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Wigmore's Treasure Box: Comparative Law in the Era of Information

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The treasure box was a favorite object of enjoyment of the Chinese emperors of the Ming and Ch'ing Dynasty. It was a small ornate box that the emperor could hold in his hand, and which sometimes contained as many as fifty tiny drawers or compartments, each revealing a different object or artifact, "real" or replica—a tiny bronze antiquity, a Neolithic jade pin, a miniature scroll of calligraphy, a piece of a French tea cup. Some of these objects replicated, in miniature, objects many times their size, yet they sat side by side in the box with other tiny objects of their actual scale. Put together, the collection represented the far ends of the empire, and as he played with the box, opening and closing the hidden compartments to reveal the objects inside, the Emperor came to feel that he held the history of the world in his hand. Although these objects were known as "cultural playthings" (wan wen)—objects of entertainment—the instrumental consequences of the collection could not have been more worldly.[1]

I. INTRODUCTION

The last five years have witnessed a resurgence of interest in comparative law. Constitutional law scholars and others whom comparativists woefully imagine as the princes of the legal academy have turned with newfound enthusiasm to comparative cases and materials.[2]

* Assistant Professor, Northwestern University School of Law & Research Fellow, American Bar Foundation. This essay owes its inception to Marilyn Strathern's work on the character of context and scale and to Hiro Miyazaki for introducing me to the wonders of treasure boxes. For their comments and assistance of many kinds, I warmly thank William Alford, Leigh Bienen, Cynthia Bowman, Don Brenneis, Paolo Wright-Carozza, Hanoch Dagan, Gunther Frankenberg, David Gerber, Bryant Garth, Aeyal Gross, Fred Inbau, Jim Lindgren, Menachem Mautner, Kunal Parker, Ronen Shamir, Mark Tushnet, Frank Upham and participants in the Harvard Law School European Law Research Center/Harvard Center for Literary and Cultural Studies research seminar, the Northwestern University School of Law faculty work-in-progress workshop and the Buchmann Faculty of Law, Tel Aviv University, at which this paper was presented. For superb research assistance, I thank Jane Campion and Karin Weiner.

1. *See* WEN C. FONG & JAMES C.Y. WATT, POSSESSING THE PAST: TREASURES FROM THE NATIONAL PALACE MUSEUM, TAIPEI 552–53 (1996).

2. *See, e.g.*, Mark Tushnet, *Learning from Our Children: Exploring the Possibilities of Comparative Constitutional Law*, YALE L.J. (forthcoming 1998); J.M. Balkin & Sanford Levinson, *Commentary: The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Jeremy Waldron, *Dirty Little Secret*, 98 COLUM. L. REV. 510 (1998); Tom W. Merrill, *A New Age of Federalism?*, 1 THE GREEN BAG 153 (1998); Rick Pildes & Sam Issacharoff, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Bruce Ackerman, *The Rise of World Constitutionalism*,

The American courts, likewise, have begun to consider the value of comparative materials in decision-making.[3] Finally, a new generation of legal scholars who a decade ago might have been drawn to jurisprudence, interdisciplinary studies of the law, or constitutional law, and who are outsiders to the organized community of comparative law scholars, are enthusiastically claiming comparative law for themselves.[4]

One source of newfound interest in comparative law from outside the traditional sub-discipline is usually understood to be the new, or at least newly realized, condition of so-called globalization.[5] In recent years, the subject of the "transnational," or "global," imagined as a new and uncharted territory for legal scholarship, has become one of ubiquitous fascination.[6] Globalization, in the popular view, is a condition of interconnected, overlapping legal regimes, a proliferation of information technologies which mediates and engineers an *awareness* of this condition. For some, the moment signals the triumph of the market,[7]

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83 VA. L. REV. 771 (1997); MARK TUSHNET, COMPARATIVE LAW CASEBOOK (1999). Some further statistical evidence of this trend may be found in the considerable increase from 1987 to 1997 in the number of academics listed in the American Association of Law Schools directory as specialists in "comparative law" from 389 to 508.

3. *See, e.g.*, Printz v. United States, 117 S. Ct. 2365, (Breyer, J., dissenting) (comparing the problems of federalism raised by the Brady Handgun Violence Prevention Act to those confronted by European states) *Cf.* Roger Miner, *The Reception of Foreign Law in U.S. Federal Courts*, 43 AM. J. COMP. L. 581 (1985) (critiquing his colleagues on the Second Circuit bench and throughout the federal judiciary for their irrational fear of foreign law); Richard J. Cummins, *International Practice and Comparative Legal Studies*, 35 J. LEGAL ED. 421 (1985) (advocating the centrality of comparative law in legal education that aims to prepare students for work as corporate counsel or as lawyers in firms representing large corporate clients).

In a particularly high-profile symbol of this new interest in comparative law, in the summer of 1998, four U.S. Supreme Court Justices—Justices O'Connor, Kennedy, Ginsburg and Breyer—traveled to Europe for discussions with judges of the constitutional courts of France and Germany, and of the European Court of Justice and the European Court of Human Rights. At a press conference at the close of the tour, Justice O'Connor and Justice Breyer indicated that they might cite European court opinions in the future. Tony Mauro, *Calling a Bad Day in Court Malpractice?*, LEGAL TIMES, July 20, 1998, at 7.

4. *See, e.g.*, Mitchel Lasser, *Judicial (Self)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L. J. 1325 (1995); Marie-Claire Belleau, *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379 (1997).

5. For example, Ugo Mattei asserts, "In the world of legal globalization, transfers of knowledge are needed not only within different areas of a given legal system but also between different legal systems" in order to learn from each other. Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 6 (1997). A LEXIS search reveals that from 1990 to 1996 the number of law review articles incorporating the term 'global' increased from 250 to 3129. Interestingly, this increase is paralleled by that in the number of articles using the term 'comparative law,' which rose from 57 in 1990 to 224 in 1996.

6. The founding of the Indiana Journal of Global Legal Studies is but one particularly explicit marker of this trend. *See generally* 3 IND. J. GLOBAL LEGAL STUD. (1995).

7. *See, e.g.*, Gordon R. Walker & Mark A. Fox, *Globalization: An Analytical Framework*, 3 IND. J. GLOBAL LEGAL STUD. 375, 380 (1996) (identifying global capital markets as the "paradigm example of globalization" and distinguishing "globalization" from "internationalization" on grounds that "globalization denotes a process of *denationalization*, whereas internationalization refers to the cooperative activities of *national* actors").

of private legal solutions over public ones,[8] of trade and finance over states and constitutional rights.[9] For others, it is apprehended mainly in terms of interconnected legal regimes, the intensification of influence of liberal first world legal regimes on those of emerging states, and the rejuvenation of "law and development" work. The collective perception of the legal profession as increasingly "global" and of legal education as situated in a transnational educational and professional field is a powerful one.[10] When legal academics can agree about little else, they do agree that they are players in a global scene, whose theories and policy proposals are of global significance.

This moment of fascination with things global, and the demands that this creates in all aspects of legal scholarship and practice, calls for a reconsideration of the rules.[11] This would seem to be precisely the task of comparative law—hence the renewed interest in the field.[12] Comparative legal scholarship is thought to be sorely needed both as a tool for solving the new problems of globalization and because law seems to be the key to a wider understanding of global, transnational, or cross-cultural legal phenomena. Indeed, comparativists have been quick to embrace this somewhat amorphous but powerful rationale for their projects.

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8. *Cf.* David Kennedy, *Interdisciplinary Approaches to International Economic Law: 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, 671–716 (1995).

9. *See, e.g.*, SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION xi–xii (1995) ("The growth of a global economy in conjunction with the new telecommunications and computer networks that span the world has profoundly reconfigured institutions fundamental to processes of governance and accountability in the modern state. State sovereignty, nation-based citizenship, the institutional apparatus in charge of regulating the economy, such as central banks and monetary policies—all of these institutions are being destabilized and even transformed as a result of globalization and the new technologies."); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995); Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957 (1996).

10. On the notion of the "global law school," *see* John Edward Sexton, *The Global Law School Program at New York University*, 46 J. LEGAL EDUC. 329 (1996) (discussing the aim of New York University's new program in global legal studies as the creation of an international network of scholars and practitioners, and noting that one component of the curriculum includes the teaching of comparative legal systems in the native language of the country); David S. Clark, *Transnational Legal Practice: The Need for Global Law Schools*, 46 AM. J. COMP. L. 261, 261 (1998) (arguing that "the wheel of legal history has turned to the point where what it is common to law in general and the similarities among local laws are sufficiently important that it makes sense to recreate the truly global law school" and that "the United States is ideally situated as the locale for the first wave of these global law schools.").

11. *See, e.g.*, Paolo Wright-Carozza, *Organic Goods: Legal Understandings of Work, Parenthood, and Gender Equality in Comparative Perspective*, 81 CAL. L. REV. 531 (1993) (discussing debates over alternative conceptions of the relationship of gender, family, and work raised by the enactment of the Family and Medical Leave Act of 1993).

12. *See, e.g.*, COMPARATIVE COMPETITION POLICY: NATIONAL INSTITUTIONS IN A GLOBAL MARKET (G. Bruce Doern & Stephen Wilks eds., 1996).

Yet in another respect, the moment is likely to catch traditional comparative lawyers off guard. For decades, comparativists have watched interest in their scholarship wane to the point that one of the principal preoccupations of the field has become how to convince "mainstream" legal scholars of the value of their enterprise.[13] Meanwhile, a collective crisis of methodological confidence is something of a defining genre of comparative legal scholarship,[14] as each commentator outdoes the next with dire critiques of the field and timid solutions for its reconfiguration. Mary Ann Glendon has captured the moment in the following assessment:

> Why, if the benefits of comparative methods are so substantial and obvious, has comparative law remained a relative backwater in the twentieth-century legal world? No doubt there are several reasons, including language barriers and the great difficulty of achieving even minimal competence in another legal system while keeping up with developments in one's own. Circumstances in the United States, moreover, long made it easy for legal scholars to carry on many types of research without casting their gaze beyond national borders. In recent years, though, with unprecedented global interdependence, and with commerce and communication linking all regions of the earth, that posture has become increasingly untenable . . . . As we stand on the verge of this new era, however, it is not altogether clear what role comparative law will play in the legal science of the future.
> . . . . The comparative enterprise seems quaint and old-fashioned—except so far as foreign law knowledge can be deployed in the service of some immediate commercial or political objective. As for comparativists themselves, most would admit we are in something of an identity crisis.[15]

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13. *See, e.g.*, KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 21 (2d ed. 1987) ("[I]f comparative law, like legal history and sociology of law, were treated as an extra, suitable only for doctoral students and budding academics, the rest of legal education would be sadly impoverished: the law school would become a mere trade school, producing professionally competent technicians.").

14. William Ewald calls attention to this shared sense of methodological "malaise" and notes that "[c]omparative law . . . is said by its leading scholars to be superficial and unsystematic, dull and prone to error." *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1891 (1995). Schlesinger summarizes this dominant view when he asserts that "the taxonomic fundamentals of comparative law are still in their infancy." RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW 311 (5th ed. 1988). As he explains, "It is difficult to engage in an intellectual interchange involving a multilateral comparison of legal systems without being able to group the systems and to apply identifying labels to each group . . . . To date, unfortunately, these endeavours have produced little standardization and much controversy . . . . [E]ven granted the same purpose and scope of comparison—there is disagreement concerning the threshold problem of the criteria to be used." *Id.* at 310. *Cf.* Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L. F. 49 (1996); Mattei, *supra* note 5.

15. Mary A. Glendon, *General Report: Individualism and Communitarianism in Contemporary Legal*

The paradoxical effect of the turn toward globalization has been to ignite within the discipline a raging debate over purposes and methods. The field of comparative law is populated by three disparate groups of scholars: first, "traditional" comparative lawyers; second, specialists in particular bodies of non-Western law such as Japanese or Chinese law; and third, younger scholars working under the banner of so-called "new approaches." These three communities have understood themselves to have little in common methodologically or theoretically with one another, and until now have been content simply to ignore one another. The renewal of interest from outside the field has raised the stakes and prompted new questions about the relationship among these projects. Meanwhile, the "phenomenon" of globalization has brought new methodological challenges, for if there was one assumption shared among these disparate groups, it was that different legal systems could be taken as discrete subjects of analysis and entities for comparison. However, the perception that law is increasingly transnational, sparked by the expansion of private contractual law and of bodies of transnational law such as European Community Law, for example, as well as by the explosion of opportunities for American law professors to serve as consultants to emerging governments on the writing of laws and constitutions, has rendered the distance between legal systems less pronounced in the consciousness of most lawyers and legal academics.

Although each community of comparative lawyers might define the questions somewhat differently, a number of foci for debate emerge. First, there is a question of the scale of comparisons to be made—to what extent must comparativists take into account the many layers of "context" that seem to envelop the law—the institutions, ideals, social forms, culture, language, for example. And if the scale must be exceedingly "local" for scholarship to be meaningful, to what extent, then, can global comparisons be made? A second point of conversation concerns the status of non-European legal systems in comparative law. If, as most agree, European and American comparative law has been unduly focused on the comparison of Euro-American legal systems, how might we belatedly bring our understanding of Asian, African, and Islamic legal systems into the fold? And what are comparativists to make of the increasingly common forms of legality that are neither European nor Asian, but transnational in character? A third focus of conversation concerns the place of instrumentality in comparative law—what legal projects does the discipline serve and how do these instrumental goals relate to the discipline's theoretical objectives?

Systems: Tensions and Accommodations, 1993 BYU L. REV. 385, 386 (1993).

The moment is ripe for a return to comparison in legal scholarship. Indeed, one of the great strengths of comparative law is its unique equipment to critically evaluate the claims, strategies, and projects asserted in the guise of globalization. For reasons explained below, I believe that comparative law is poised to upstage interdisciplinary approaches to legal scholarship and jurisprudence as the theoretical engine of legal studies in an era of transnational legality. Like most comparative lawyers, moreover, I have my own thoughts on the sources of our methodological quagmires. The subject of the comparativist's tableau, as well as the canvas on which he or she paints, is very different than a generation ago. Globalization (interpreted throughout this Article as a discursive condition rather than an independent fact) brings with it a series of new topics, tools and terrain, new fertile ground for the comparativist to toil. It also brings calls for comparativists to "get with the program," to modernize, to privatize, to turn from the local legal systems to the global epistemes, or else watch the changes pass them by,[16] and comparativists will need to formulate a response—pragmatic and rhetorical—to this discourse. I will argue that in the aftermath of typologies of legal systems, the promises of interdisciplinarity, the quagmires of cultural context, and the critiques of poststructuralism, the new comparative law must take aim at a different kind of problem, with new questions and a renewed spirit of experimentation.

This Article, however, is the artifact of a different kind of comparison, a comparison between my own ideals and ambitions for the discipline and those of John Henry Wigmore, a scholar writing some one hundred years ago. Given the very novelty of the problem, as I have laid it out here—the changes in the world of comparative lawyers as much as in the world they study—a diversion into comparative law's almost forgotten pre-modernist past might seem an odd approach. The oddity is augmented by Wigmore's own anomalous status. By any standard, Wigmore is a canonical figure, credited by some for founding American comparative law,[17] but one whose work—some nine hundred articles and monographs in all[18]—seems tangential to all of the diverse concerns of comparative lawyers in the latter half of the twentieth century.[19] Wigmore's writings, it should be noted, do little to put

16. *See, e.g.*, Bryant Garth, *Comparative Law and the Legal Profession: Notes Toward a Reorientation of Research*, presentation at the Cornell Symposium on the Legal Profession (July 5, 1996).

17. *See* JEROME HALL, COMPARATIVE LAW AND SOCIAL THEORY 10 (1963) ("In the United States, although Kent and Story made use of foreign treatises in reaching their decisions, professional comparative law may be said to have begun with Wigmore's publication in 1897 of 'The Pledge-Idea: A Study of Comparative Legal Ideas.'").

18. *See* WILLIAM R. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER 279 (1977). *See also* Albert Kocourek & Kurt Schwerin, *John Henry Wigmore: An Annotated Bibliography*, 75 NW. U. L. REV. (Supp.) 19 (1981).

19. He is remembered more often for his contributions to the study of the law of evidence. *See,*

aside the sense of sheer absurdity that might accompany any attempt to reflect seriously on his contribution. The first line of the preface to his famous text *A Kaleidoscope of Justice* is only one of a myriad games he seems to play: "READER! This work is not offered to you as a piece of scientific research, but mainly as a book of informational entertainment."[20]

Like an exotic but now extinct legal system of the kind he delighted in writing about, then, John Henry Wigmore is something of a mystery, a towering but perplexing character. My own fascination with Wigmore's work has its roots in the way his scholarship stubbornly resisted my own efforts to "categorize" or even "contextualize" it, to cite two comparative moves.[21] Might the very puzzle he poses to the debates of our time, the discomfort his work suggests, paradoxically suggest a way forward? Perhaps some of his ideas, or at least the challenges he poses to comparativists, may serve as sources of inspiration for our current disciplinary conundrums.

In particular, I wish to focus on two distinct challenges raised by a contemporary re-reading of Wigmore's work in comparative law. The first concerns the extent and kind of engagement with the world that we expect of our scholarship, and the breadth and scope of the world in which we imagine ourselves to be engaged. The second concerns the style, form, or techniques of representation we employ and the scope for experimentation with genres, materials, and methods of comparison.

It is important, at the outset, to be clear about the nature and goals of my comparative experiment. I am not suggesting that we recuperate Wigmore's methods or conclusions as a program for the future. In fact, I am less interested in Wigmore's scholarship than in the very sense of confusion it is likely to generate among all of the communities of comparativists currently competing for the methodological soul of the discipline.[22] The confusion highlights the extent to which received knowledge about the discipline's methods and projects is shared among these competing communities.

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e.g., TERENCE ANDERSON & WILLIAM TWINING, ANALYSIS OF EVIDENCE: HOW TO DO THINGS WITH FACTS BASED ON WIGMORE'S SCIENCE OF JUDICIAL PROOF (1991); WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM & WIGMORE (1985). *See generally* JOHN H. WIGMORE, TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1904-05) (this treatise is one of a series on evidence bearing similar titles that continues until 1915); JOHN H. WIGMORE, A POCKET CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW (1910); JOHN H. WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF AS GIVEN BY LOGIC, PSYCHOLOGY, AND GENERAL EXPERIENCE, AND ILLUSTRATED JUDICIAL TRIALS (1913).

20. JOHN H. WIGMORE, A KALEIDOSCOPE OF JUSTICE at v (1941).

21. *See infra* sections of this Article entitled "Context" and "Categories" in Part II.

22. The startling assumption here is that what seems strange, comical, or absurd may tell us a great deal about what is so central to our received knowledge that it is beyond our faculties of observation and challenge. *See, e.g.*, MARY DOUGLAS, PURITY AND DANGER (1966); MICHEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE (1972).

