instance, has advocated using "general principles of law" as a source of a "denationalized" private law in the service of party autonomy, particularly in order to remove investment disputes from the messy sphere of (host country) politics. *See* von Mehren, *supra* note 64, at 480. And Zweigert and Kötz, reinterpreting the public internationalist's category of "general principles" to serve their aggressive functionalist agenda, write:

> At first sight there is little in common between comparative law and *public international law*, for public international law, or the law of nations, is essentially a supranational and global system of law. Yet comparative law is essential to the understanding of the "general principles of law recognized by civilized nations" . . . whether this means principles of law accepted by all nations without exception, which would only include a few trivial truisms, or rather the principles of law accepted by a large majority of nations. The recognition of such general principles is rendered more difficult by the basic differences of attitude between the capitalist countries of the West and the socialist countries of the East on the one hand, and between the developed and developing nations of North and South on the other. Now one of the aims of comparative law is to discover which solution of a problem is best, and perhaps one could include as a "general principle of law" the solu-

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has become less preoccupied with deference to the political wishes of actual sovereigns and more attuned to broader interpretation of the rules idealized sovereigns or "the state system" requires. International law has become ever more procedural, ever less committed to particular substantive outcomes while pursuing construction of one or another general international regime, and more willing to embrace the disaggregated institutions of a fragmented state in a broad terrain of international, or transnational "civil society."[120] All this has taken the public international lawyer ever further towards a cosmopolitan disengagement from the overtly political as a self-conscious strategy of regime building. In a sense, the therapist has become the model for photographic interactions with the client. The interesting point is that the same rather technocratic structures and professional styles which seem savvy strategies of international governance in the hands of the most advanced public international lawyer continue to present as escapes from the political in the hands of comparativists and private international law scholars.

One can imagine tracing this comparativist involvement with governance in a variety of ways, borrowing from work on the politics of private law in other fields. Mitch Lasser's work reinterpreting the relationship between civil and common law judicial mechanisms to foreground the presence in each of political choice represents one such effort.[121] We might look as well at Joel Paul's work on the politics of comity doctrine and choice of law, Jean Manas, Crystal Nix, and Robert O'Malley's work on the images of national identity reinforced by judicial interpretation of doctrines concerning state responsibility and evaluation of national assertions of jurisdiction, or Günter Frankenberg's study of the range of German national identities expressed by the law on citizenship, asylum, and refugees.[122] One might also directly engage the comparativist's claims

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tion of a particular problem which emerges from a proper evaluation of the material under comparison as being the best.

ZWEIGERT & KÖTZ, *supra* note 8, at 7–8.

120. *See, e.g.*, CHAYES & CHAYES, *supra* note 5; Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Slaughter, *supra* note 40.

121. *See* Lasser, *supra* note 1 (comparing treatment of "policy issues" in French civil law and American common-law systems). Lasser argues that French legal writers present two versions of their method for explaining and justifying decisions. Officially, outcomes are ineluctably compelled by texts, whereas unofficially they emerge from a situational calculus of equities and utilities. American legal writers deploy both methods without segregation, but present them as compatible. Writers in both systems evade the problem of the apparently contradictory or at least incommensurable character of the methods.

122. *See* Paul, *Comity*, *supra* note 58, at 54–77 (discussing justifications of comity

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about private international governance, as in Amr Shalakany's ongoing work on commercial arbitration.[123] Shalakany argues that the problem with international commercial arbitration is not that the private international regime is "biased" against the third world—that, in effect, comparativists are politically uncongenial to the political interests of third world states. In fact, Shalakany argues, one often finds the contrary, and one should take the comparativist at his word when he eschews direct participation in governance. Rather, the difficulty is the acceptance by both international comparativists and their third-world critics of the apolitical structure of international private law as a whole, which facilitates and disguises a disestablishment of the possibility for public policy.