One aspect of this received knowledge is the history of the discipline—a history predicated on a fundamental difference between the pre-modernist nineteenth century and the advent of modernism in the early twentieth century. In the nineteenth century, so the story goes, comparativists busied themselves with dubious and non-scientific typologies of the world's legal systems based on a crude evolutionary model of social and legal development, and they worked with little actual knowledge of the legal systems they studied.[23] During this period, some might add, comparative law served as the handmaiden of colonialism, as a grand producer of rationalizations for the expansion of Euro-American interests and law across the globe.[24] The methodological corollary was an excessively narrow definition of law—a limited conception of law as the edicts of legislatures or courts alone—which too often led to the conclusion that those who had no such institutions had no "law."

In the twentieth century, however, all this is understood to have changed. Comparative law became more "scientific" and abandoned its evolutionary framework in favor of a more functionalist understanding of law.[25] With functionalism came a new attention to "context," for if what mattered were the functions of legal rules, it would be important to understand the meaning of statutes or cases in the context of the institutional, economic and cultural pillars of each society. From this vantage point, then, the methodological debate in comparative law is simply a question of what and how much context we include, or what kind of scientific methods we choose.

What renders Wigmore interesting is his status as a figure who bridges this all-important shift from the nineteenth to the twentieth century. Wigmore's career as a scholar began in the late 1880s, and he published prolifically until his accidental death in 1943. The development of his scholarship tracks a course precisely the reverse of the accepted progress narrative of the discipline—at a time when, in our collective imagination, comparativists simply relied upon accounts of foreign laws from history books and reports from missionaries and travelers, Wigmore traveled to Japan, where he served for three years as the first full-time faculty member, in charge of all curriculum, at Keio University's newly founded law school.[26] During this period, he

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23. For example, ZWEIGERT & KÖTZ note that, "The founders of comparative legal ethnology, J.J. Backhofen (*Das Mutterrecht* (1861)) and Sir Henry Maine, had an aim rather different from that of true comparativists, namely to produce a general world history of law as part of a general history of civilization. At its outset legal ethnology rested on a specific belief . . . that mankind, with its common psyche, follows the same path of development in everything regardless of location or race." ZWEIGERT AND KÖTZ, *supra* note 13, at 9.

24. *See* M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS (1975).

25. *See, e.g.*, Max Rheinstein, *infra* note 44 and accompanying text.

26. Wigmore taught at Keio University from 1889 to 1892. *See* Jura Iwatani, *Wigmore no*

conducted extensive original archival and ethnological research in the customary law of Japan.[27] Paradoxically, toward the latter part of his career, when his friend Roscoe Pound and others heralded the new modernist genre of "scientific" scholarship in comparative law,[28] Wigmore turned away from the scientific ethos of scholarship that had animated his early career to experiment with other genres of scholarship altogether.

The significance of the comparison, then, lies in the way Wigmore's writings render explicit some of our assumptions about the discipline's history and thereby open them up for question. My premise is that this history is important not just for its own sake, but because it encapsulates the unspoken parameters of the field—the agreed bases which make possible methodological contention among competing communities of scholars in the first place. The corollary to this premise, developed further in the final Part of this Article, is that the rejuvenation of our discipline will require the rethinking of these implicit and agreed premises more so than the resolution of the explicit issues currently under contention.

My claim may seem quixotic. I will argue, contrary to the entire tradition of modernist comparative law, that what is needed in the era of globalization is *not* more "information" about other legal systems. Hence, I will take issue with the two principal rationales comparativists offer for their work—that the information they generate has instrumental uses and that the collection of information about foreign legal systems is valuable as an end in itself. Rather, I will argue that globalization is precisely a condition of information overload.

The contribution of comparative law emanates not from its pseudo-scientific, information-gathering pretenses. Rather, I will appeal to another inchoate but powerful tradition of comparative law. What comparativists share, as much as a body of knowledge, a set of methods or techniques, or even common research questions, is a *passion* for looking beyond, an *empathy* for differences but also for similarities, a *faith* in the self-transformative task of learning, and an interest in the *form* of knowledge itself. These are not qualities typically valued by modernist legal scholars, or indeed by modernist scholars of any kind, and comparativists have become skilled at emphasizing instead their scientific and instrumental aims. Yet if globalization, as I will claim, is

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Horitsu Gakko: Meiji Chuki Ichi Amerikajin Horitsuka no Kokoromi {Wigmore's Law School: An Attempt by an American Lawyer During the Mid-Meiji Period}, 69 HOGAKU KENKYU 175 (1996); *Northwestern's Wigmore Ranks as Dean of Legal Educators in Illinois*, 27 ILL. B.J. 67 (1938).

27. *See, e.g.*, MATERIALS FOR THE STUDY OF OLD JAPAN (JOHN H. WIGMORE ed., 1892); D.B. SIMMONS & JOHN H. WIGMORE, NOTES ON LAND TENURE AND LOCAL INSTITUTIONS IN OLD JAPAN (1891).

28. *See, e.g.*, Roscoe Pound, *What May We Expect From Comparative Law?*, 22 A.B.A. J. 56 (1936); Roscoe Pound, *The Place of Procedure in Modern Law*, 1 S.W.L.REV. 59 (1917).

actually a collective awareness that science and instrumentality have outdone themselves, the comparativist's "expertise" in passion and empathy has instrumental uses of its own. After all, is it a lack of knowledge or a crisis of faith that stands in the way of the harmonization of legal regimes, for example?

I proceed as follows: In Part II, I trace the differences and commonalities among three communities of comparativists writing today to show that the disparate methodological positions in comparative law today are renditions of a singular response to a classical modernist epistemological dilemma. In Part III, I formulate this dilemma as a problem of the scale of comparison, and consider its relationship to the phenomenon of globalization. In Part IV, I revisit these debates from the point of view of Wigmore's eclectic method to consider how comparative law as collection challenges our assumptions about the inherent problems in comparative law. In Part V, I propose an alternative formulation of the purposes, methods and subjects of comparative law.

II. COMPARATIVE LAW'S METHODOLOGIES

A. Three Communities

As noted in Part I, one of the features of this moment is the coexistence distinct of theoretical and methodological approaches within a singular disciplinary terrain—traditional approaches to comparative law, area studies, and "new" approaches—which, from the point of view of many of those who practice them, have little to say to one another. The renewed outside interest in the discipline, however, has prompted questions about the relationship among these methods, which in turn has moved disparate communities of comparativists from a peaceful state of mutual avoidance to direct confrontation.

One way of stating that these communities of scholars have little to say to one another—and it is a way suggested implicitly or explicitly by many who take two of the three positions—is that these are not alternatives but stages, innovations on one another, methodological moments, less momentous versions of the shift from the nineteenth to the twentieth century described above. In this view, the first position might be viewed by proponents of the second two as backward, a kind of scholarship that would have been erased from the map long ago were it not for the forgiving largesse of tenure, while both the first and second might be viewed in such terms by the third.

One objective of this Part is to open up this progressive account for query: The argument of this Part, in contrast, will be that the coexistence of three distinct communities of comparative lawyers corresponds to three possibilities or versions of a singular central methodological problem. Hence all three share more than they might wish to

acknowledge, and each might benefit more from engagement with the others.

I hope to show that each of the major communities of comparative law represents an alternative solution to one common problem, a problem that pervades what in Part III I will call modernist epistemology. The problem, broadly speaking, concerns the relationship between ideas and the world they represent, and takes one of two principal forms. The first manifestation, imagined by comparativists as primarily methodological, suggests a problem in the scale at which analysis should be done. The second, imagined as primarily procedural or instrumental, suggests a problem in when and how comparative law should engage with real world problems, politics or policy debates.

I will assign each of these three possibilities a somewhat caricatured methodological label. Although labels necessarily emphasize differences, we will see that in fact each group borrows continually from the methodologies of the others, and that in essence they cannot help but do so. I will call the three possibilities Categories, Context, and Discourse, and will survey the features of each in turn.

B. Categories

A first group of comparative lawyers is sometimes described by the rest as "mainstream" or "traditional." Its dominance of the field of comparative law is evidenced by the fact that all of the major casebooks and treatises in comparative law are authored by scholars writing within this tradition.[29] In the United States, the core group of scholars currently working under this banner corresponds roughly to member schools' representatives to the American Society of Comparative Law,[30] with many of its luminaries represented among the editors and authors of the *International Encyclopedia of Comparative Law*, a mammoth undertaking produced over a period of thirty years by the Max Planck Institute for Foreign and International Law in Hamburg, Germany. At present, as over the last several decades, this community has been led primarily by émigrés from Europe and their students, and these scholars have maintained close ties with their European counterparts throughout.[31] It is not surprising, therefore, that the work has

29. *See, e.g.*, SCHLESINGER, ET AL., *supra* note 14; KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW, v. 2 (Tony Weir trans., 1987). An equally important reason, however, is that the methodological and epistemological premises of the other schools of comparative law render the task of writing a general casebook a problematic and somewhat pointless enterprise. *See infra* notes 73–78 and accompanying text; and notes 90–97 and accompanying text.

30. The Society's members are law schools. At present, it has no individual members; however, each member school sends one or two delegates to the ASCL's annual meetings.

31. Noted European émigrés include Ernst Rabel, Rudolf Schlesinger, Mirjan Damaska, and Max Rheinstein. *See generally* Richard M. Buxbaum & Ugo A. Mattei, *Tribute to R.B. Schlesinger,*

focused almost exclusively on the comparison of American and European legal systems.[32] The questions of greatest interest to these scholars are, on the whole, questions of how norms are similar or different from one jurisdiction to another, how such norms are borrowed or transplanted, and how they are expressed in differing or similar kinds of rules.[33] How are the doctrines of contract law similar or different from one jurisdiction to another, for example?[34] What is the functional equivalent of a particular doctrine in another jurisdiction?[35]

Frustrated by their marginal status on American law faculties—the notion that "[l]ike a child in Victorian England, the comparativist on an American law faculty is expected to be seen but not heard,"[36] these scholars enumerate a number of instrumental purposes for their scholarship. They argue comparative law aids in the uses of foreign law in decision making,[37] in the harmonization of laws, and in local debates within each jurisdiction over the merits of particular legal reforms.[38] They also claim as their objective the elevation of the scientific caliber of legal debate as a whole. Zweigert and Kötz, for example, write of:

> a very simple consideration, that no study deserves the name of a science if it limits itself to phenomena arising within its national boundaries. For a long time lawyers were content to be insular in this sense, and to some extent they are so still. But such a position

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45 AM. J. COMP. L. 1 (1997).

32. There are, however, exceptions. Max Rheinstein wrote a number of articles about African law. *See, e.g.*, Max Rheinstein, *Problems of Law in the New Nations of Africa*, *in* OLD SOCIETIES AND NEW STATES: THE QUEST FOR MODERNITY IN ASIA AND AFRICA (Clifford Geertz ed., 1963); Max Rheinstein, *Law and Social Changes in Africa,* 1962 WASH. U. L.Q. 443 (1962). Likewise, after a lengthy debate, the *Encyclopedia* project was organized to include non-Western legal systems. *See* René David, *Introduction* to THE DIFFERENT CONCEPTIONS OF LAW, 1 INT'L ENCYCLOPEDIA OF COMP. L. 4 (René David ed., 1983).

33. *See, e.g.*, ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d. ed. 1993).

34. *See generally* ZWEIGERT & KÖTZ, *supra* note 13; FORMATION OF CONTRACTS (Rudolf Schlesinger ed., 1968); 7 INT'L ENCYCLOPEDIA OF COMP. L. (Arthur Von Mehren ed., 1976) (Contracts in General).

35. *See* ZWEIGERT & KÖTZ, *supra* note 13, at 33.

36. "Even when scholarly inquiry concerns topics on which foreign experience is deep and potentially instructive, American legal dialogue starts from the premise that no relevant insights are to be found beyond the water's edge. To be sure, the fads of Continental philosophy have their innings; the cognoscenti invoke Foucault, Derrida, and Habermas. But the lessons of the Swiss Code or the work of the German *Verfassungsgericht* are simply unknown." John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 546–47 (1995).

37. *See* ZWEIGERT & KÖTZ, *supra* note 13, at 15 ("Legislators all over the world have found that on many matters good laws cannot be produced without the assistance of comparative law, whether in the form of general studies or of reports specially prepared on the topic in question").

38. *See, e.g.*, David S. Clark, *The Use of Comparative Law by American Courts (I)*, 42 AM. J. COMP. L. 23 (1994); James Gordley, *Comparative Legal Research: Its Function in the Development of Harmonized Law,* 43 AM. J. COMP. L. 555 (1995); Eric Stein, *Uses, Misuses and Nonuses of Comparative Law*, 72 NW. U. L. REV. 198 (1977); SCHLESINGER ET AL., *supra* note 14.

> is untenable, and comparative law offers the only way by which law can become international and consequently a science.[39]

One of the hallmarks of this comparative community is its frustration with the pedantic anti-intellectualism of American legal education, a lack of commitment to the true pursuit of knowledge which it understands as the root of its own marginal status.

As mentioned in Part I, one of the defining features of the Categories School's self-understanding concerns the distinct break its adherents see between their own goals and methods and those of scholars of the nineteenth and early twentieth century.[40] In fact, this difference is so absolute that it is utterly taken for granted. In this respect, we can speak of these scholars as *modernist*, as opposed to the classical or historical tradition of nineteenth-century comparative legal scholarship. For these scholars, the principal difference between themselves and their predecessors lies in nineteenth-century scholars' rigid adherence to the taxonomy of legal systems.[41]

In this respect, scholars in this tradition will legitimately object at the outset to the "Categories" label. After all, these scholars are heirs to Legal Realism in the United States and to sociological jurisprudence in Europe. Borrowing from social scientific studies of the law and, in particular, the anthropological and sociological functionalism of the 1950s and 1960s,[42] their dogma has been attention to the functions of rules, institutions and norms. Their guiding question, in other words, is "what legal norms, concepts or institutions in one system perform the equivalent functions performed by certain legal norms, concepts or institutions of another system?"[43] As Max Rheinstein, a pillar of this community, wrote many years ago:

> It is suggested that the term [comparative law] should be reserved to denominate those kinds of scientific treatment of law

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39. ZWEIGERT & KÖTZ, *supra* note 13, at 14.

40. ZWEIGERT & KÖTZ, *supra* note 13, at 4–6.

41. What I describe here are the methods of the 19th century, as understood and described by modernist scholars. A cursory reading of 19th century texts reveals a very different picture of this tradition. *See, e.g.*, Annelise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity*, 1994 U. ILL. L. REV. 597 (1995). In her work on the French analog to American Legal Realism, Marie-Claire Belleau has argued that the "Juristes Inquiets," as they were known, consciously or unconsciously invented the image of French civil judges as formalistic readers of codes as a kind of foil against which to define themselves. The irony, she notes, is that while the Juristes Inquiets have been largely forgotten in France, their image of classical French formalism has lived on. *See* Marie-Claire Belleau, *supra* note 4.

42. *See, e.g.*, MAX GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA (1955).

43. W.J. Kamba, *Comparative Law: A Theoretical Framework*, 23 INT'L & COMP. L.Q. 485, 517 (1974).

> which go beyond the taxonomic or analytical description or technical application of one or more systems of positive law.
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> The statement that law is a means of social control and organization has almost become a commonplace. Not all of the implications of this proposition have been fully realized, however. For legal science, it implies the task of inquiring into the social function of every legal rule and institution. It means that nothing in the realm of law can be taken for granted, that every rule and institution has to justify its existence under two inquiries: First: What function does it serve in present society? Second: Does it serve this function well or would another rule serve it better? It is obvious that the second question cannot be answered except upon the basis of a comparison with other legal systems.[44]

This functionalist approach is understood to entail a turn away from the arid classification of statutes associated with the modernists' precursors, what Rheinstein disparagingly terms the "synoptic description of legal rules and institutions,"[45] toward an interest in the "context" of law:

> Although it may be difficult to determine the precise correlation between the law and its socio-economic environment, there is no doubt that there is a significant relationship between legal development and socio-economic changes . . . the legal systems under comparative study must be viewed in the socio-cultural context in which they thrive.[46]

Thus, for example, in his comparative study of theories of adjudication in France, Germany and the United States, Arthur von Mehren explores topics as diverse and outside the spectrum of traditional legal scholarship as "The Form and Content of Judicial Decisions," "The Reporting System," "Legal Education," "The Judge's Position in Society" and "Forceful Judicial Personalities."[47] He describes his method as follows:

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44. Max Rheinstein, *Teaching Comparative Law*, 5 U. CHI. L. REV. 615, 617–18 (1938). *See also* ZWEIGERT & KÖTZ, *supra* note 13, at 31 ("The basic methodological principle of all comparative law is that of *functionality*. From this basic principle stem all the other rules which determine the choice of laws to compare, the scope of the undertaking, the creation of a system of comparative law, and so on. . . . The proposition rests on what every comparatist learns, namely that the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results."). For a critique of this interest in law as "social control," see Marilyn Strathern, *Discovering 'Social Control,'* 12 J. L. & SOC. 111 (1985).

45. Rheinstein, *supra* note 44, at 618.

46. Kamba, *supra* note 43, at 513.

47. Arthur von Mehren, *The Judicial Process: A Comparative Analysis*, 5 AM. J. COMP. L. 197, 206–17 (1956).

> In drawing comparisons, it must be remembered that each system functions as a whole. Its general tendencies depend on the interaction in concrete situations of all the elements discussed. Nor can the systems be compared by assigning equal weight to each element considered. A particular element may influence the operations of the judicial process more strongly in one system than in another.[48]

This functionalist turn away from doctrinal categories to "law in action" also entails at least a partial embrace of interdisciplinarity. The *International Encyclopedia of Comparative Law* volume on "Persons and Family," for example, includes a lengthy "Sociological Introduction" which surveys anthropological kinship theory in careful detail.[49] The appeal of interdisciplinarity lay in the great confidence the Categories School placed in the *science* of comparison. As Rheinstein wrote:

> The second objective of comparative law . . . is to determine the social function of law in general. In this sense, comparative law is synonymous with Sociology of Law. Emphasizing an inductive method and starting with the data of factual research extending over the laws of all times and peoples, it tries to formulate general statements about the conditions under which "law" appears as one of the means of social control and regulation.[50]

It was precisely this scientific quality that distinguished it from the dilettantism of its predecessors.[51] As Rodolfo Sacco more recently observed:

> The comparative method is thus the opposite of the dogmatic. The comparative method is founded upon the actual observation of the elements at work in a given legal system. The dogmatic

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48. *Id.* at 198. *See also* Max Rheinstein, *Introduction* to 4 INT'L ENCYCLOPEDIA OF COMP. L. 2, 4-5 (Aleck Chloros et al. eds., 1974) (excluding from his definition of law rules of ethics, religion or convention, but adding that "we must emphasize that we do not limit the use of the term Law to norms which are created or promulgated by legislation, judicial precedent or any other form of governmental pronouncement. For our purposes Law is to embrace every norm of conduct which is *sanctioned* by governmental action, irrespective of whether the government's enforcement officer or the judicial officer whose authorization is regularly required for individual enforcement in modern society, has 'found' the norm in a set of rules 'created' by the state, or originating in religion, ethics or convention.").

49. *See* René Konig, *Sociological Introduction*, 4 INT'L ENCYCLOPEDIA OF COMP. L. 19 (Aleck Chloros et al. eds., 1974). *Cf.* Max Rheinstein, Book Review, 47 A.B.A. J. 406 (1961) (reviewing PAUL BOHANNON, AFRICAN HOMICIDE AND SUICIDE (1960). Rheinstein introduces Bohannon's work to lawyers and argues that anthropology and sociology can contribute greatly to the understanding of legal problems.

50. Rheinstein, *supra* note 44, at 619.

51. As Zweigert and Kötz note, "It therefore makes good sense to pay quite close attention to the method of comparative law . . . because legal science in general is sick, and comparative law can cure it." ZWEIGERT & KÖTZ, *supra* note 13, at 30.

> method is founded upon analytical reasoning. The comparative method examines the way in which, in various legal systems, jurists work with specific rules and general categories. The dogmatic method offers abstract definitions.[52]

And as this passage suggests, a scientific turn has also meant disdain for the abstractions of jurisprudence and philosophy.[53] A modern world has demanded, rather, a pragmatic and factually grounded comparative law. In his seminal "Comparative Law in Space and Time," for example, [54] Roscoe Pound questioned the contribution of analytical jurisprudence to legal scholarship:

> What is the function of a comparative method? Shall we say it is to make the legal order operate so completely and effectively as it can be made to operate toward achieving and maintaining the ideal relation among men? But what is that relation? Are we to leave that question to the philosophers? As a philosophical question this has been debated since the Greeks. There has never been complete agreement among them. There seems little likelihood of our getting a final answer from them. But understanding of the practical task of social control in civilized society is something at which we may arrive more readily . . . . At any rate, with no pretensions to be a philosopher, as a lawyer I can see a practical ideal to which we may fashion a measure of comparison in the systematic ordering of the satisfying of so much as we can of the whole scheme of reasonable expectations involved in civilized life with a minimum of friction and waste.[55]

In practice, however, these scholars have found the comparison of legal functions very difficult to do. Context, for many, is a kind of quicksand; it draws comparativists ever deeper, into a potential infinity of details. These traditional comparativists therefore remind themselves that they lack the tools of social scientists for a great expedition into social context,[56] and in any case too much context might obscure what is distinctive about the "law" they compare.[57] Alan Watson, for example, asserts without apologies that:

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52. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 25–26 (1991).

53. For an internal critique of this school's failure to engage in jurisprudential and philosophical debates, see William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?* 143 U. PENN. L. REV. 1889 (1995). A powerful counter-critique, representative of the Categories School's suspicion of abstract philosophy is Joachim Zekoll, *Kant and Comparative Law—Some Reflections on a Reform Effort*, 70 TULANE L. REV. 2719 (1996).

54. *See* Roscoe Pound, *Comparative Law in Space and Time*, 4 AM. J. COMP. L. 70 (1955).

55. *Id.* at 83–84.

56. *See* Mary Ann Glendon, *Why Cross Boundaries?*, 53 WASH. & LEE L. REV. 971, 973 (1996).

57. *See* Eric Stein, *Uses, Misuses and Nonuses of Comparative Law*, 72 NW. U. L. REV. 198 (1977).

> Comparative law is superficial . . . . [It] is hard enough to know in detail one branch of the law of one system, but to know the history of that branch and its relationship with that of some other system (and thus to possess a knowledge of the history of that as well) is well-nigh impossible.[58]

Glendon echoes this point in defending comparativists against outsiders' view of them as dilettantes.[59]

These scholars' research agendas, therefore, have always entailed a middle position between functionalism and the classificatory schemes of their nineteenth-century predecessors, a self-consciously compromised methodology rather than a clear break from the past.[60] Glendon's solution, ultimately, is to reaffirm the centrality of "law" as a safe haven from the quagmires of context:

> The question remains whether comparative methods, after taking us deep into the twisted labyrinths of law, behavior, and attitudes, can also help to lead us out of them? Or do they merely sweep us into a dizzying spiral where everything is both cause and effect; different from, but similar to, everything else; separate but intertwined; constituted by and constitutive of everything else; and so on? . . . . [F]ancy legal and social theory in recent years has often lost track of what is distinctively legal, which in turn has made it difficult for theorists to develop any coherent concept of the relations between social and legal phenomena.[61]

Classification resurfaces in these scholars' work, therefore, as a pragmatic but regrettable solution to what seems an impossible dilemma. Although the classification schemes vary somewhat, most are adaptations of a standard division of common law, civil law, socialist law and "other" legal families.[62] In these writers' accounts, then, the refrain concerning the significance of function over classification must also be read as a collective rehearsing of the inevitable failures of their method.[63] A stark example of this slippage from functions to catego-

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58. WATSON, *supra* note 32, at 10.

59. Glendon, *Why Cross Boundaries?*, *supra* note 56, at 973 ("the field of human knowledge is vast and life, alas, is short.").

60. *See, e.g.*, Stephen C. Hicks, *The Jurisprudence of Comparative Legal Systems*, 6 LOY. L.A. INT'L & COMP. L.J. 83 (1983).

61. Glendon, *General Report*, *supra* note 15, at 418.

62. *See, e.g.*, 2 INT'L ENCYLOPEDIA OF COMP. L. (René David ed., 1972) (dividing the world's legal systems into Civil, Common, Socialist, Islamic, Hindu, Far Eastern, and African legal families); ZWEIGERT & KÖTZ, *supra* note 13, at ix–x (dividing legal systems into Romanistic, Germanic, Anglo-American, Nordic, Socialist and Other legal families); Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 19 (1997) (proposing a "non-Western-centric classification" of "three great patterns of law: 1) rule of professional law, 2) rule of political law, and 3) rule of traditional law").

63. In their casebook, for example, Schlesinger et al. present students with the usual compara-

ries appears in Max Rheinstein's memorial to his great teacher Ernst Rabel, a father of the sociological tradition, in the *American Journal of Comparative Law*. Ironically, Rheinstein eulogizes him not for his functionalism, but for his categories:

> In his view law was to be treated as a body of rules and concepts arranged harmoniously and systematically. It was his aim to improve the "system," to refine its concepts, and to prevent their obfuscation .... What will probably prove to be Rabel's most enduring contribution has been the conception of a workable scheme to overcome the limits of any single scholar's range of knowledge.[64]

Likewise, despite their avowed contempt for "fancy legal and social theory," [65] the Categories Scholars display a certain affinity for jurisprudence rather than concrete fact-finding and for knowledge of other systems for its own sake rather than for the instrumental purposes of legal harmonization and reform. In fact, while commitment to these more instrumental or practical goals of the kind elucidated by Roscoe Pound in the passage above[66] are always rehearsed and no doubt strongly held, the Categories Scholars also understand themselves to share a passion for knowledge about foreign law for its own perhaps illogical sake.[67] As Glendon writes:

> The attraction of comparative law has never been just the study of foreign law as such. It has also been the allure of a glimpse into the origins of legal norms; the prospect of a better understanding of the efficacy and limits of law; and the hope of insight into the connections among law, behavior, ideas, and power. In other

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tive law typologies of civil law, common law and socialist law only to follow with a section on "The Limited Usefulness of the Common Law-Civil Law-Socialist Law Trichotomy" which closes with a call to functionalism: "Significant insights into the nature and the function of legal systems may be lost for one who, through exclusive reliance on traditional schemes of classification, fails to pay sufficient attention to the fact that the importance of law as an ordering device is not everywhere the same." SCHLESINGER ET AL., *supra* note 14, at 330–32.

64. Max Rheinstein, *In Memory of Ernst Rabel*, 5 AM. J. COMP. L. 185, 187–90 (1956).

65. Glendon, *General Report* at 418, *supra* note 15.

66. *See supra* note 55 and accompanying text.

67. Perhaps the greatest example of this secret penchant for theory is Max Rheinstein's lucid English edition of Max Weber's *Wirtschaft und Gesellschaft*. *See* MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein ed. & Edward Shils trans., 1966). *Cf.* MARY A. GLENDON, MICHAEL W. GORDON, & CHRISTOPHER OSAKWE, COMPARATIVE LEGAL TRADITIONS 7 (1994) (arguing that the discipline of comparative law is primarily a study of the "historical relationship between legal systems or the rules of more than one system," in which theory and practice must be granted commensurate importance, and to which "[t]he study of foreign law is an indispensable preliminary step").

> words, comparative law belongs not only to international legal studies, but to basic research in law.[68]

In the end, therefore, scholars writing within traditional understandings of comparative law experience their work as something of an unfortunate compromise in two important ways. The first concerns method: The inescapability of classification, and of the centrality of traditional textual definitions of law, and the borrowing of methods from other disciplines in the end always concludes with a realization that comparativists lack the skills or the time to make the inquiries that these functionalist methods might suggest. The second compromise concerns purpose: The rooted pragmatism of functionalism, self-consciously against theory, seems to leave no room for the passion for comparison that led these scholars to the discipline in the first place. Conversely, the instrumental project of building transnational law or even grand comparative frameworks through comparison seems to disintegrate into a plethora of minutely detailed factual inquiries. The projects of aiding in the harmonization of law or in domestic legal reform are rarely undertaken, or worse yet, fall to private lawyers unschooled in the traditions and methods of comparative law.

The fate of the Max Planck Institute's Encyclopedia project mentioned above captures the comparativist's recurring experience of the collapse of grand comparative aims into an infinite facticity. After decades of work on singular volumes, the project simply petered out, a victim of collective exhaustion. One is reminded of Baudrillard's account of the cartographers who sought to make a map of the Empire so accurate that in the end it covered the territory exactly, and then simply disintegrated into dust.[69] The result is that these scholars have had considerable difficulty in recent years uniting around a research agenda, or even a definition of their field. Alan Watson eschews any definition of the field or method of comparative law in favor of a more limited aim, "namely to determine what—if anything—Comparative Law is or should be as an academic activity worthy of pursuit in its own right and with its proper boundaries."[70] We might take this extreme modesty as one hallmark of this line of scholarship.

The distinction between the Categories Scholars and their classical predecessors is more difficult to draw than those scholars would prefer, therefore, because classification, the hallmark of late nineteenth-century scholarship, is also central to late twentieth-century scholar-

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68. Glendon, *General Report*, *supra* note 52, at 387. *See also* Sacco, *supra* note 52, at 4 ("Like other sciences, comparative law remains a science as long as it acquires knowledge and regardless of whether or not the knowledge is put to any further use").

69. *See* JEAN BAUDRILLARD, SIMULACRA AND SIMULATION 1 (Sheila Glaser trans., Univ. Michigan Press 1994) (1981).

70. WATSON, *supra* note 33, at 10.

ship. Yet ironically, rather than erode the distinction between classical and modernist comparative law in the Categories Scholars' eyes, these methodological compromises, have served as a new basis for distinction from the past. If an epistemological or methodological distinction cannot be made between modernism and its predecessor, then at least a distinction exists at the level of *style*—of the difference between the confidence of Henry Maine and the diffident sense of self-compromise of the Categories Scholars. One of the premises of this essay is that such self-conscious differences of style are now central distinguishing features of each school.

My point here is that traditional comparativists' turn to Categories is simply one solution to a pervasive problem that inheres in the exercise of comparison. Any amount of contextual detail that the comparativist might provide seems insufficient, and yet every amount of detail threatens the possibility of comparing across different systems. The return to Categories then is a methodological selling of the soul, from the functionalists' own point of view, but one that nevertheless preserves the possibility of a nominal claim to a comparative enterprise. In the next two sections we will consider two equally compromised solutions to the same problem.

C. Context

For at least two decades the Categories Scholars have not been alone on American law school faculties. I refer to a group of comparative lawyers defined by their *absence* from the meetings of the American Society of Comparative Law, the encyclopedia project, and other indicia of membership in mainstream circles. In self-conscious contrast to the European focus of the Categories School, this community sketches its contours by its orientation toward a different part of the world. These scholars' presence on American law faculties dates to the emergence of Area Studies in the 1960s, and many of the leaders of this school are second generation heirs to the original faculty appointments in their fields.

To call these scholars a community, in the sense that the Categories Scholars form a community, is to misrepresent the situation somewhat. Although they read one another's work, they have no formal association or annual meeting, and they often feel a greater allegiance with area specialists in other disciplines—political science, history, anthropology, or economics—than with other comparative law scholars.[71] These associations are significant for their methodological implications, as these scholars also understand one important difference be-

71. *See, e.g.*, Frank K. Upham, *The Place of Japanese Legal Studies in American Comparative Law*, 1997 UTAH L. REV. 639, 640 (1997).

tween themselves and the Categories Scholars to be the extent of their training in, or at least openness to, the methods of other disciplines.[72]

As the label suggests, the Context Scholars also take a broader view of the sources of comparison. While a Categories Scholar might compare Malaysian and Hong Kong statutes, on the basis of the fact that both are the products of "legal transplants" from Britain, a Context Scholar of Islamic law would consider such a comparison, in the absence of consideration for differences of religion or philosophy, as nothing more than an arid intellectual exercise.[73] The questions of interest to these Scholars are also rather different in their own conception. They include the relationship between law and culture or law and society, as demonstrated, for example, in the cultural foundations of judicial decision-making,[74] and the local "meaning" of legal institutions or practices. Also among the Context School's subjects of inquiry is the character of their own society's legal reasoning, including the character of academic legal reasoning itself. This question corresponds to an interpretive stance that we might call relativist because its insight consists in seeing one's own law and society from a different point of view.[75] Rebecca French, for example, begins her account of Tibetan law with the following anecdote:

> An American law professor recently asked me, "So, Rebecca, what *was* the Tibetan law of torts?" His question makes sense in the context of legal treatises that discuss legal institutions, move on to substantive legal rules and procedures, describe appellate and Supreme Court cases of interest, and analyze the current state of a particular legal category—that is, in the way American lawyers typically construct and define what is important in their own and

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72. *See, e.g.*, Lucie Cheng & Arthur Rosett, *Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Hierarchy to Market, 1978-1989*, 5 J. CHIN. LAW. 143 (1991) (a collaborative effort between an American comparative lawyer and a Chinese-born sociologist); Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC. REV. 461 (1986) (a collaborative effort between an American comparative lawyer and a Japanese anthropologist).

73. *See, e.g.*, FRANK E. VOGEL, ISLAMIC LAW & FINANCE: RELIGION, RISK AND RETURN (1998); Frank E. Vogel, *Islamic Governance in the Gulf: A Framework for Analysis, Comparison and Prediction*, *in* THE PERSIAN GULF AT THE MILLENNIUM (Gary Sick and Lawrence Potter eds., 1997). *See generally* ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS (Muhammad Khalid Masud et al. eds., 1996) (a sourcebook of Islamic legal cases containing essays by anthropologists, theologians, historians, lawyers and specialists in Islamic studies).

74. *See, e.g.*, LAWRENCE ROSEN, THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY (1989).

75. Note that relativism here does *not* mean lacking in any foundational normative standards but simply an interest in examining those standards from another point of view. On relativism as a source of 20th-century normative debate, *See* RICHARD RORTY, OBJECTIVITY, RELATIVISM & TRUTH (1991); ERNEST GELLNER, POSTMODERNISM, REASON AND RELIGION (1992); CLAUDE LEVI-STRAUSS, LE REGARD ELOIGNE (1957); Clifford Geertz, *Anti Anti-Relativism*, 86 AM. ANTHROPOLOGIST 261 (1984).

> other legal systems. Indeed, they will say that this is what *constitutes* law.
>
> What the law professor's question does not recognize are all the practical and conceptual assumptions that American lawyers already *know* about the world and about the law: the dimensions of space and time, the subtleties of legal myth and narrative, the legal rituals that define how actors act, speak, and move in a legal forum, social hierarchies that influence their decisions, the aspects of authority, power and legitimation they understand.
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> But what if most or all of these practical and conceptual assumptions were not only different from those that apply in Tibet but arranged in networks or sets of relations that were also entirely different? What if, when one first asked Tibetans about law, they said that no such category existed?[76]

What is important here is that the Context School has rendered explicit what remains implicit in much of the Categories Scholars' writings—that *self-knowledge* is as important an outcome as knowledge of the Other in comparative law.

The Context Scholars understand themselves to be better skilled in comparison than the Categories Scholars, whom they describe as predecessors. Many have lived for extensive periods of time in the societies they write about, speak the original languages, and are experts in history and culture as well as law. Implicit in their critique is the assumption that they also share a different kind of commitment to their subject. A Context Scholar might assert that, like scholars in the nineteenth century, the Categories Scholar simply compares this and that; he or she has nothing at stake personally, or perhaps even intellectually, in the comparisons he or she makes. In contrast, this Context Scholar might say, his or her own commitment takes the form of intellectual collaboration with foreign scholars, or personal friendships, or the experience of many years of work or study.

Commitment also requires careful description, even where it is undervalued in the legal academy.[77] Often, this is experienced as a task of translation of one set of norms and practices into the language of another. This sense of commitment also raises what the scholar experiences as ethical problems, as he or she attempts to render the foreign system relevant to American law without misinterpreting it, or worse yet, standing by while others propose knuckle-headed legal reforms to

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76. REBECCA FRENCH, THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET 57 (1995).

77. *See* William Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945, 947 (1986) (noting "the importance of 'description' and particularly, the type of textured, reflective examination that Clifford Geertz terms 'thick description.' Legal academics typically place little value upon descriptive work in legal scholarship.").

aid the foreign country on the path to development or recast the country's legal history for their own Eurocentric, theoretical ends.[78]

The pathos that often accompanies this commitment to the study of another legal culture is acknowledged by David Westbrook in the introduction to his study of Islamic International law:

> [T]he relationship between conscience and the legal obligation of public officials, or the legal nature of truth, for another, are topics which are oft-discussed in Islamic law and on which public international law is virtually mute. In expressing these things Islamic law does not simply fill lacunae in Western systems. Islamic law provides a different framework for viewing the world, an external perspective from which we can examine the beauties and the failings of our own legal ideals. I conclude that Islamic law . . . cannot provide a legal articulation of a world order. The discourses are separate: Islamic international law does not address the concerns, or remedy the failings, of public international law. As a professional matter, I find this separation both disconcerting—a cause of legal misunderstanding—and interesting—a rich source of problems for the comparativist. As a human matter, the distance between the discourses is sad, and in understanding that sadness, I hope to shed some light on the possibility that each law holds forth.[79]

From the point of view of a scholar in the Context School, it is difficult to see the difference between the Categories School and its nineteenth-century predecessors: both share the same inability to understand law in its social context. They also reject what they see as the pretensions to "grand theory" of the Categories scholars, like their nineteenth-century ancestors and the Discourse Analysts considered below, in favor of their own more careful understanding.[80] From their point of view, a taxonomy of the world's legal systems according to "traditional", "political" and "professional" (common law/civil law)[81] for example, only reconfirms what the Categories Scholars assumed from the start—that some systems are traditional and others are not—and can provide few further insights.[82] In this respect, the Context

78. *See, e.g.*, William P. Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEXAS L. REV. 915 (1986); David Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA J. INT'L L. 819 (1993) (defending the Islamic challenge to public international law from liberal stereotypes and proposing an alternative vocabulary for international law borrowed from the Islamic one).