This ideological role is reassuring not only to the comparativist extending the ambit of international private law. It also reassures about the capacity of more public internationalist regulation by setting a limit on the ambit of the private sphere. Across many cultures, private law rules have developed according to their own logic, in the face of numerous interventionist initiatives and divergent public styles. One need not worry that the ecology partisans or the human rights fanatics will screw up your culture or disable your participation in the global market. Private order can be build outside all that, and culture is more resilient than that—take heart in the gap between law in the books and law in action.

3. Defending the Relative Autonomy of Law

The third significant way in which comparative law scholars participate in governance, across a range of political positions, is by engaging in a broad polemic about the nature of law and its relationship to society. A great deal of what many legal scholars write about particular legal subjects is also, if not primarily, intended as a contribution to ongoing scholarly debates about what have become classic questions of jurisprudence—what is law, how does law relate to society, and so forth. The importance of such debates for governance is hard to measure, although it is clear that participants

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and explaining how U.S. courts invoke county as "bridge" and as "wall"); Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273 (1990); Jean Manas, *Bad Citizens: The Non-Assimilating Immigrant and the Xenophobic Native*, AM. SOC'Y INT'L L. PROC. 1995; Günter Frankenberg, *The Alchemy of Law and Strangeness: The Stranger as a Juridical Construction*, 19 RECHT EN KRITIEK 362 (1993).

123. Amr Shalakany, Disempowering the National: The Contribution of International Commercial Arbitration (1996) (unpublished LL.M thesis, Harvard Law School) (on file with author).

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seem convinced that there is much at stake politically in their discussion about, say, the autonomy of judges. In particular, much American legal scholarship makes an argument for one or another version of the claim that law is an autonomous social institution and value system, and at the same time is able to reflect and affect other cultural or political values and institutions.

It is easy to see that such an argument might play an ideological role in particular instances, persuading the reader that this or that rule or social fact or political initiative is or is not part of the law, that this or that governmental initiative is or is not political rather than legal. It is also possible to imagine academic work of this sort having a more general political effect, both ideologically and psychologically. Perhaps in a small way, legal articles devoted to demonstrating the quasi-autonomous nature of law help to stabilize, defend, or explain the role of legal officials who might otherwise seem unaccountable. They might help persuade that although law is generally pragmatically responsive to social needs, it remains amenable to a kind of internal reason different from the purely political, available only to experts. To the extent we are able to credit this scholarly activity with a broader social or political role, reassuring an elite about the strengths and docility of law, legitimating the work of judges or legal scholars, justifying or obscuring or apologizing for aspects of social life which seem determined by legal rules, making aspects of law seem more or less integrated with or entailed by one another, making one or another aspect of law or social life seem easier or harder to change, this is governance work in which comparativists also participate.

A great deal of comparativist writing seeks to use the results of a comparative investigation to support an argument about the relative autonomy of law in ways which we can instantly recognize from scholarship in other fields.[124] Study of foreign legal cultures is frequently deployed to substantiate arguments concerning the ability of judges to fill gaps in legislation without themselves legislating, or

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124. Wieacker's concept of "legalism" encapsulates the idea of relative autonomy of law in a nutshell: "the need to base decisions about social relationships and conflicts on a general rule of law, whose validity and acceptance does not depend on any extrinsic (moral, social, or political) value or purpose." Wieacker, *supra* note 12. Harold Berman disaggregates the notion of relative autonomy into several elements all of which he identifies as fundamental characteristics of the Western legal tradition: the sharp distinction between law and other institutions (religion, politics, morality, custom), the existence of a separate legal profession to operate legal institutions, a unique education for legal specialists, the existence within the law of a meta-law or legal science, the idea of law as a coherent, integrated system, and the supremacy of law over political authorities. BERMAN, *supra* note 92, at 7–10.

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the ability of harmonizers to have references to a body of rules which have developed accidentally, have been exported and borrowed by experts without reference to their political redistributive consequences across radically different social situations or the extent to which law can retain its integrity in the face of social repudiation or export to more primitive social situations. Of course, legal scholars often turn to other disciplines to shore up their claims about the nature of law. International lawyers have consistently deployed anthropology, for example, in arguments for the legality of international law, comparing the international system with other "primitive" legal cultures which are decentralized and lack formal legislative or judicial institutions. Anthropology has also been deployed to argue for the inevitability of an evolutionary move toward a more complete international legal system.[125] The challenge is to explain in more concrete terms the ideological role such academic argument might in fact play in governance.

One effort in that direction is Jorge Esquirol's ongoing work on images of Latin American law in the comparative tradition.[126] In reading comparative scholarship to learn about Latin American law, Esquirol encountered two quite different images of Latin America. While comparativists interested in the technocratic project of development or modernization stress the illiberality of Latin American society, those whom I would term culture vultures stress rather Latin America's participation in the European legal family. Esquirol takes these two conclusions as windows on the ideological projects of particular comparativists. He reads the exemplary French comparativist René David as motivated by an ideological ambition to demonstrate the organic relationship between European society and its law, alongside the autonomy of the liberal Latin American jurist resisting, on behalf of a European legal culture, illiberal political and social conditions. Esquirol suggests that although David's formulation may well have had a self-fulfilling impact on some Latin American jurists, David's picture is a partial one, foregrounding those elements of Latin legal culture which make out the case for its European affinities in a way which suggests an ideological project broader than description. Esquirol speculates that this comparativist project may have an ideological effect both in the French legal academy reinforcing David's polemic for a historical approach to law which would be neither nationalist nor Marxist,

125. *See, e.g.*, Riles, *supra* note 49 (discussing historical encounter between law and anthropology which foregrounds this mutual reliance from Leech and Maine through legal process school).

126. *See* Esquirol, *supra* note 1.

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and in the Latin American academy, reinforcing the autonomy, prestige and antidemocratic leanings of some Latin American jurists. The result is a defense of law as organically connected to society in Europe and to a particular class in Latin America. Ironically, these ideological effects are reinforced rather than questioned by comparativists more directly involved in Latin American modernization and development who are usually far to the left of David's European liberalism and may be quite critical of the legal elites David aims to reinforce. Although these scholars focus on the social rather than the legal side of the equation, they often reinforce the ideological construct of a Latin American law at odds with an illiberal society, as if the most significant aspects of legal culture and social/political culture on the continent could be captured in two such general and quasi-autonomous identities.

The argument, however, is not that these images are or are not correct. The argument is that they are partial and tendentious or motivated—the decision to foreground this set of relations and cultural identities has, however modest, a political or ideological effect, making some development strategies seem available, others not, strengthening the hand of some jurists and excluding others. The argument is not that comparative work might better be conducted purged of such jurisprudential agendas, more fully suppressing the subjectivity of the comparativist. Rather, the suggestion is that if comparativists with great self-reserve and restraint about their role in governance are pursuing ideological projects of this sort, it might be possible to imagine an altogether more political conception of the comparativist endeavor.

Marie-Claire Belleau's comparative reading of sociologically oriented French and Quebecois legal scholars pursues an overtly ideological project of precisely this sort.[127] She reads with an explicit determination to trace the invention and loss of a critical jurisprudential tradition which would have facilitated understanding the civil law as a social/political institution in much the same vein proposed by American legal realists. In this, her project shares a great deal with Mitch Lasser's effort to uncover the presence of

127. *See* Belleau, *supra* note 1. Marie-Claire Belleau provides an interpretation on the turn of the century French "free law" school of legal theory. She explicates their critique of what Lasser calls the official version of legal reasoning, and shows how it differed from the much more developed critiques the American legal realists produced—partly on the basis of French sources—in the next generation. She suggests that important differences between French and American legal culture stem from the truncation of the French critical tradition and its eventual coaptation by the mainstream.

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"policy" arguments in the French judicial process which would parallel the pragmatic consciousness often visible in American judicial opinions.[128] These are both political projects of critique explicitly launched as comparisons—one point of their work is that this makes them no more polemical or tarnished by participation in the politics of governance than the comparativist classics.