79. Westbrook, *supra* note 78, at 822–23.

80. *See, e.g.*, Alford, *supra* note 77, at 946; W. Byron Groves and Graeme R. Newman, *Against General Theory in Comparative Research* 13 INT'L J. COMP. & APPLIED CRIM. JUST. 23 (1989).

81. *See* Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, *in* 45 AM. J. COMP. L. 5, 16 (1997).

82. "[W]hat concerns me is that our efforts at engaging in broad theoretical work may unwittingly lead us to believe that we are considering foreign legal cultures in universal or value-free

Scholars view the Categories School as indefensibly Western-biased. Their typologies and legocentric comparisons are absurdly inapplicable to non-Western legal systems.

If they ever respond to the charges explicitly, scholars in the Categories School assert that the non-Western systems studied by the Context School are too different for meaningful comparison, with vast *cultural* differences rendering a comparison of *laws* problematic at best and uninteresting at worst. They also note that the scholars of Context have produced more "area studies" than insights of a truly comparative nature.[83] Hence the disparaging charge heard among some European comparativists that these scholars are engaged not in the study of comparative law, but of "foreign law." Watson, for example, sets initial boundaries on the discipline: comparative law is not the study of one foreign legal system alone, but rather "the study of the relationship of one legal system and its rules with another."[84] For the most part, however, the two groups have chosen to politely ignore one another.

What is most interesting about the Context Scholars' critique of the Categories School is that it is exactly the same critique that we saw the Categories scholars make of their antecedents. Indeed, it is important to understand that this group of scholars shares a number of principal tenets with the Categories School. The first of these is a distrust of premodernist comparative law. The second is the commitment to an understanding of law in context. A third shared tenet is the understanding that comparative law should serve some instrumental purpose, or should entail some forms of commitment in and to the world in which comparison is made. In fact, the mutual alienation of the core community of Europeanist comparative lawyers from those focusing on East Asian and Islamic legal systems may have less to do with the "fundamental difference" between European and non-European legal systems than with a battle over who is the true heir of modernism, that is, the

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terms when, in fact, we are examining them through conceptual frameworks that are products of our own values and traditions, and that are often applied merely to see what foreign societies have to tell us about ourselves." Alford, *supra* note 77, at 946. Alford intends this comment as much as a critique of the "grand theory" of Habermas, Foucault and Skinner (whom he quotes as heralding the era of grand theory in the social sciences), as the 'old' theory of comparative law.

Likewise, David Westbrook concludes his article on Islamic international law with the following comment on "mainstream Western Islamic law scholarship":

> The problem with Orientalism is that Islamic law is external to its intellectual apparatus. Orientalism makes no attempt to participate in Islamic law, but is content to describe Islamic law as if it were to remain, despite great scholarship, utterly foreign to the reader. If one has a limited curiosity about other cultures, this perspective is unproblematic.

Westbrook, *supra* note 77, at 890.

83. *See, e.g.*, Mattei, *supra* note 81, at 8. Mattei expresses a need to "incorporate observations [by area studies scholars] about the 'radically different conceptions' within the mainstream of comparative law to avoid their marginalization into area studies."

84. WATSON, *supra* note 33, at 6.

extent to which the contextual approaches have definitively conquered the classificatory approaches.[85]

Finally, the Categories School's counter-criticism that Context work is not truly comparative highlights a fourth shared element between these two communities—the sense that at the level of both purposes and methods comparative work is compromised, that grand hopes must be traded for middle-level successes. As the absence of considerable dialogue within the community of Context scholars might suggest, the irony of the contextual approach is that it has not led to a great deal of interest in the possibility of comparison, for if context is all important, then meaningful comparison becomes increasingly problematic.

More interesting still is the recent angst concerning whether, by emphasizing "context," this scholarship has unwittingly contributed to Western lawyers' exoticization of other legal systems, and has provided an excuse for their dismissal as utterly different. In contextualizing law, some argue, comparativists have treated culture and society as if they were coherent woven wholes enveloping the law, as if these were internally consistent and utterly explanatory.[86] Some of the Context School's most challenging work of late aims precisely at the refutation of the claim that non-Western societies are culturally different and therefore uninteresting from a legal point of view. Mark Ramseyer, for example, has presented the case for understanding Japanese judges, lawyers and politicians as rational actors no different from their Western counterparts in their motivations.[87] Likewise, Frank Upham has written eloquently about the way that hegemonic, culture-based explanations of Japanese law have made it difficult for non-Japanese and

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85. Westbrook, *supra* note 78, at 892. Consider, for example, Westbrook's taking of a Categories scholar to task for the scale of his comparison. Quoting this scholar's comments about a Shafi'i scholarship as the moment at which Islamic legal reasoning reached its zenith, he writes:

> On a cursory reading, this makes sense. But on a closer reading, the meaning dissolves altogether. Taking the first few clauses on faith, as conclusory sentences which a great scholar is entitled to make without support, what is the "zenith" of legal reasoning in Islam? I am not making a skeptical argument that any judgment of the quality of legal reasoning is nonsensical. I would be willing to opine on the quality of legal reasoning in the context of, say, appellate jurisprudence in United States courts. But what does [this scholar]—of Leyden and Oxford universities—mean? Are we to assume that legal reasoning is the same thing for Dutch, British and Islamic law? . . . [The author] implies that we can conclude that legal reasoning was (and is) distinct from other activities that might be carried on in legal writings. This seems odd, given that Islamic law is self-consciously a sacred law. What is the relationship between legal reasoning and religious belief in second century Islamic doctrine? Reading [the author], I do not know, and I conclude that I have learned almost nothing important about Islamic law.

Id. at 892–93.

86. For an anthropological expression of the same critique, arguing that the concept of society is theoretically obsolete, see Marilyn Strathern, *For the Motion*, *in* KEY DEBATES IN ANTHROPOLOGY 60-66 (Tim Ingold, ed. 1996).

87. *See* Mark Ramseyer, *Learning to Love Japan: Social Norms and Market Incentives*, 31 SAN DIEGO L. REV. 263 (1994).

Japanese alike to see the ways in which their laws and practices are not so culturally distinct after all.[88]

Even for those comparativists who willingly accept the more modest label of "foreign lawyer," questions concerning the proper scale of inquiry remain. The deferral of meaning from one context to another creates an unending cycle as it invites further deferral of meaning. This problem, also familiar to the Categories School, is one of the hallmarks of modernist epistemology considered further below.

D. Discourse

Finally, a third group of scholars claims a piece of the disciplinary territory of comparative law. The principal participants are young American and Canadian law professors, although the group includes several senior scholars associated with the Critical Legal Studies movement and its European counterparts. The Discourse Analysts do not share a set of skills or orientations. Some are trained in other disciplines; others are not. Some have extensive language skills and cultural experience in other societies; others have no outside specialty. However, the Discourse Analysts do share an affinity for critical theory and cultural studies. Like the Categories scholars and unlike the Context scholars, the Discourse Analysts are very much a community; their personal networks establish their methodological alliance rather than vice versa.[89]

These scholars see themselves as writing against both the Categories and the Context scholars. They view their relationship with the other two schools as a progressive one. They view their contribution, not as an alternative and coexisting approach, but as a third stage of comparative law, a new approach to comparative law.

Like other schools' interdisciplinary borrowings of notions of function and context, this school's critique imports from outside sources. One of the important differences between the Discourse Analysts and other communities of comparativists, however, concerns the nature of the borrowing. These scholars turn away from the models, theories, and methodologies associated with mid-twentieth-century social science in favor of mid-twentieth-century literary theory and its late twentieth-century mutation into cultural studies. This shift from social science to literary theory signals a different kind of project. Rather than comparing the foreign to the familiar, the task involves uncovering hidden purposes, meanings, themes or strategies in familiar main-

88. *Id.*; *see also* Upham, *supra* note 71, at 639, 645 (noting that the cultural specificity of Japan has even become something of an excuse for mainstream comparativists to ignore Japanese law altogether).

89. This third community was self-consciously constituted and publicized at a conference on New Approaches to Comparative Law held at the Utah Law School in September 1996.

stream legal texts or genres of argument. As such, Discourse scholarship consists primarily of close analyses of the rhetoric of their own legal traditions, including the kinds of questions judges, comparative lawyers, or schools of legal scholars ask themselves and the language and posture they adopt in answering them. For example, borrowing from the plethora of Foucauldian scholarship in cultural studies,[90] the body of work seeks to reveal the implicit assumptions behind the objective task of comparing described in the comparative law texts themselves. As with similar scholarship in other disciplines, the primary interest is in the politics and epistemology of comparative research itself, not in the actual nature of laws to be compared.

One important contribution of this turn away from empiricism is the liberation of their project from the traditional angst comparativists feel concerning the relevance of their work to the instrumental purposes of legal development. These writers do not pretend to "solve" real world problems. Rather, in the spirit of "Art for Art's Sake," they present comparative law as an entirely academic (by which they mean theoretical) pursuit, more similar to cultural studies or comparative literature than a technocratic set of skills.

The self-image of these scholars, and their image among the two other communities of comparativists whom they critique, is as activist academics bent on emphasizing the politics of comparison.[91] However, to understand this body of scholarship as a political turn in comparative law is to understate and overstate the implications of the moment, in my view. For when one looks closely at this scholarship it is difficult to ascertain how it is more overtly political in its conclusions than its predecessors.[92] In this respect, the Discourse School's scholarship is markedly different from the work of discourse theorists such as Michel Foucault[93] and Edward Said,[94] for whom questions of epistemology and representation are intimately linked but ultimately subordinated to questions of politics. Tellingly, perhaps, these scholars' claims of politicization surface when they express a sense of disorientation as to how they are different from other comparativists.[95] Their own discur-

90. *See, e.g.*, JAMES CLIFFORD & GEORGE MARCUS, WRITING CULTURE (1986); HOMI K. BHABHA, THE LOCATION OF CULTURE (1994).

91. *See, e.g.*, David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance* 1997 UTAH L. REV. 545.

92. In a response to Gunther Frankenberg's keynote address at the New Approaches conference, Frances Olsen derided the address precisely for *failing* adequately to politicize comparative law: "I want for Professor Y to stop agonizing over his identity and to start examining his politics." Frances Olsen, *The Drama of Comparative Law*, 1997 UTAH L. REV. 280.

93. *See generally* MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE (A.M. Sheridan Smith trans., Pantheon Books 1972).

94. *See generally* SAID, *infra* note 144.

95. *See* Paolo G. Carozza, *Continuity and Rupture in "New Approaches to Comparative Law,"* 1997 UTAH L. REV. 657, 659 (noting first that "perhaps the 'new approaches' are not really all that new after all," but adding that one defining feature is that "much of the work presented at this

sive method suggests that we might see this political identity as a strategy for defining a community through self-differentiation rather than a core methodological aspect of the project.

More significant is the Discourse School's critique of other comparativists' pretenses of empiricism. First, they point out that empiricism is not as simple a matter as the calls to contextualize have made it out to be, but may merely be a projection of the scholar's own imagination.[96] This claim—a familiar one to readers of contemporary literary and cultural studies—is that there is no getting outside the dominant discourse of law, and thus no foreign worlds for the comparativist to discover. All that can be done, then, is to deconstruct the ambiguities and indeterminacies within the dominant discourse, including the internal contradictions in its assumptions about the character of foreign law.[97]

The problems that lurk behind empiricist claims are not novel revelations to other communities of comparativists; as we have seen, the Categories and Context Scholars are painfully aware of the limitations of their methods. The innovation of this literary turn lies in the way in which the problem of context is defined as a critique, rather than experienced as a methodological struggle. In other words, it is the style rather than the politics of critique that defines this school.[98]

In practice, however, these scholars draw substantially on the methods of the comparative law communities they critique. Gunther Frankenberg critiques mainstream comparative lawyers for their dilettantism and their obsession with categories—precisely for their failure to engage in the sustained study of the societies involved advocated by the proponents of Context.[99] More recently, Frankenberg again poked fun

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conference relates to the politics of law").

96. Nathaniel Berman, *Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion*, 1997 UTAH L. REV. 281.

97. *See generally* Jacques Derrida, *Force of Law: The Mystical Foundations of Authority*, *in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE (Drucilla Cornell et al. eds., 1992); JACQUES DERRIDA, WRITING AND DIFFERENCE (Alan Bass, trans., University of Chicago Press 1978).

98. Strathern has described this explicit redefinition of the implicit and agreed bases of knowledge, so that they no longer function as knowledge devices, as emblematic of late modernist knowledge:

> Making things explicit I refer to as a practice of literalization, that is, a mode of laying out the coordinates or conventional points of reference of what is otherwise taken for granted. One effect of literalisation [sic] is to realise that describing a process of constructionism is itself a construction of sorts. This is the autoproof of constructionism. . . . Making the implicit explicit is a mode of constructing knowledge which has been an engine for change for more than a hundred years. It has also produced an internal sense of complexity and diversity. But to make explicit *this* mode has its own effect: the outliteralisation of the literal-minded. I suspect something similar to this particular literalisating move has been behind the prevalent sense of a new that is after an event. This sense of being after an event, of being post-, defines the present epoch.

MARILYN STRATHERN, AFTER NATURE: ENGLISH KINSHIP IN THE LATE TWENTIETH CENTURY 5, 7 (1992).

99. *See* Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L

at the Categories Scholars for their willingness to serve as consultants to governments around the world without more than a cursory understanding of the wider issues at stake or an appreciation of the politics of their intervention. Although the ironic style of the argument was very different from the scholarship of the other schools, the point itself could be taken directly from the Context School.[100] Likewise, Mitchel Lasser describes his intricate study of French judicial discourse in terms that will be familiar to the other communities of comparativists considered above. The study, he writes, aims at "correcting skewed American accounts of how the French judicial system actually functions."[101] Its critique of the comparativists Dawson and Merryman, for example, rests on their failure to produce a true "insider perspective" on French law.[102] To rectify these defects, Lasser "constructs and deploys a 'literary theory' methodology," and recommends reading foreign literature[103] and "gaining access to those who operate within the system."[104] These tasks require the comparativist to have "not only the language skills necessary to ask questions, but also the discursive skills and corresponding conceptual fluency."[105] Despite the disavowals of the naïve epistemology of the Context School, the Discourse Analysts are as "naïvely" optimistic about the simplicity of interpreting the meaning of others' texts, and in practice they cannot avoid turning to context themselves. The debate between the Discourse School and its opponents is better understood as a struggle over who shows a true commitment to modernism, and therefore not a repudiation of context as a method.

Finally, as mentioned earlier, there is a striking failure in this scholarship to include the non-Western world in the comparison. A Context or Categories Scholar might ask whether, having announced that comparative law is "Orientalist," the Discourse School does any better simply by avoiding comparisons with the non-West altogether. The Contextualists might further point out, as they do in the case of the Categories approach, that the very terms of this debate, which are framed by cultural studies, may be Western terms that seem absurd when transplanted to the non-Western world.[106]

L.J. 411, 421 (1985) [hereinafter *Critical Comparisons*] (describing the method of comparative law as "cognitive control" characterized by "the formalist ordering and labeling and the ethnocentric interpretation of information, often randomly gleaned from limited data").

100. Indeed, the critique seems curiously misplaced since these scholars pride themselves in their attention to the politics of their relationship to the legal communities they study.

101. Mitchel Lasser, *Comparative Law and Comparative Literature: A Project in Progress,* 1997 UTAH L. REV. 472.

102. *Id.* at 476.

103. *Id.* at 472, 476.

104. *Id.* at 477.

105. *Id.* at 478.

106. One New Approaches scholar writing about a non-Western legal system writes from pre-

For Discourse Scholars, the powerful corollary to the sense of self-compromise that pervades the Categories and Context Schools is the lurking fear that there is nothing new to be said in comparative law, that in fact they have no methodological or substantive innovation to deliver. Having attacked both the grand claims of the Categories School and the fear of grand claims of the Context School, what kind of claims can they take on for themselves? David Kennedy, for example, offers a wicked note of pessimism about younger Discourse Scholars' efforts to rejuvenate the discipline:

> 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.[107]

III. MODERN KNOWLEDGE

A. The Era of Information and the Quagmire of Scale

In the previous Part, I compared three methodological positions, three possibilities, three groups of scholars working under the disciplinary umbrella of comparative law—Categories, Context, and Discourse. Scholars in each group believe their respective positions are strongly at odds and they see virtually no value in engaging one another. Yet as we have seen, these three positions have much more in common than their proponents imagine. Indeed, what they share is so taken for granted by all sides that it hardly seems worthy of reflection.

Despite their differences, the three schools of comparative law considered above share a common methodological problem. The effect of this shared problem, as we have seen, is to lead each group to a series of compromises, including the adoption of the very techniques and approaches of the communities with which they feel they have so little

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cisely the kind of engaged position that characterizes the Context school, as she explicitly announces her (compromised) position as a Jordanian-born but American-trained feminist. Her work is paradigmatic of the Context school. *See, e.g.*, Lama Abu-Odeh, *Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West,"* 1997 UTAH L. REV. 287.

107. Kennedy, *supra* note 91, at 547.

in common. From this point of view, we can understand the controversy in comparative law as a struggle about who remains most true to the modernist agenda.

It is worth noting the way in which a consciousness of "globalization" now pushes the envelope. Globalization is a phenomenon that demands commitment (either for or against), that propels us to act or be overtaken and, therefore, often serves as a rationale for normative commitments of other kinds.[108] Is it possible that the apprehension of a new global condition for legal scholarship has altered the character of scholars' engagement with comparative materials?

This new consciousness has created pressure for diverse groups of comparativists to engage with one another to a productive end. Comparative lawyers are conscious of the criticism sometimes leveled by their colleagues that at a moment of tectonic shifts, they are myopically haggling over methodological turf and insular technicalities.

Moreover, the increased movement of persons, products, popular culture and capital across borders calls into question the division of "West" and "Non-west," which, as we have seen, has allowed something of a division of labor to develop between Context and other scholars. The refusal to engage non-European materials on grounds that they are too "different" to understand, for example, is increasingly difficult to defend in a world where legal rhetoric and practices in many societies share a singular vocabulary.[109] Indeed, for the heirs to the tradition of modernism, with its dedication to the discovery of legal diversity through an understanding of law-in-context, the seemingly global victory of law over custom, formal rules over relational contracts, and documents over handshakes presents a methodological, as well as a political problem or a new order.[110]

Conversely, rising immigration, foreign investment and infusions of foreign popular culture call into question the character of "our" homogenous cultural identity against which we define difference. Garth, for example, rejects the very notion "that two or more countries being compared can realistically be treated as independent . . . ."[111]

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108. *See, e.g.*, David M. Trubek et al., *Symposium: The Future of the Legal Profession: 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, 498 (1994) (examining the effect of political and economic processes of global restructuring upon lawyers and the practice of law, and the consequent potential for a "renaissance in comparative legal studies" and development of "closer linkages among sociological scholars around the world necessary for the study of the interaction of law and global processes.")

109. *See* MARY ANN GLENDON, RIGHTS TALK (1991).

110. *See* BRYANT GARTH & YVES DEZALAY, DEALING IN VIRTUE (1996) (tracing the movement in private arbitration law from informal networks of academic arbitrators to arbitrators associated with American-style litigation and the enforcement of American-style contracts); Thomas C. Kohler & Matthew W. Finkin, *Bonding and Flexibility: Employment Ordering in a Relationless Age*, 46 AM. J. COMP. L. 379 (1998).

111. Garth, *supra* note 16, at 2.

In other words, one feature of many so-called global phenomena is that they resist contextualization.[112] To understand the implications of this new condition for comparative legal scholarship, therefore, requires a more careful analysis of the nature of comparativist engagements with context described in the previous Part.

We saw that the method of today's comparative lawyers consists of putting the examined law in context. We could call this method a manipulation of scale. Indeed, the art of modernist comparative legal scholarship consists of discovering, representing and managing this problem of scale change.[113]

The problem, simply put, is at what level of generality can comparison meaningfully be made? Rodolfo Sacco, for example, considers the quagmires of scale at issue in the simple question, "what is the legal rule" in a particular state—the statutory rule, the rule of the constitution, of the courts, of the academic commentators? How can we compare if we cannot even identify stable units of comparison?[114]

> One must avoid the optical illusion caused by magnifying the more general statements of the law, the large definitions, and neglecting the specific operational rules that courts actually follow. By the same token, one must avoid the error of perspective that makes the more abstract legal conclusions invisible.[115]

This sense of dissatisfaction among comparativists with their own methods can be traced to the inner workings of the device itself. Inherent in the possibilities of scale as an organizing device for an account, is also the understanding that the analysis could be done at any level of scale. And thus the analysis always leaves out much more than it includes.

Marilyn Strathern has described the parallel problem of social scientists—the problem of infinite levels of possible inquiry:

> The more closely you look, the more detailed things are bound to become. Increase in one dimension (focus) increases the other (detail of data). For example, comparative questions that appear interesting at a distance, on closer inspection may well fragment into a host of subsidiary (and probably more interesting) questions .... The perception of *increasable* complication—that there are

112. *See* MARC AUGÉ, NON-PLACES (1995).

113. *Cf.* Annelise Riles, *The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law*, LAW AND CRITIQUE (1994) (describing a similar problem in the practice of international law).

114. *See* Sacco, *supra* note 52, at 21.

115. *Id.* at 27.

> always potentially 'more' things to take into account—contributes to a muted skepticism about the utility of comparison at all.[116]

Thus one feature of modernist scale change is fractility: the same problem reasserts itself at every level of detail. After describing the treacherous territory of "macro-comparison," for example, René David points out that many of the same problems reassert themselves in the "micro-comparison" of legal systems within the same family. Even if two legal systems require that a contract be made in writing, for example, they may disagree as to whether a writing is a document signed by both parties or merely correspondence.[117]

This problem of how to manage an infinite amount of detail in comparison is not unique to comparative law. Consider for example, the problem faced by a judge attempting to decide a choice-of-law question. Before deciding whether to apply the law of State A or State B, the judge must decide whether the two laws are the same or different.[118] Yet how can that be determined without a functionalist inquiry? How can such an inquiry be conducted without plunging into the minutiae of each law, as well as its context and purpose? If the two laws are different, how will the judge resolve the conflict without falling once again into the rabbit's hole of contextual inquiry? It is generally recognized that there is no effective method of balancing state interests and that efforts to choose among interests are severely flawed and open to manipulation. It is easy to see why many courts, like comparative lawyers, have retreated to rigid categorical tests,[119] and it is also easy to understand why those tests in the end only reintroduce the problem of context which they seek to resolve.[120]

The assumptions at work in this problem of scale—assumptions that social phenomena are infinitely complex, and thus that the set of potential information academics might include in their analyses is infinite[121]—are so utterly entrenched that it is difficult to remember how recent they are. Paul Rabinow's study of the parallel modernist field of urban planning, for example, finds that during the 1920s and 1930s society emerged as a complex subject of inquiry open to intervention by experts:

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116. MARILYN STRATHERN, PARTIAL CONNECTIONS xiii–xiv (1991).

117. René David, *Introduction* to INT'L ENCYCLOPEDIA OF COMP. L. 2(2) (René David, ed. 4 (1974)).

118. On the jurisprudence of so-called false conflicts, *see generally* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICTS OF LAWS (1963); DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS (1965).

119. *See generally* RESTATEMENT OF CONFLICT OF LAWS (1934).

120. *See* Joseph William Singer, *Real Conflicts,* 69 B.U. L. REV. 1 (1989); *A Pragmatic Guide to Conflicts,* 70 B.U. L. REV. 731 (1990).

121. *Cf.* Annelise Riles, *Infinity within the Brackets,* 25 AM. ETHNOLOGIST (1998).

> [I]ntervention slowly shifted from city planning to the management of *la matière sociale* . . . . Georges Canguilhem, analyzing a parallel change in psychology, characterized it as a shift from utilitarianism—utility for man—to instrumentalism, i.e., man as a means of utility. The sea change in techniques, objects, and goals caused theorists to seek laws of adaptation to a socio-technical, rather than a historico-natural, milieu.[122]

Likewise, as James Clifford has noted, the modernist foundation of the notion of "context" is a textualization of the world as subject of knowledge. That is, it is an understanding that the world is "a corpus . . . to be interpreted." As Clifford argues, this supremacy of interpretation necessarily foregrounds the relationship between every text to be interpreted and its context. It assumes a stable relationship between text and context but also destabilizes this relationship in the process of interpretation, thereby rendering context and its representation problematic.[123]

The problem of context, then, is endemic to the modernist's scaled view of the world. And so is the "problematizing" of context—calling into question the idea of context as a coherent whole—which, as we saw, is the basis of the Discourse School's critique of other schools of comparative law. After World War I a notion emerged that reality is not set, but rather, open to multiple interpretations and fragmented into myriad parts juxtaposed in further ways,[124] that "the pure products go crazy," as in Clifford's borrowing from William Carlos Williams's poem.[125] Strathern puts it as follows:

> Contexts seemed real (they provide the rationale for the properties of things), where analogies once made conscious seemed artificial or incidental, 'metaphorical'. Indeed, contexts were real insofar as they provided a perspective, even though they could always be displaced. In short, contexts have been 'natural' to the twentieth-century viewing of the world. We were organisers of the spectacle but it was in human nature to so create the contexts (perspectives) for understanding, and thus humankind created for itself its grounding for (self) knowledge. This was modernity.[126]

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122. PAUL RABINOW, FRENCH MODERN: NORMS AND FORMS OF THE SOCIAL ENVIRONMENT 343 (1989).

123. *See* JAMES CLIFFORD, THE PREDICAMENT OF CULTURE 38 (1988).

124. *Cf.* Nathaniel Berman, *"But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993).

125. CLIFFORD, *supra* note 123 at 1.

126. MARILYN STRATHERN, AFTER NATURE 197 (1992).

B. Globalization and Modernist Knowledge

The purpose of this extended discussion of modernist knowledge practices is the following. First, at the crudest level, if the problem of comparative law is a problem of scale, then it is no wonder that an awareness of globalization intensifies the comparativist's methodological problem, since globalization is precisely a condition of scale change—of the local writ large. What is the relationship between global and local, if not a relationship of scale?

More importantly, however, I wish to claim, contrary to much popular and academic discussion of globalization, that the new condition of globalization, or the new information age, is not a phenomenon—something out there—but rather the *effect of the working out of these modernist knowledge practices*.[127] That is to say, globalization is the instantiation of the scale problem—the sense that there are ever more levels or layers of context to be appreciated on the one hand, and that all the levels in the end only replicate one another in a fractal way on the other—which has come to be taken as a phenomenon in itself.

In particular, one characteristic of globalization is the awareness that the framework with which we have been analyzing legal problems no longer works for us. There is now an awareness of change as a phenomenon, rather than merely some object of change. It is "a particular series of developments concerning *the concrete structuration of the world as a whole.*"[128] Scholars in international relations, anthropology and sociology have begun to define globalization as much by the particular kind of knowledge it entails—the collective moment of self-reflexive awareness of our condition—as by the phenomena we associate with globalization. George Marcus, for example, asserts:

> Perhaps the single most striking rhetorical characteristic of writing about the contemporary in this *fin de siècle* (and probably others before it) is the hyperawareness that the velocity and immensity of changes are beyond the conceptual grasp of writers of various kinds to describe and interpret them.[129]

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127. Not everyone agrees. Others embrace globalization as an objective fact in need of elaboration, and from which other implications flow. *See, e.g.*, Roland Robertson, *Mapping the Global Condition: Globalization as the Central Concept*, 7 THEORY, CULTURE & SOCIETY 15, 19 (1990) ("[S]ocial theory in the broadest sense . . . should be refocused and expanded so as to make concern with 'the world' a central hermeneutic, and in such a way as to constrain empirical and comparative-historical research in the same direction.").

128. *Id.* at 20 (1990).

129. George E. Marcus, *Introduction, in* CONNECTED: ENGAGEMENTS WITH MEDIA 1 (George E. Marcus, ed., 1996). *Cf.* ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE 8 (1992). For a powerful critique of this notion of globalization as "intensification of consciousness of the word as a whole" *id.* and specifically for the way its fascination with "global culture" denies the material bases of phenomena such as immigration, see Kunal M. Parker,

Of course, globalization has brought "real world" changes, such as new information technologies that bring an excess of information to our fingertips at lightning speed. Yet many of these phenomena—the intensification of communication, the emergence of a global popular culture, the rapid development of information technologies, the movement of persons and products across borders—are significant precisely because they are conditions of changed knowledge about the character of the world.[130] These communications technologies have created an increasingly recursive feedback loop in which representation is understood to be inseparable from reality.[131] Moreover, the demand for these technologies is the result of a changed consciousness of the world as alternatively shrinking or expanding in scale, becoming more vast or more closely knit.[132] The change, in other words, is an epistemological change as much as a phenomenological one.

In sum, in the popular understanding of globalization, all of this is a new phenomenon; something in the world has changed, and we, as scholars, had better adapt. In many respects this no doubt is true. Yet the *perception* that the world has changed—the sense of being on the verge of a different kind of era with different kinds of problems requiring a new and more active engagement with comparative law, and that these problems and their solutions are transnational in character—is by no means new.

Instead, it is an effect of our devices for knowing the world—devices so fundamental that they rarely become the subject of explicit contention. They are agreed bases and shared foundations that enable debates of the kind explored in Part II. A comparative look at a similar historical moment may provide a sense of perspective and suggest a way forward.

IV. J.H. WIGMORE: COMPARISON AS COLLECTION

In reading Wigmore's writings, one is liable to be surprised both by the work's familiarity and its strangeness. The familiarity stems from the world Wigmore understands himself to inhabit, a world on the verge of change. His wonder at the consequences of new information

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Official Imaginations: Globalization, Difference, and State-Sponsored Immigration Discourses, 76 OR. L. REV. 691 (1997).

130. *See, e.g.*, ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION (1996); MARC AUGÉ, NON-PLACES: INTRODUCTION TO AN ANTHROPOLOGY OF SUPERMODERNITY (John Howe trans., Verso 1995) (1992); Manuel Castells, *The Net and the Self: Working Notes for a Critical Theory of the Informational Society*, 16 CRITIQUE OF ANTHROPOLOGY 9 (1996).

131. *See* PENELOPE HARVEY, HYBRIDS OF MODERNITY 5 (1996).

132. Internet technology was available for two decades before it captured the popular imagination.

technologies, for example,[133] is matched by a celebration of what we would call globalization:

> It should have given to every lawyer a thrill of cosmic vibration to learn . . . that an International Court of Justice had come into existence . . . . For the first time in the history of mankind a genuine World Court of Justice exists. The dreams of past centuries are realized, and the persistent practical efforts of the last twenty years, for a time fruitless, have at last reached success.[134]

Other elements of Wigmore's work are less familiar. In this Part, I consider several aspects of Wigmore's writings that seem particularly problematic to the communities of scholars considered in Part II. I argue that what makes Wigmore's work shocking to contemporary sensibilities is that it does not manifest the problem of scale that, as we saw in Parts II and III, is so ubiquitous today. Wigmore's "global perspective", we might say, informs a different kind of method and vice-versa. The corollary, I will argue, is that the problem of contemporary scholarly engagement—the nature and extent of the instrumental goals of comparative law—is also absent in Wigmore. These absences make his scholarship trivial and under-theorized to modernists since his work does not address itself to our problem. Yet it is precisely the absence of that problem, rather than a novel solution, that we might wish to take from Wigmore's work in comparative law.

A. From Inside the Treasure Box

My own fascination with Wigmore's work began not with his writings but with the enigmatic surroundings he had created for scholarly work itself. At Northwestern University Law School, where Wigmore served for forty years as a member of the faculty and as dean, I encounter the puzzling vestiges of his presence at every turn. In Northwestern's collective memory he lives on more as a colorful dean than as a great scholar.[135] He was a quirky man, people say, a great figure, but also an unfathomable one.[136]

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133. "We have now apparently entered further upon a somewhat variant documentary epoch—that of the typewriting machine." John H. Wigmore, *Introduction*, *in* ALBERT S. OSBORN, QUESTIONED DOCUMENTS vii–viii (2nd ed. 1929).

134. John H. Wigmore, *The World Court of Justice*, 16 ILL. L. REV. 207 (1921) (quoted in ROALFE, *supra* note 18, at 253).

135. The epigraph chosen by Wigmore's biographer summarizes this view: "Valiant, colorful, resourceful, courageous, he was a personality first and a scholar afterward." ROALFE, *supra* note 18, at vi.

136. Among his many legacies is a large collection of songs he composed and wrote for the law students to sing. *See* John H. Wigmore, *Lyrics of a Lawyer's Leisure* (1914). I am told that he and Roscoe Pound delighted in performing these as duets. Interview with Fred Inbau, Wigmore Professor Emeritus, Northwestern Univ. School of Law, in Chicago, Ill., (Apr. 30, 1998).

Levy-Mayer Hall, the legacy of his deanship that now houses many of the law school faculty offices, is an extremely curious architectural environment. The building is a hasty caricature of the East Coast universities' own copies of the great halls of English universities, rendered all the more odd by its setting, plunked in the middle of downtown Chicago. Cartoon-like coats of arms in the moldings display the names of the great legal scholars of Wigmore's day. Wigmore even built a chime into the walls that still plays each day a school anthem written by none other than Wigmore himself.

Like an idiosyncratic treasure box, the building is cluttered with a parade of oddities: lithographs from English periodicals that lampoon the courtroom, the barrister, or the judge; portraits of famous legal figures; facsimiles of the American Declaration of Independence and other assorted documents; even an eight-foot-tall copy of the stone bearing the Hammurabi Code. The Dean's collection does not stop with the ornaments: in the course of his travels, he assembled one of the greatest collections of foreign legal books of his day, from the laws of ancient Japan to the statutes of the colony of Fiji. Those of us who make the building our scholarly home might be forgiven for beginning to imagine ourselves as just another element in the odd collection.

Were it not for these collections, Wigmore's work[137] might never have come to my attention because from the point of view of today's comparativist, regardless of their methodological allegiances, Wigmore is something of a scandal. Like the non-Western legal system, as imagined by the Categories School, Wigmore's work seems just too different to be compared to our own in any meaningful way. For one thing, although he published dozens of volumes, they consist almost entirely of collections resembling treasure boxes. And although many of these are of great scholarly importance—his translations of Japanese Tokugawa Period Customary Law rules and decisions ranks perhaps first among these[138]—in the modernist academic world, collection is always of secondary academic merit to analysis.

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137. The sheer diversity of his scholarship and activities might give current scholars reason to pause. In fact, in reading about his life and work one has the sense that he was everywhere at once: As a law student at Harvard, he helped found the *Harvard Law Review*; as an academic in Japan, he taught up to 30 hours of classes each week, maintained a side career as a journalist writing for American periodicals, conducted extensive research into the legal history of Japan, chaired the Asiatic Society of Japan's Committee on Ethnography, published numerous articles on Japanese law and custom, found time to write articles for the *Harvard Law Review* and other law reviews on subjects of comparative law more broadly, and even played shortstop on Japan's first baseball team, which is credited with bringing baseball fever to Japan. *See* ROALFE, *supra* note 18, at 11, 21–31.

138. *See Materials for the Study of Private Law in Old Japan* (John H. Wigmore ed.), 20 Transactions of the Asiatic Society of Japan (Supp. 1892). *See also* John H. Wigmore, *The Legal System of Old Japan (I-II)*, 4 THE GREEN BAG 403–11, 478–84 (1892).

More importantly, the genre of writing he employed toward the end of his career seems to defy reason. His two major works of comparative law, like Levy-Mayer Hall, consist of exhaustive but haphazard collections of vignettes about the law: stories of famous trials and first person accounts by Europeans and Americans who confronted foreign legal systems.[139] A review of *A Panorama of the World's Legal Systems*, published in the *Harvard Law Review*, epitomizes the modernist reading that still prevails among comparativists today when it asserts that "the early records would signify nothing to those for whom the book was intended," and that there should have been "fewer curiosities" and more of "Dean Wigmore's learning."[140]

But Wigmore is not just forgotten; he is derided and even ridiculed.[141] In fact, each of the three communities of comparativists considered in Part II might read him as the very caricature of what is wrong with their adversaries. First, the breadth of his projects seems unrealistic, even romantic.[142] The question of whether and how to include non-European comparisons is ignored in Wigmore's text. Indeed, his failure to appreciate the problematic character of the comparison across so wide a cultural gulf might remind one of the Categories School of the Context scholars.[143] From the point of view of the Context School, his evolutionary model of legal systems, and, in particular, his usage of the language of "racial varieties" for what we now refer to as "cultural variation," will seem anachronistic at best and of-

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139. *See* JOHN HENRY WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS (1936 [1928]); JOHN H. WIGMORE, A KALEIDOSCOPE OF JUSTICE (1941), *supra* note 20.