V. A PARTNERSHIP OF CULTURE AND GOVERNANCE

There is an odd difference between scholars of international law and comparative law. Internationalists seem comfortable with power and uncomfortable with culture, while comparativists are eager for cultural understanding and wary of involvement with governance. Thus, as the internationalist Wolfgang Friedman states:

> To confuse policies born of changing positions of interest with religious, cultural, or other values inherent in the national character or the culture pattern of a people, can only lead to a grave distortion of the real problems of contemporary international politics and law. Just as in the Western world, the relative positions of Britain, France and the United States, and other countries have changed, with the change in their political and economic status, so the positions of the presently underdeveloped countries will be affected by their development.[129]

This view was picked up by scholars from the periphery as well. Take Anand, who comments:

> In fact the attitudes of the Western countries, as well as those of the Asian and African nations, whether toward the traditional principles of customary law, international organisations, or newly developing areas of international law are determined, as always, by their views of their interests. It is this conflict of interests of the newly independent States and the Western Powers, rather than differences in their cultures and religions, which has affected the course of international law at the present juncture.[130]

In comparative law, it is striking how firmly scholars introduce their work by disclaiming any but an accidental use value—their

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128. *See* Lasser, *supra* note 1.

129. Wolfgang Friedmann, *The Position of the Underdeveloped Countries and the Universality of International Law*, 2 INT'L L. BULL. 5, 9–10 (1963); *see also* Wolfgang Friedmann, *The Changing Dimensions of International Law*, 62 COLUM. L. REV. 1147, 1151 (1962) (restating Friedmann's position); Stone, *A Common Law for Mankind?*, 1 INT'L STUD. 430 (1955–56).

130. R.P. ANAND, *Attitude of the Asian-African States Toward Certain Problems of International Law, in* THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW 5, 17 (Snyder & Sathirathai eds., 1987).

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goal is understanding or contributing to a broadly humanist understanding of a universal phenomenon called "law." Glendon, Gordon, and Osakwe describe the "aims and uses of comparative law" in the introduction to their casebook this way:

> In a world where national and cultural "difference" is often seen as posing a formidable challenge, comparatists hold up a view of diversity as an invitation, an opportunity, and a crucible of creativity . . . comparatists are witnesses to the joys and discoveries awaiting those who make the effort to enter imaginatively into another mental framework. . . . Among the aims of comparative law, we would put first the pursuit of knowledge as an end in itself: comparative law responds to that characteristic of the human species which is curious about the world and wants to understand it.[131]

The knowledge thereby gained may turn out to be useful, but for Glendon et al. the various possible "practical applications" of comparative law are by-products, not goals. For the comparativist, practical matters are significant as facts against which to test evolving knowledge.

> The only harm comes if one forgets that the practical aims just mentioned are furthered by serious pursuit of scholarly objectives, and that scholarly exercises are apt to prove sterile if they are carried on without close attention to the way law operates in the rough and tumble of daily life. The fact is that, in law as elsewhere, theory and practice are like the two blades of a scissors, complementary and indispensable to one another. The best practical work is grounded in theoretical understanding; the soundest theory emerges from constant testing against practical knowhow and experience.[132]

At the same time, international lawyers have a quite complex and engaged relationship with matters of culture. Unpacking that relationship has been helpful in illuminating their governance strategies. It is precisely by eschewing involvement with matters of culture, which can be kept below the line of sovereignty, and foreswearing any particular culture of their own, that international lawyers have sought to persuade sovereigns to submit to their rule. We might return to the story of Uncle Chuck and Aunt Betty for a moment, for the internationalist is much like a photographer. The international legal order, or process, presents itself as nothing more than the normative restatement of the wills, claims, and commitments of sovereigns, confirming, enshrining, recognizing sovereigns

131. GLENDON ET AL., *supra* note 8, at 8.
132. *Id.* at 9.

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as sovereign, and registering their prerogatives. .