140. Theodore F. T. Plucknett, *Book Review*, 42 HARV. L. REV. 587, 588 (1929).

141. The reviewer for the *Yale Law Journal*, for example, wrote:

> If Dean Wigmore's primary aim is to give the general reader a series of interesting, but necessarily rapid and incomplete, pictures of the historical development of the sixteen legal systems of the world then he has undoubtedly been successful. Beautifully printed on excellent paper and enlivened by over five hundred illustrations the books are a pleasure to the eye. These "impressionistic" sketches, full of pleasant gossipy bits and occasional good stories, are particularly easy reading for they do not attempt to deal with any general ideas or principles .... If, however, this work is intended as an introduction to the subject of comparative law, then we are doubtful whether it will accomplish its purpose .... After having enjoyed the elaborately colored illustrations of the Great Pyramid, the Hanging Gardens of Babylon, the Parthenon, and the Colossus at Rhodes, it may seem ungracious on the part of the reviewer to disagree with Dean Wigmore's view that the pictorial method is of practical value in expounding the science of the law. A student whose zeal must be stimulated in this way, can hardly be worth teaching.

A.L. Goodhart, *Book Review*, 38 YALE L.J. 554, 554–55 (1929).

142. Kenneth W. Abbott, *Wigmore: The Japanese Connection*, 75 Nw. U. L. REV. (Supp.) 10, 13 (1981).

143. We can trace the constriction of the field to European comparison to the early functionalists whom Wigmore implicitly wrote against. Roscoe Pound, for example, announced that he had no interest in "primitive" legal systems since they were by definition "behind" American law in the process of development and therefore could not serve as useful models. *See* Pound, *supra* note 54, at 70.

fensive at worst, and it will remind them of the biases they see latent in the typologies of the Categories School.

Conversely, Wigmore's free play with materials and cultures may remind the Context Scholars of the frivolity they associate with the Discourse community. In recent years, we also have become accustomed to critiquing the "Orientalism" latent in legal writings of Wigmore's age[144] and Discourse Analysts count Wigmore among the fathers of the Orientalist encyclopedic method of comparative law, which they disparagingly associate with the Categories scholars.[145]

Third, given contemporary comparativists' angst about the practical, real-world relevance of their work, Wigmore's passion for the practical, indeed, his starting assumption that comparative law is highly relevant to real world legal problems, seems quaintly refreshing. Wigmore was an ardent advocate of the League of Nations, the World Court and international law more generally.[146] He was a founder of the American Bar Association Section on International and Comparative Law, Chairman of the ABA's Special Committee on International Bar Relations, and a founding figure in the Inter-American Bar Association.[147] He also published articles condemning the United States for failing to submit a dispute with Mexico over its oil and land laws to the International Court of Justice[148] and he condemned California laws forbidding "Orientals" from owning land.[149] Moreover, he campaigned for ratifying the treaty to establish the World Court at a time of great isolationism. His writings often close with a resounding call for the evolution of international law.[150]

Indeed, Wigmore's writings display no awareness of the fact, about which so much ink has been spilled: that theory and instrumentality

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144. *See, e.g.*, Timothy Mitchell, *Orientalism and the Exhibitionary Order*, *in* COLONIALISM AND CULTURE, 289-317 (Nicholas B. Dirks, ed., 1992). Orientalism is a term coined by the literary critic Edward Said to refer to a set of tropes in nineteenth and twentieth century art and literature. Said has highlighted the depiction of non-Western cultures as the barbaric and exotic opposite of the West, a kind of mirror image of Western culture which serves to confirm the superiority of the West. *See generally* EDWARD SAID, ORIENTALISM (1978).

145. *See, e.g.*, Frankenberg, *Critical Comparisons*, *supra* note 99, at 427. In fact, the structure of Wigmore's writings contrasts sharply with an encyclopedic ordering of legal facts. Wigmore makes no pretense of systematically classifying his bewildering array of vignettes and first person accounts of exotic legal systems by American, British and French lawyers sent abroad in service of the colonial project. Wigmore's emphasis on narrative in these books might appeal more to the Discourse Analysts than to any other school of comparative law.

146. *See, e.g.*, John H. Wigmore, *The International Assimilation of Law: Its Needs and Its Possibilities from an American Standpoint*, 10 ILL. L. REV. 385 (1916); John H. Wigmore, *Problems of World-Legislation and America's Share Therein*, 4 VA L. REV. 423 (1917).

147. *See* ROALFE, *supra* note 18, at 258–59.

148. *See* John H. Wigmore, *Elihu Root and Our Mexican Backsliding*, 21 ILL. L. REV. 610 (1927); John H. Wigmore, *Does Might Make Right with Latin America?*, 22 ILL. L. REV. 648 (1928).

149. *See* ROALFE, *supra* note 18, at 251.

150. *See* JOHN H. WIGMORE, PROBLEMS OF LAW 105–36 (1920).

are at odds with one another in comparative law. Instead, he shows a passionate attachment to the theoretical possibilities of comparative law precisely as a means of rethinking the legitimacy and rationale of the most concrete aspects of the American legal system. In an Association of American Law Schools volume, which surveyed a wide variety of legal subjects and combined essays by leading comparativists with the writings of Bentham, Hegel, Mill and other political philosophers, Wigmore wrote that:

> [Our legal institutions] have come down unquestioned, in the memory of the past generation of lawyers. Whatever questioning may have taken place in the realms of philosophy, of ethics, of economics, of social science, has not disturbed the mental peace of the legal profession, nor even come to its notice. The calm of the solid ocean surface of the Is has prevailed. Reversing Descartes' famous phrase, the lawyers have been satisfied to announce, "These things Exist, therefore we do not need to Think."[151]

Crucial to this vision was Wigmore's commitment to scholarship that reached beyond legal academics to practitioners and the public at large—a vision now likely to be derided as producing popular rather than scientific work. For contemporary scholars, Wigmore's understanding of scholarship as entertainment is difficult to accept indeed.[152]

As we saw, comparativists of all three traditions find themselves drawn to theory, to knowledge of foreign law for its own sake, and to the idea that their work serves wider internationalist goals. Yet they understand such impulses as shamefully grandiose and to be kept in the background of more limited and sober aims. From this point of view, Wigmore's open celebration of his work as a project in the service of humanity seems embarrassingly naïve. The dedication to *A Panorama of the World's Legal Systems* puts the point starkly:

> To the brethren of the bar of the United States of America, in hope that through their leadership this nation may attain to a larger knowledge and a deeper interest in the legal institutions of

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151. John H. Wigmore & Albert Kocourek, *Editorial Preface*, in RATIONAL BASIS OF LEGAL INSTITUTIONS xix (Wigmore & Kocourek, eds., 1923).

152. One could draw an interesting parallel with Sir James Frazer, the classicist writing some 20 years before Wigmore. His very reputation in other disciplines and among the general public led to his dismissal among modernist anthropologists as a showman and dilettante. *See* Marilyn Strathern, *Out of Context: The Persuasive Fictions of Anthropology*, in MODERNIST ANTHROPOLOGY 80 (M. Manganaro, ed., 1990).

> other peoples and thus may be inspired to a more ready cooperation in all that makes for the world's legal progress.[153]

The preface, likewise, concludes with the following resounding aspiration: "May this volume contribute to a better understanding of other peoples, and thus help toward greater intelligence and mutual toleration in world-affairs!"[154]

As I learned more about Wigmore's writings, this scandalous picture intensified in aspects but was complicated considerably in others. Consider, for example, Wigmore's book *A Kaleidoscope of Justice*.[155] As the critics of his day noted, the book is replete with shameless Orientalist appeals to the exoticism of foreign legality. A smattering of chapter titles will capture the flavor: "A Seer Pronounces the Ancestral Law, and a Sorcerer Conducts an Ordeal";[156] "Trial of an English Sea-Captain in Siam in the Early 1700s: Saved by a Clever Question";[157] "Reforming Old Trial Methods in Old Korea: Witnesses Willingly Endure a Beating."[158]

Yet when one reads each account, perhaps expecting a chuckle at the naïve Orientalist world view the titles would imply, one encounters a very different kind of story. The latter chapter, for example, is excerpted from the memoirs of a young American diplomat sent to Seoul in 1897, who became advisor to the Korean Emperor. The writer's own ironic and self-deprecating tone ("I had a program, and I had a party at court . . . . I was enormously flattered, and at the very competent age of twenty-five, I felt capable of pulling the grand khan himself out of any amount of trouble")[159] foreshadows the lessons he learns from his effort to convince the Korean Chief Justice that the use of torture to secure witness testimony is barbaric and should end. The Chief Justice, perhaps skilled at dealing with foreign interventions, simply agrees to the suggestion and stands by as the court disintegrates into mayhem. The account closes with the author's ironic conclusion that "it was the last trial on the Western model, as well as the first."[160]

Wigmore's interest in Japanese legal institutions, likewise, aimed to counter Orientalist viewpoints. That is, he demonstrated deep commonalities between Japanese and Euro-American traditions:

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153. JOHN HENRY WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS (1936 [1928]), *supra* note 139.
154. *Id.* at viii.
155. JOHN H. WIGMORE, A KALEIDOSCOPE OF JUSTICE (1941), *supra* note 20.
156. *Id.* at 317.
157. *Id.* at 367.
158. *Id.* at 385.
159. *Id.*
160. *Id.* at 388.

> Our attention has hitherto been taken by the things that are dissimilar and un-Occidental. We have still to turn our attention to those subjects in which we may find a kindred course of development, in which the history of Japan may throw some light on the history of Europe, and may furnish facts which may be grouped with the facts of European development and used as a foundation for contrast and generalization.[161]

All in all, the accounts he produces are certainly not the confident narrative of Western domination over the exotic Orient that modern comparativists might expect of their Orientalist predecessors.[162] Although Wigmore certainly was no political progressive,[163] his writings are replete with warnings about nineteenth-century, Western, modernist arrogance. For example, he condemned a federal court's ruling that Japanese immigrants were not "free white persons" for naturalization purposes,[164] pleaded with the Harvard Law School that it adopt different admission standards for Japanese students that would take into account their educational background, and wrote that Commodore Perry's celebrated treaty opening Japan's ports to American trade, contrary to general opinion, had brought Japan far more harm than good.[165] Equally surprising is the degree to which he counted non-Western academics as colleagues, and he wrote numerous articles introducing foreign comparative work to the American legal audience.[166]

Finally, I quickly learned that dismissing the scholarship because it was presented in nonscientific guise would be foolish. In any given chapter, Wigmore's text surpasses most comparative legal scholarship written today in its attention to detail, in the degree to which primary

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161. John H. Wigmore, *Summary by the Editor*, *in* D.B. SIMMONS, NOTES ON LAND TENURE AND LOCAL INSTITUTIONS IN OLD JAPAN 149 (J.H. Wigmore, ed., 1891).

162. Even Wigmore's evolutionary theory more often subverted the pretense of Western superiority than it defended it. In a critique of Henry Maine, for example, he wrote, "What is meant by the evolution of law? Does it mean necessarily progress? Or may it mean mere change? And if so, change of what? Can we conceive of a going backward, in evolution—or of the death of an institution? May there be a degeneracy now and then, in evolution? . . . The evolution of law, which we seek to discover, does not imply progress, either morally or otherwise, but merely movement." JOHN H. WIGMORE, PROBLEMS OF LAW 20, 25 (1988[1920]).

163. He was considered "reactionary" among his students who had returned disillusioned from World War I for his support for the war. *See* ROALFE, *supra* note 18, at 144-54. At the time of public discussion of his possible nomination to the World Court, an editorial in *The Nation* condemned him as a candidate because "his attitude toward pacifists and radicals during the time, 1916–1920, when he was attached to the Judge Advocate General's office was so openly hostile as to unfit him for Judicial honor." *Editorial,* 130 NATION 504 (1930), quoted in ROALFE, *supra* note 18, at 256.

164. *See* John Henry Wigmore, *American Naturalization and the Japanese*, 28 AM. L. REV. 818 (1894).

165. *See* John Henry Wigmore, *Our Treaty with Japan*, BOSTON HERALD, Nov. 28, 1889 (collected in 9 OPERA MINORA 25 (1943)).

166. *See, e.g.*, John Henry Wigmore, *Three Japanese Scholars and Their Work*, YOKOHAMA, Jan. 11, 1892 (collected in 9 OPERA MINORA 85 (1943); JOHN H. WIGMORE, PANORAMA, at 1123 (discussing the comparative legal methods of Professor N. Hozumi).

sources in original languages are consulted, and in the integration of cultural and legal elements in the explanation.[167] In light of this fact, one must understand Wigmore's bold disclaimers—his assertions that his scholarship is entertainment and not science—as purposeful moves, interventions of a particular kind.

Perhaps most puzzling is that Wigmore was committed to the importance of law in social context, even as he constructed sweeping typologies of legal systems that are so troubling to modernists because such typologies neglect context. Wigmore gave prominent play to social context, and, in particular, to social scientific tools for deciphering it:

> By comparative law . . . it is meant the tracing of an identical or similar idea or institution through all or many systems, with a view to discovering its differences and likenesses in various systems, the reasons for these variations, and the nature and limits of the inherent and invaluable idea, if any—in short, the evolution of the idea or institution, universally considered.
>
> The time has now arrived in legal thought when this study can be scientifically undertaken as never before. Modern scientific thought has made it generally understood that a legal institution can be fully comprehended only in the light of the social, economic, religious, political, racial, and climatic circumstances which surround it.
>
> . . . The constant aim of the sociologist and the anthropologist is to visualize the idea or the institution in its actual environment, and all his efforts are directed to ascertaining the environmental details for the better interpretation of the idea. But in the study of comparative law this handicap has not usually been present in the scholar's consciousness . . . . The literature of comparative law is marked frequently by the barren dissection of verbal texts.[168]

In fact, what Wigmore found noteworthy in some foreign legal traditions was precisely the holism he saw lacking from comparative law and Anglo-American legal thought more generally:

> For the Anglo-Saxon lawyer, accustomed as no other is to do homage to strict legal principle, as in and for itself the *summum bounum*

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167. His work on Japanese customary law is particularly notable. At the time when Japanese lawyers were only interested in emulating European laws, Wigmore published an article in 1892 in which he favorably compared Japanese legal concepts with European legal imports. *See, e.g.*, John H. Wigmore, *New Codes and Old Customs*, THE JAPAN MAIL (1892).

168. John H. Wigmore, *Jottings on Comparative Ideas and Institutions*, 6 TULANE L. REV. 48, 51, 263 (1931-1932).

> of law, and to regard legal justice as manifesting itself only in a science of unbending rules, this . . . will indicate better than anything else the vast gulf that is fixed between his own system and that which is indigenous to Japan . . . the chief characteristic of Japanese justice, as distinguished from our own, may be said to be this tendency to consider all the circumstances of individual cases, to confide the relaxation of principles to judicial discretion, to balance the benefits and disadvantages of a given course, not for all time in fixed rule, but anew in each instance, in short, to make justice personal, not impersonal.[169]

The scandal of Wigmore's work, then, may be that our well-meaning critiques of comparative law before modernism are too simplistic: a close reading of Wigmore's scholarship refutes most of the assumptions today's comparativists share about their antecedents.

B. The Treasure's Scale

My intention here is not to rehabilitate Wigmore's writings. Rather, I am interested in a comparison of his methodology with our own. To begin with, Wigmore's work presents a strikingly different understanding of what constitutes scholarship, that is, of what a comparativist actually does. Rather than arguments, models, categories, contexts, or cultural meanings—the products of today's scholarly work—the products of Wigmore's scholarly ventures are collections of various kinds: photographs, accounts of Westerners' encounters with non-Western legal systems, translated cases, even essays by other scholars.[170] In fact, Wigmore's haphazard collection of objects, persons, books and artwork at the Northwestern Law School might be understood as simply the continuation of a series begun with *Panorama* and *Kaleidoscope.*

In his later works, Wigmore seems consciously to ignore conventional scholarly methods and norms that made work analytically significant, and which he had mastered from the early days of his ca-

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169. John H. Wigmore, *The Administration of Justice in Japan*, PENN. L. REV. 437, 438-9 (1893).

170. MATERIALS FOR THE STUDY OF PRIVATE LAW IN OLD JAPAN (J.H. Wigmore, ed. & trans., 1892) *supra* note 27; SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (J.H. Wigmore, ed., 1907-1909); THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY, MODERN CRIMINAL SCIENCE (J.H. Wigmore, ed., 1911-1917); ASSOCIATION OF AMERICAN LAW SCHOOLS, THE MODERN LEGAL PHILOSOPHY SERIES (J.H. Wigmore, ed., 1911-1925); THE CONTINENTAL LEGAL HISTORY SERIES (J.H. Wigmore, ed., 1912-1927); EVOLUTION OF LAW (J.H. Wigmore & A. Kocourek, eds., 1915); SOCIETY FOR AMERICAN FELLOWSHIPS IN FRENCH UNIVERSITIES, SCIENCE AND LEARNING IN FRANCE (J.H. Wigmore, ed., 1917); U.S. WAR DEPARTMENT COMMITTEE ON EDUCATION AND SPECIAL TRAINING, A SOURCE-BOOK OF MILITARY LAW AND WAR-TIME LEGISLATION (J.H. Wigmore, ed., 1919); LAW AND JUSTICE IN TOKUGAWA JAPAN (J.H. Wigmore, ed., 1941-1975).

reer.[171] Absent from the display of exhibits, stories and photographs, is the slightest pretense of analysis and evidence of the work of the comparativist himself.

Of course, the work of comparison still goes on. As we saw, Wigmore was neither an opponent of categories nor of context. How else would the collector/editor choose his photographs and exhibits? Yet this labor is backgrounded, as if the picture provided a more direct encounter between the viewer and the moment of legal activity it represents, unmediated by the comparativist. In *Panorama*, Wigmore's models and theories are relegated to the epilogue which, after 1100 pages of images and factual descriptions, tosses out the self-effacing comment: "and so (for those who care) the following broader survey of the whole field of the problem, in outline, is here offered."[172]

Indeed one of the features of collection, as a method, is that the theoretical apparatus of the comparativist is backgrounded. The skill of the endeavor lies in the containment and preservation of the open-ended quality of the collection rather than in the analytical work performed on the collected materials.

Wigmore's comments at the end—a typology of the world's legal systems and hypotheses about the causes of their evolution or decay—would be familiar to Category comparativists writing today. The difference, however, is that these questions appear only at the close. Such a method is so counterintuitive to all three modern schools of comparative law that it hardly seems like comparative law at all.