But the internationalist is not simply content to wait and see whether anyone seeks his services—he aspires to build the international order, to induce sovereign participation, thereby assisting the hand of evolution in advancing international society. He can do this in only two ways: patiently waiting by the lakeside for sovereigns who might stray before his camera or by advertising the perfection with which he mirrors the sovereign's will and facilitates the sovereign's desire. Aunt Betty might be stalked or wooed. The international lawyer governs by flattery of the king, appealing to his narcissism, gazing upon the sovereign as a woman. But there the story must stop, with a gaze. Betty and the photographer must somehow be frozen in this pre-Oedipal moment. Neither Chuck, nor Betty, nor the photographer can think the next step, can consummate a relationship beyond an endless process of seduction and photography.

And it is here that the internationalist begins to play a role not simply in governance, but in culture, stabilizing the innocence of the photographic moment by strengthening the sovereign as a veil between the culture and politics within society and the acts, demands and forms of interest in international law. The camera images only a surface, the photographer is simply its servant. Betty and Chuck are people, with passions, relationships, and engagements; the photographer is merely a functionary. However uneasy about his power and desire, the internationalist can now catch his pleasures obliquely, safely, at once masochist and voyeur. The internationalist persuades sovereigns to come to his studio to be photographed, to see themselves in his mirror, and then constructs a regime consonant with his promises, for which his scholarly texts work less as polemics or proposals or ads than as works of justification, legitimation, or apology. By describing what he wishes to make true, by treating contestable matters as settled fact, by remembering his history as progress, the internationalist contributes not only to governance but also to culture, remaking culture as local and governance as global, rearranging the international public space, at least in the legal imagination, as distanced from messy matters of value or dispute, a technical terrain of objective procedures and consensual rules. For whatever reasons, moreover, the internationalist has been astoundingly successful, as a matter of both culture and governance—we all live, to some extent, in the international as a legal concept.[133]

133. *Cf.* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057

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The comparativist's focus on culture at first suggests a distance from such ideological and institutional projects of governance. But the comparativist's modest posture as expert or erudite facilitates a remarkably parallel set of ideological and psychological relations to problems of power, reinforcing ideas about culture, about the posture of rulership, and about the role of law which are familiar from internationalism. In the legal academy, if international law is the department of global governance, comparativists serve as a department of diversity. In differentiating themselves from governance by engaging with culture while asserting that culture can be understood without being ruled, comparativists reinforce the internationalist's claim to govern from a space beyond culture. By dividing the assimilable from the exotic, the comparativist stabilizes the boundaries between center and periphery while reinforcing the claim that those boundaries are matters of culture and history rather than political products of an ongoing international regime. At the same time, comparativists construct and defend a cosmopolitan private law regime which presents itself as detached from both cultural and governmental pressures, facilitative of commerce, and wrought by a combination of technocratic consensus, historical accident, and deracinated expertise. Comparativists participate in the academy's broad ideological project to defend the integrity, autonomy, and pragmatic capacity of the international legal order to remain above the specifics of political dispute, and precisely thereby to provide a rational and pragmatic machinery for practical government.

By rendering plausible a project of understanding divorced from management, the comparativist contributes, in his small way, to a regime which separates problems of order among sovereigns from problems of understanding between cultures, a separation of government and culture as useful to the internationalist as to the local politician consolidating a domain of resistance to foreign rule. The comparativist, in this sense, works as ideologist for the global system of government, reinforcing the legitimacy of local potentates and cosmopolitan technocrats alike. By foregrounding legal cultures in historical, even familial relations with one another, the comparativist reinforces the artificiality and deracinated character of the international legal regime, both public and private. Together, the comparativist and internationalist, a therapist and a mirror, form a partnership to imagine and then create a geography of global governance and local culture. We might begin to unravel their work

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by reading global governance as a local culture, and the localization of culture as a governance project common to international and comparative law.

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