Moreover, like the objects collected in the Chinese treasure box described at the outset of this essay, some of the items in Wigmore's collections are authentic, some are not, and many seem to challenge the very possibility of veracity in representation. In Levy-Mayer Hall, for example, an original lithograph from a nineteenth-century English publication sits side by side with a copy of the Hammurabi Code. The lithograph itself is a parody of the legal profession that, in typical cartoon form, disclaims representational accuracy in favor of the deeper truths it lampoons. For such insouciance, Wigmore was disparaged by at least one prominent reviewer of his day:

> Historians are unanimous as to the value of such a work as Fehr's *Das Recht im Bilde*, or the illustrated edition of Green's *History*, for all these pictures are contemporary and therefore historical documents. But Dean Wigmore does not discriminate among his pictures. He confesses that while some of his portraits are "veritable," others are only "ideal," the latter term being a euphemism for

171. *See, e.g.*, Wigmore, *The Pledge-Idea: A Study in Comparative Legal Ideas*, 10 HARV. L. REV. 321, 389 (1896); 11 HARV. L. REV. 18 (1897).

172. WIGMORE, PANORAMA, *supra* note 139, at 1120.

> imaginary, unauthentic, and unhistorical. The distinction is vital. No one could deny after examining the fantastic portrait of Demosthenes here reproduced, that the cleverness and ironic bitterness displayed in those features are a true and contemporary picture of at least one aspect of Greek law; but does Dean Wigmore really mean to imply that a similar revelation on Celtic law is to be derived from the whiskey-distiller's poster of a Highlander, which he also reproduces in all the gorgeous colors of a London billboard?[173]

Whether "true" or not, these collections had the quality of discovered treasures for Wigmore, as he explained with typically unrestrained enthusiasm in the preface to *Kaleidoscope*:

> The field available for such narratives is unbelievably rich. In the present selection, comparatively little of the extant material has been touched .... [I]n the secondhand booksellers' lists, European and American, can be found hundreds and hundreds of inaccessible titles that must have contained scores of eye-witness accounts of trial-styles in every country and period, titles in Russian and Arabic (for the Arabs were the great travelers of the 900s-1200s) as well as in English, French, Italian, Spanish, and other languages.
>
> There is here a mine of richest value for some one who will open it up. Perhaps some day an editor will be found who will care to compile a series of the sort, "The Kaleidoscope of Justice," Volume Two, and so on.[174]

Like the Chinese emperors who delighted in opening and closing the drawers of the imperial treasure box, Wigmore's pleasure at his finds did not rest on the originality of the discovery any more than on the truthfulness of their representation. Each story had already been placed in the field of objects to collect, recounted by someone else, and experienced once before. Instead, the pleasure of the treasure box lay in generating surprise and enthusiasm for what was already given; for stories about the law that had been relegated to second hand book stores (those ultimate sites of the pleasure of collection); and for the wonder of revealing once again images, themes, accounts already known.

What intrigues me about Wigmore's collections is the way they obviate the problem of scale which, as we saw in Part III, lies at the heart of the condition of both globalization and the methodological quagmires of comparative law. One of the features of Wigmore's collections,

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173. Plucknett, *supra* note 140, at 587.
174. WIGMORE, KALEIDOSCOPE, at vii, *supra* note 20.

like the Chinese treasure box, is that within the treasure box, things that we might normally imagine as of different orders sit comfortably side by side. Consider, for example, the collection assembled in Levy-Mayer Hall: it includes artists' depictions of legal situations and figures, actual legal documents, scholarly writings about the law, even legal scholars themselves. This mix of entities of different order, side by side, rather than the veracity of particular representations, is the greater source of discomfort with Wigmore's collections. What the *Yale Law Review* critic objects to is not so much the existence of untruthful accounts—like the existence of a whiskey distiller's poster of Highlanders—but rather that the veritable is presented side by side with what is only the "ideal", hence rendering a singular mode of interpretation impossible.

Such a collection, it is important to understand, is the exact opposite of an encyclopedic venture of the kind attempted and eventually abandoned by the Categories School.[175] The encyclopedia compares phenomena of the same order; or perhaps, more accurately, it compares what is asserted to be of the same order. Marriage rules here are of the same order as marriage rules there, the encyclopedia's editor implicitly assures us, and the editor's impossible task is to ensure that the scale of the analysis—the amount of detail, the kinds of sources used remain uniform from one subject of comparison to the other. If encyclopedia editorship is an exercise in phenomenal analytical control over one's material, and one that begins with the categories of analysis and then completes the project with the addition of the facts, comparative law as collection, on the other hand, abdicates such control from the start.

In order to understand what this has to do with globalization and the problem of scale described at the close of Part II, return for a moment to the Chinese treasure box. As mentioned at the outset, the treasure box was but a toy for the Emperor, an instrument of pleasure. But it would be foolish to think it lacked significance, for as the Emperor held the box he must have felt that he held the world (or rather, the Chinese understanding of the entirety of history) and the entirety of the past in his hand. It is perhaps not too much to say that the treasure box was a concrete analytical device that effectuated a move from one scale to another and back again.

From this vantage point we can see how collection as a method of comparative law entails a different kind of engagement with the world that obviates the problem of relevance or instrumentality so prevalent among today's comparativists: in Wigmore's treasure box, there is little difference between a well-prepared trial case and a well crafted article, nor between a collection of essays or a collection of scholars. All

175. *See* discussion, *supra* Part II (discussing the INTERNATIONAL ENCYCLOPEDIA OF INTERNATIONAL LAW).

can serve the equally theoretical and instrumental purposes of fostering "deeper interest in the legal institutions of other peoples," and thus, of "legal progress."[176]

C. The Panorama and the Kaleidoscope

This leads us to the puzzle that animated my reading of Wigmore's work: why would a serious scholar of comparative law experiment, as Wigmore did, with genres? One might expect a late nineteenth-century lawyer to dabble erratically in foreign materials. But Wigmore had been an empiricist, had learned the foreign language, and had concluded extensive original research. In short, he had lived up to modernist ideals to an extent that remains rare among comparative lawyers to this day. This experimentation is all the more surprising given its timing at the moment that the scientific and functionalist theories of jurisprudence were beginning to take hold. How, then, do we understand his turn away from modernism?

In truth, from the early days of his career, Wigmore's conception of legal materials was unusually broad—broader, even, than many of the Context school writers today. He had an avid, perhaps even primary interest in the mythology of law rather than its doctrines. [177] Yet his later writings pushed this interest further still. In 1909, for example, he published a list of 100 legal novels that in his view captured the spirit or character of the law.[178] This literary interest was reflected in the attention he gave to his own writing style and presentation. One tribute at his death described him as a "literary stylist":

> But may not one whose profession requires him to read many pages of legal literature, express thanks for the purely literary pleasure enjoyed as a fortunate by-product of studying the "Treatise on the Anglo-American System of Evidence" or the "Principles of Judicial Proof"? . . . Nor is literary skill confined to the

176. Wigmore, *supra* note 153, and accompanying text.

177. Wigmore collected numerous popular stories concerning legal institutions, such as folklore concerning a popular eighteenth century Japanese magistrate. *See* John H. Wigmore, *Japanese Causes Célèbres (pts. I-III)*, 4 GREEN BAG 563 (1892), 9 GREEN BAG 359 (1897), 10 GREEN BAG 287 (1898).

178. "[T]here are certain episodes or types of character in professional life whose descriptions by famous novelists have become classical . . . . With these every lawyer must be acquainted, not merely because of his general duty as a cultivated man, but because of his special professional duty to be familiar with those features of his profession which have been taken up into general thought and literature . . . and exhibit to him the law and its workings as they appear to the layman." John H. Wigmore, *A List of Legal Novels*, 2 BRIEF 124, 124 (1900). *See also* KAREN L. KRETSCHMAN, LEGAL NOVELS: AN ANNOTATED BIBLIOGRAPHY (Tarlton Law Library Legal Bibliography Series No. 13, 1976). (Wigmore selected novels which met one of the following four criteria: (1) Novels in which a trial scene is described; (2) novels which portray the typical traits or lifestyle of a lawyer or judge; (3) novels addressing methods of prosecution or punishment of crime; (4) novels in which some point of law enters into the plot.)

> text. With admirable patience and discrimination the author has selected his illustrative cases and materials to administer constant stimuli to lagging attention. Not merely in such works as his "Kaleidoscope of Justice," where the curious, the dramatic or the odd constitute the primary appeal, but throughout his writing Wigmore has drawn upon an extraordinary knowledge of trials, legal institutions, and legal writings ancient and modern, English and American and foreign, to provide the perfect functional ornament—the illustration which gives pleasure for its own interest while it aids in establishing or clarifying some point to which the major argument is directed.
>
> True, the literary quality of his work is no more its major merit in the case of Wigmore than in the case of Holmes. But it cannot be accidental .... Perhaps Dean Wigmore, whose work shows so clearly his own realization of this importance of style, would appreciate being praised more often as our literate legal scholar.[179]

Most of all, Wigmore is remembered for one particular experiment with style: his use of visual materials, or the "pictorial method", of comparative law, as it is sometimes termed.[180] His books include literally hundreds of illustrations. Like the collection, this pictorial method, I believe, entails a very different conception of the project of comparative law, for the objective is not to convey information about foreign legal systems but to stimulate interest, awaken the imagination, and bring the subject to life. As he writes in the preface to *Panorama*:

> Who would have thought that the dry history of Law could be made realistic with pictures? The purpose of this book is to present, in narrative and pictures (for the first time in any language), an impressionistic survey of Law and Justice in all the progressive race-stocks from ancient times to the present.
>
> The pictures serve to supply the distinctive atmosphere of each of the legal systems, and to make realistic the racial varieties of feature in the different institutions. So they include the chief codes and typical legal documents (in facsimile), the scenes where laws were enacted and justice was done, and the portraits and statues of eminent law-givers, judges, and other jurists. In short, the book offers a passing Panorama of the World's Legal Systems in Story and Picture.[181]

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179. George E. James, *A Literary Stylist*, 32 J. CRIM. L. & CRIMINOLOGY 275, 275–76 (1941).

180. *See, e.g.*, KEIO UNIVERSITY, THE FIRST HUNDRED YEARS OF KEIO GIJUKU 437 (Supp. 1962).

181. WIGMORE, PANORAMA, *supra* note 139, at vii.

Wigmore's comparative interest, therefore, lies in the character of legal argument, in what convinces or engages here as much as there. Like the meticulously prepared trial case, scholarly work is made to look like a simple collection of elements from which the reader is to draw his or her own conclusions. In this respect, Wigmore's interest in the field of evidence is utterly fitting.[182]

No wonder, then, that Wigmore's works look more like publicity experiments than scholarship. One could label this as a mere interest in the pedagogy of comparative law, that is, in the secondary, more procedural matter of how comparative law should be marketed to its audience rather than what the substance should be. Yet it is also a substantive interest in the character of legal rhetoric that parallels Wigmore's interest in the mythology and rhetoric of law in disparate societies. What is compared in Wigmore's works, in contrast to today's comparative law, are visual images rather than norms, functions, rules or even contexts. Captured in Wigmore's images are archetypal moments in legal activity—the courtroom drama, for example—or archetypal artifacts of law, such as the bill of sale.

In his last book, Wigmore pushed the envelope even further by shifting from the panorama to an even more improbable organizing device: the kaleidoscope. If the panorama implied a singular, all-encompassing perspective or organizing frame—one already prevalent in the popular culture of Wigmore's day[183]—the kaleidoscope required a greater leap of methodological faith. It represented something considerably more humble and perhaps even somewhat quaint. Wigmore seems to celebrate the contrast with the grand comparisons of scientific jurisprudence: "And what is a 'kaleidoscope'? It is now only a child's toy, though it was once regarded as a scientific instrument when it was invented a century or more ago."[184]

This purposeful marriage of knowledge and entertainment seems distasteful. Yet it was not always this way. During the eighteenth century, art and science, recreation and intellectual work, were imagined to work comfortably together, especially where the visual aspects of information exchange were concerned.[185] As Stafford notes, "[r]ational recreations succeeded in turning visual pleasures into moral philosophy and optical games into meditative icons."[186] The kaleidoscope epito-

182. *See, e.g.*, JOHN H. WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF (1913), *supra* note 19.

183. *Cf.* STEPHAN OETTERMANN, THE PANORAMA (1997) (characterizing the panorama as the 19th-century leisurely parallel to Bentham's Panopticon); DONNA HARAWAY, PRIMATE VISIONS 26–58 (1989) (describing turn-of-the-century fascination with panoramic scenes of exotic places, as reflected in natural history museum dioramas).

184. WIGMORE, KALEIDOSCOPE, *supra* note 20, at v.

185. BARBARA M. STAFFORD, ARTFUL SCIENCE: ENLIGHTENMENT ENTERTAINMENT AND THE ECLIPSE OF VISUAL EDUCATION (1994).

186. *Id.* at 286. Stafford argues that like in the eighteenth century, we are again at a moment when, thanks to the proliferation of information technologies aimed at entertaining as we learn,

mizes this practice. It was invented in 1817 by a Scottish scientist, who called it a "philosophical instrument," a means of thinking through patterned changes in natural environment.[187]

Yet the kaleidoscope was not a toy chosen at random for Wigmore. Rather, it represented a call to a new focus:

> A dictionary definition would be: "An instrument in the shape of a telescopic tube containing colored pieces of glass with reflecting surfaces, so arranged that when it is revolved by hand the same pieces fall at each turn again and again into new symmetrical varicolored forms. And the Kaleidoscope of Justice shows the different peoples of the world in all times and climes perpetually engaged in this perennial process of seeking to administer justice, in one or another fashion. *The same recurring elements are found combining again and again in new designs.*[188]

With the kaleidoscope, then, Wigmore entices an interest in underlying patterns far more significant than those imposed by comparative law's outside organizing devices.[189] In other words, within the common theme of the trial as a spectacle in which citizens seek justice from their rulers, one could observe the various patterns and combinations of citizenship and ruler, procedures of administering justice, different kinds of communities, and so on.[190]

Moreover, unlike the panorama, which retains the effect of representationality—of surveying a scene, a world out there—the kaleidoscope is not an instrument for knowing the world, but for effectuating an experiment on oneself. The endless variety one apprehends in the shapes and patterns of the kaleidoscope may mirror, in some ways, the endless variety we delight in finding in the real world of legal or social diversity. But the images of the kaleidoscope are produced, we know, by a given set of glass pieces contained within the toy. What the kaleidoscope offers the viewer, then, is the magic, the possibilities, and the effect of variation without the pretense of representing actual variation:

> Through a simple arrangement of mirrors the kaleidoscope could produce a nearly infinite array of shifting symmetrical visual patterns, quite unrelated to any attempt at representation or any claim of typicality. Unlike other visual devices of the nineteenth century (such as the phenakistiscope or stereoscope), the kaleidoscope provided a purely visual spectacle, the mechanical comple-

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and at providing beautiful graphics with our information, the aesthetic aspects of information display are at the forefront of serious intellectual inquiry.

187. *Id.* at 67.

188. *Id. (emphasis added).*

189. *Cf.* JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE (1987).

190. *Id.* at 5–6.

> ment to the gawker or *badaud* . . . . The kaleidoscope's ethics were striking: it combined order and transformation by creating an aleatory and unpredictable movement within a highly structured visual composition and consistent frame.[191]

The kaleidoscope, then, is a device for a very different kind of comparative exercise. Unlike categories, context, discourse, or, indeed, even evolutionary models, all of which draw connections between one legal system and the next,[192] Wigmore's pictures and vignettes demand that the reader/viewer immerse him or herself into each, separately and in turn, without clear guidance as to how one might relate to the next. Hundreds of disparate moments in legal activity, written by almost anyone with a story to tell and haphazardly collected by the comparativist as editor, hang together on nothing but the slightest organizational frame.[193]

This is important because, in the terms of the previous section, we can understand Wigmore's method as a collection of its own and as a means of accommodating American and foreign law in a singular project or frame. Yet his method accomplishes this without reducing the two to their differences and without emphasizing their commonalities.

In this respect, Wigmore's interest in the appeal of foreign law is not just a matter of changing the subject away from the question of categories or contexts. It is also a solution to the problems of context and scale raised in the previous section.

In light of the quagmires of context that now engulf the more modern methodologies of comparative law, what interests me most of all about Wigmore's method is that his text evidences none of these anxieties. The foreclosure of the possibility of informing the audience—for Wigmore's texts, as their critics point out, shamelessly evade the task of providing accurate information about foreign law—also averts the methodological problem of what level of informational detail is required. Some might view this foreclosure as an abdication of the comparativist's responsibility to accurately represent the world. Yet whether or not one takes this view, we can appreciate that the turn away from information, in Wigmore's comparative law, opens up other possibilities. Wigmore's collections stir the reader's passion for expanding one's horizons, they challenge assumptions, and they cultivate one's taste for the pleasure of learning about what is outside and beyond one's experience. Equally importantly, in their failure at the modernist task of informing, Wigmore's collections offer a different

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191. Tom Gunning, *From the Kaleidoscope to the X-Ray: Urban Spectatorship, Poe Benjamin, and Traffic in Souls* (1913), WIDE ANGLE , October 1997, at 25, 32.

192. *Cf.* Marilyn Strathern, *The Relation: Issues of Complexity and Scale*, 6 PRICKLY PEAR PAMPHLET (1995).

193. The text is organized into parts based on the geographical location of each legal system.

kind of knowledge: an empathy for underlying patterns in the character of legality and for archetypal situations, problems, and forms.[194]

Although I am not advocating that we adopt Wigmore's comparative method as our own (we will have to find solutions suitable to our own times), the comparative possibilities are illuminating. First, as we saw, comparison is backgrounded in Wigmore's work in favor of collection. If comparison entails relating disparate objects, with the collection we encounter the task already complete. In his collections, all objects are treated on the same par, whether "real" or copies, three-dimensional or two, whether academic writings or historical accounts. No attempt is made to relate the objects, that is, to understand or make sense of the differential scale among them. They simply coexist side by side. In such conditions, objects are neither contextualized, nor are they categorized; they are simply collected. The metaphorical distance between text and context is broken, and hence, the comparativist's problem of how to engage the world is also broken.

In other words, we can understand the twin problems of comparative law that we explored in previous Parts—scale and instrumentality—as versions of a singular, modernist problem concerning the character of information. The possibilities of Wigmore's comparative project for comparative law in the era of information are explored in the following Part.

V. FROM INFORMATION TO EMPATHY

As noted at the outset, ours is a moment of great resurgence of interest in comparative law. The newfound audience for comparative law stems from a growing realization that abstract models derived from commonsense hunches about the character of the world no longer suffice as a basis for legal reasoning. The world is considerably more surprising and challenging, in other words, than the academic's theories may describe. It is increasingly understood that legal scholarship must be relevant to changes in the character of legal rules, institutions, and the legal profession as a result of increasingly transnational markets, production processes, immigration patterns, trends in popular culture and more. The consequence is that we need new understandings of law—concepts, doctrines, and theories—that emerge from these new conditions rather than being deduced from a given jurisprudential framework.

The frustration that many legal scholars now feel with the abstract reasoning of jurisprudence—which too often proceeds from the assumption that one kind of reasoning applies everywhere—speaks to a growing interest in the exercise of comparing legal norms, theories and

194. *Cf.* GREGORY BATESON, MIND AND NATURE: A NECESSARY UNITY 8–9 (1979).

practices. Increasingly we reason about the law by asking ourselves about the character of the community that shares a set of norms, who that community includes and excludes, and how it differs from other possible communities.[195] Thinking comparatively, in the widest sense of the term, has come into its own, irrespective of comparative law, as a method of legal reasoning.[196] Comparative law, then, seems poised to take on the task of creating a genre of legal theory more informed by, and more receptive to, the demands of a changing espistemology which, as I have argued in Part III, we experience as an expanded world.

Another way of stating this is to say that not only is the subject matter of comparative law (i.e., foreign law) increasingly relevant to legal scholarship and practice, so is the methodology of comparison itself. The problems that have long captivated comparativists—problems of the kind explored in Parts II and III—are now a part of every legal enterprise.

To some outside observers, comparative law's obsession with the problems of categories, discourse, and context may seem like excessive navel gazing. Yet given the increasingly transnational character of all aspects of law, legal scholars will soon enough be forced to confront these questions as well. Two decades ago, the British comparative lawyer F.H. Lawson defined the scale of law as follows:

> [T]he extent of territory or the size of population to which a rule, a principle or a system of law applies; the density of population in a law-area; the density of a legal system, that is to say, the comparative closeness or looseness of its texture; the amount of its documentation; the size of the problems it has to deal with, including the size, extent and complexity of industrial or commercial operations; the time and space over which they stretch; the weight of taxation; the amount of litigation; the number of persons engaged in making law or administering justice.[197]

We no doubt could add to the list. The point, however, is that virtually every legal academic and practitioner has an interest in legal scale so defined. Indeed, comparativists who imagine a distance between their theoretical work and its instrumental applications might realize that the resolution of this very issue may be the most instrumental accomplishment of all.

In the remaining sections, I make two suggestions for how comparative law might be done. The first is that comparativists focus not on

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195. *See, e.g.*, MARTHA MINOW, MAKING ALL THE DIFFERENCE (1990).

196. *Cf.* Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43 (1998).

197. FREDRICK HENRY LAWSON, SELECTED ESSAYS: THE COMPARISON 105 (1977).

global typologies or local contexts, but on attempting to understand the concrete artifacts of globalization itself. My second suggestion, explored in the final section, is that comparativists bring their passion for the task of comparison itself to the forefront and celebrate its contribution to the theory and practice of law in an age of information overload.

A. Artifacts of Globalization: A New Agenda for Research

To claim comparative law as the engine of legal theory is also to acknowledge that globalization presents challenges for comparativists. What might comparative law have to say about global patterns of financial dependence? About the regulation of hedge funds? About the human rights norms busily promulgated by the World Trade Organization? How might we understand the differing local effects of these transnational norms? If comparativists were to study such forms of legality, would their work still count as comparative?

To begin with, at the simplest level, the answer to this question clearly must be yes. Comparative lawyers must take on transnational legal phenomena and arrangements as a subject of study, and they must do so in a manner that is genuinely curious and empirically informed. If comparativists fail to treat transnational subject matters with the methodological care that we have shown in comparisons involving non-Western legal systems, the contribution of comparative law vis-à-vis jurisprudence and other genres of legal theory is eroded.

More importantly, however, globalization, as a subject of comparative legal study, also presents comparativists trained in modernist methods of comparing rules and contexts with an intensified version of a familiar challenge. In Part II we saw that despite the self-image of comparativists as locked in a struggle over method, all of the scholars writing today share much more than they wish to admit. What they share is precisely the problem of how to compare. This problem, we also saw, is a problem of scale—a problem of how to make sense of law at different levels of generality. We saw that this problem was all the more intensified under conditions of globalization as scholars became more aware of the differences in scale at stake in every legal transaction and the fact that the context of law is now both global and local at once.

If, for example, one wishes to understand a particular ruling of the World Trade Organization, what is the proper "context" for interpretation? Is it the realm of decision making at the WTO? Is it the politics surrounding tariff laws or the legal framework regulating the industry involved in each country? Or is it the experience and attitudes of consumers or producers in the United States or in Indonesia? Any singular perspective seems to leave out far more than it includes.

Thus, what stance should we take toward the intensified problem of scale in the study of globally produced legal phenomena? Some might suggest that the emergence of an international cultural elite, living in a global village of chain hotels and standardized contract terms[198] might provide a new kind of context for law. To follow this approach would be to do comparative law as before, that is, to put legal rules in their context, only now with a new global context in mind.

At this point, Wigmore's eclectic approach illuminates one possibility. Recall my metaphor of the treasure box to describe Wigmore's scholarship. The simple collection (argument, volume, or even law school hall) that contains within itself items of different scale side by side obviates the need to determine the proper scale of description. That problem is left to the collection itself since it already contains within itself items of different scale.[199] Recall further that the work of the comparativist was backgrounded in this scheme and that it involved selecting and compiling instances of legal phenomena rather than tying them together in a singular grand theory.

Following Wigmore's ingenious move from comparison to collection—and building on the insight of Part III that globalization is not a simple phenomenon out there, but the product of the very ways of knowing and analyzing the world that now characterize comparative law—we can see that the study of transnational legal phenomena itself offers a methodological solution. Rather than attempting to relate global and local spheres of legality, to somehow tie them up in one grand comparative scheme, we might take on the somewhat less grandiose task of describing and understanding actual artifacts of transnational legality—artifacts like international institutions, hedge funds, treaties, refugees, environmental problems, "schools" of comparative lawyers, etc. The list of phenomena that exist as a result of the character of global legality is certainly long. A careful description of the inner workings of such artifacts will provide a means of understanding how the very apprehension of globalization is created and intensified through legal instruments.

How is this different from comparative law as currently practiced? We would not begin with a grand and global scheme, like a set of typologies of legal families, and look for local or particular facts to fill in the picture. Nor would we begin with moments of transnational legal activity and analyze them in their local contexts or attempt to situate

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198. *See, e.g.*, AUGÉ, *supra* note 112; Anthony D. Smith, *Towards a Global Culture?* THEORY, CULTURE & SOCIETY, June 1990, at 171; Ulf Hannerz, *Cosmopolitans and Locals in World Culture*, THEORY, CULTURE, & SOCIETY, June 1990, at 237.

199. *See supra* pp. 92-95. *Cf.* Roy Wagner, *The Fractal Person*, in BIG MEN & GREAT MEN: PERSONIFICATION OF POWER IN MELANESIA 159 (Maurice Godelier & Marilyn Strathern, eds., 1991).

them in a new context of global culture.[200] Rather, studies of the concrete artifacts of globalization would render that kind of analytical work obsolete because, like Wigmore's collections, they are always already internally scaled, and therefore cannot be described as either global or local.

From one perspective, for example, a hedge fund is the ultimate global actor being that it can bring a nation-state to its knees in a matter of minutes. Yet from another perspective, it is the ultimate local actor: five young math Ph.D.s holed up in a room with some computers. Neither local nor global descriptions of such artifacts will be adequate since their power lies in the way they work at multiple levels of scale at once.

In other words, we would allow the artifact, the subject of our study, to do the work of scale change that has been the hallmark, as well as the evidence, of the comparative lawyer's task. Instead of managing an analytical move from global to local elements in the comparison of legal systems, we would compare the devices for effectuating scale change. If comparativists foster understanding of how artifacts of global legality, such as hedge funds, become "global", we would contribute a great deal to the understanding of law in the age of globalization.

In effect, this is already being done. One example is Kyoko Inoue's ingenious study of the Japanese Constitution as an outcome of American and Japanese misunderstandings of one another after World War II.[201] Inoue describes the negotiations between Japanese and Americans while drafting a new constitution and reveals how Japanese negotiators at times misunderstood the legal ideas favored by the Americans and at other times purposely mistranslated the original intention of some sentences in the draft constitution Americans had prepared.[202] Inoue's work allows us to understand the Japanese constitution as an artifact of a transnational legal encounter, as a failed exercise in comparison between two legal systems, which nonetheless produced a series of powerful and lasting domestic legal changes in Japan such as the ban on military aggression contained in Article 9.

A second example is Richard Harper's study of the production and uses of a particularly important artifact of transnational legality, the International Monetary Fund project report.[203] In the traditional academic view one might imagine a report of this kind as an unimportant

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200. *See supra* Part III.

201. *See* KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION (1991).

202. According to Inoue, "the acceptance of the new Japanese Constitution by both the Americans and the Japanese depended heavily on the ambiguities of cross-linguistic and cross-cultural communication between both parties." *Id.* at 269–70.

203. RICHARD H.R. HARPER, INSIDE THE IMF: AN ETHNOGRAPHY OF DOCUMENTS, TECHNOLOGY AND ORGANISATIONAL ACTION (1998).

sideline, a necessary but inconsequential vehicle for the rules and policies it details. Yet Harper demonstrates the changing significance of the document itself, as it is made, used, filed and ultimately retired, the different ways in which it is read at different levels, and the way it constitutes the states under IMF supervision and their problems.

My work on negotiations of international agreements at the United Nations offers a third example.[204] The doctrine of international law rests upon an understanding that its problem, or context, is to reconcile national and international spheres of legality. However, the negotiators of international agreements, which international lawyers assume help bridge the gap between national and international, do not necessarily see things this way. Those I observed consider these agreements neither "global" nor "local," but simply "technical"; they are documents to be completed on deadline in a particular way. The negotiators only apprehend a gulf between levels of legality—that is, they only think of themselves as global players, distinct from the national levels at which their agreement will be implemented—at particular moments in the negotiation when, in the course of haggling over particular clauses or phrases, they realize that behind every phrase are countless other negotiations—national, religious, and so on. The awareness of differences between global and local, then, is an artifact of the process of negotiation itself for these actors, not an outside condition (or context) for their work.[205]

Finally, an artifact of globalization need not be our vision of the global, as the Context School's careful attention to non-Western legalities reminds us. Rebecca French's pathbreaking work on the similarities and differences between the Tibetan and American legal systems demonstrates that the Tibetan *mandala*—a pattern used for meditation, the layout of cities, a map of the human soul, as well as of the universe—is an image that is both radically particular and utterly all-encompassing.[206] The *mandala*, French points out, encompasses a very different notion of the relationship of law to culture, society, or selfhood than the Euro-American understanding of the relationship of law to its social context. It is a conception of legality as utterly global and local at once.[207]

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204. ANNELISE RILES, THE NETWORK INSIDE OUT (forthcoming 1999).

205. In a recent article, Mark Tushnet offers a similar analysis of the writing of constitutions. *See supra* note 2. Drawing upon comparative materials from the Hungarian and South African experiences of constitutional drafting, Tushnet argues that at least as concerns certain portions of the text, constitution drafting is an act of "bricolage." Constitutions are artifacts of haphazard borrowings from other national and international traditions. Tushnet's exemplary analysis offers another demonstration of the insights to be gained from a look at concrete artifacts of transnationalism.

206. *See* REBECCA REDWOOD FRENCH, THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET (1995).

207. Interestingly, given the discussion in the preceding Part, she uses the image of a kaleido-

These studies take globalization as their subject, but do not assume knowledge of what global or transnational legality is at the outset. Rather, they treat the character of the Global, as an artifact of legal consciousness, as the question they seek to answer. This work is distinguished by quality empirical, historical, sociological or anthropological research, yet it does not begin and end with the functionalist/contextualist paradigm that characterizes the majority of comparative legal scholarship. Because these texts do not conform to the practices of any of the schools of comparative law described above, they may not look like comparative law at first glance, just as Wigmore's texts do not look like comparative law today. Therefore, we may have to retrain our ear to hear a new kind of tune.

From the point of view of these artifacts of transnational legal activity to which I would draw our comparative attention, globalization is not a new context for law that brings with it novel problems for comparativists and for lawyers more generally. Rather, it is an increased awareness of differences of scale experienced precisely through these artifacts themselves. If the problem of comparative law is how to grasp different levels at once, we can find one paradoxical solution in treating the patterns of global legality as items in Wigmore's collection.

B. Last Lines

Of course this approach is only one of many avenues for comparativists to explore. And in any case, it is just as insufficient to blame categories and context for the methodological quagmires of comparative law, as it is unduly hopeful to imagine that any singular device will solve the problems of representation that are the hallmark of modernism. As we have seen in Part III, these are problems that in effect cannot be solved because the innovations of modernist comparative law also entail a working out of the method's own shortcomings—a recurring sense that any comparison of legal regimes is always both too general and too specific to capture all that we would like to know.

Yet if the principal methodological dilemma of comparative law is a question of the amount and level of detail of information to be provided in comparative analysis, the task of comparative law in an era of information finds itself outdone at the start. New information technologies, such as hyperlinks, search engines, and web pages for every institution from a Peruvian village to the Vatican, provide an instant and excessive abundance of information, at any level of generality and scale, without the necessity for mediation by the comparativist. I was jolted into the position of defending the relevance of comparative law in light of new information technologies during the first meeting of

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scopic justice to capture the differences between the *mandala* and more familiar legal models.

my comparative law class last year when, as I carefully explained what comparativists do, one student raised his hand and asked, "Don't librarians do all this for us already?"

And it is not just librarians and their information technologies that have supplanted the traditional work of comparative law. As Bryant Garth notes,[208] the legal profession, which traditionally relied on scholarly work in comparative law for its understanding of foreign law, now looks to foreign counsel, overseas offices, or, indeed, to those same information technologies. The global law firm, Garth warns, is in danger of rendering comparative law obsolete.[209]

Here I wish to suggest an even more counterintuitive claim: what is sorely needed in the study of comparative law is not information about foreign law at all. Contrary to the many arguments surveyed in Part II that the information generated by comparative inquiry serves instrumental purposes, such as aiding in the harmonization of laws, or even that information has value in itself, I believe that the moment of globalization is characterized by a great excess of information. The last thing we need from comparativists, or from librarians or global law firms, for that matter, is another web page, hyperlink, or database.

How then do we explain the great interest in comparative law? Is it simply a misplaced desire for what librarians or law firms could more readily, more efficiently and more cheaply provide? This is only the case if we confuse information with insight, facts with knowledge, or data with the passion and perspective that accompanies the task of learning itself. The task of comparativists in the coming years will be to help the legal community understand the important difference between the two and the difficult voyage from one to the other.

In conclusion, I want to propose that what ultimately is needed from comparative law is something entirely different, an antidote to an excessively self-aware, self-reflexive, self-informed world. What is needed are not empirical findings of the kind the Context and Categories scholars offer us, nor is it a critique of context and categories for their inadequacies as representational devices, as the Discourse scholars propose. Instead, what is needed—what no global law firm nor computerized search engine can offer—is comparativists' expertise of a different kind.

Recall for a moment Wigmore's collected works. Whether accurate or outlandish, they were first and foremost tools for reaching an audience, ways of promoting interest in, and empathy for, what was beyond the boundaries of the reader's imagination. Of course, Wigmore himself recognized that these works did not require giving up on empiricism in all aspects—he praised the work of scientific jurisprudence, as

208. *See* Garth, *supra* note 16, at 12.
209. *Id.* at 6.

we saw, and organized his thoughts around his own typology of legal systems. However, he also recognized another kind of contribution, one informed by, and informing, comparative law's more empirical strains: fostering a passion for comparison itself.

For those who might think of Wigmore's efforts as mere entertainment or pedagogy, secondary in importance to the instrumental task of harmonizing law or improving each domestic legal system through comparative example, it is useful to remember that Wigmore saw no substantive distinction between his efforts to stir his students' interest in foreign law and his work on behalf of the League of Nations. Indeed, he no doubt is one of the most active practitioners of comparative law of all time. There is a lesson in this. The fantasy, still reproduced in some neo-liberal and international circles, that merely sharing information will generate meaningful communication, is beginning to give way to more sobering realizations that there exists a wide gulf between knowing the facts and true empathy for others' experience and understanding of alternative forms of legality.

Yet comparative law has never been just about the facts of foreign law. It is the passion for understanding these differences, I believe, that ultimately motivates comparative lawyers, and it is this passion that is sorely lacking from the theory and practice of law today. An international agreement is more likely to fail, or a possibility for legal reform to go unconsidered, for example, because of a lack of interest, empathy, or faith in the possibility of engagement with difference than because of a lack of information about things foreign.

In this respect, we might follow Wigmore in his turn away from a concern with problems of context and typology. We might follow him, instead, to a celebration of faith in comparison and of the stylistic devices (such as the collection) that enable its appreciation. It is on this terrain, I hope, that comparativists might come together to contribute to the understanding of legality in an era of information.[210]

Indeed, hidden in the notes or tucked into the last lines of the writings of comparativists from the different schools is a recognition that something else altogether animates their project. One could read these last sentences as mere throw-aways, the artifacts of irrelevant moments of uncontrollable sentimentality; or one might read them as the somehow unspeakable animus for the project itself. Glendon closes one recent article, for example, with an image of hope unfulfilled:

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210. Indeed, it is only on this final, and perhaps unlikely point that I part company with the discursive critique of comparative law and legal rhetoric. My fear is that the critical move that uncovers endless strategies, rhetorical or otherwise, latent in every comparative effort, however well grounded and insightful, ultimately kills the illogical hope that is the basis of this other comparative enterprise.

> To my mind, the most poignant detail of the biblical account of the wanderings of Israel in the desert is that Moses himself never entered the promised land, but only glimpsed it from afar. And so it is with the journeys we undertake in any serious form of research. From time to time, we have glimpses that lift our hearts and gladden our spirits, but the pilgrimage continues.[211]

Frankenberg likewise concludes his article with the following claim:

> Essentially, we have to turn what we come upon against our own assumptions and let it speak for itself. This is a risky business, for it may reveal our arbitrariness and may undermine our confidence in the various rationalizing strategies the scholarly discourse offers. At the same time, the risk we take with critical legal comparisons may allow us a vantage—in uncertainty—from which to re-evaluate the givens of our legal world and to re-imagine our possibilities and our freedom.[212]

And William Alford closes his argument with the following statement:

> I believe our faith in the possibility of understanding others, coupled with the process of rigorously seeking to reach that end, brings us as close to an appreciation of others as is possible—so long as we neither mistake our faith for a description of reality nor forget that we can never expect to attain the objective we seek.[213]

One might take the deeply felt passion in these three passages from such eminent voices, drawn from all three communities of comparative lawyers as evidence of a shared animating drive in their work, irrespective of the differences considered in this Article about which they are more explicit and forthcoming. The argument of this Article has been that it is this commitment for its own sake, and the interest in styles of scholarship that will render that passion for knowledge, that is sorely needed in an age of information overload, in which all differences are prefigured. Given the sobering style of empiricism which, we have seen, characterizes modernist comparative law, one might forgive these writers for avoiding ridicule by relegating such thoughts to the margins. Perhaps the next step for a comparative law of transnational legality is to bring this animating passion to the forefront of our work.

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211. *See* GARTH, *supra* note 16, at 419.
212. *Id.* at 455.
213. Alford, *supra* note 77, at 948.