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Identity, Effectiveness, and Newness in Transjudicialism's Coming of Age

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IDENTITY, EFFECTIVENESS, AND NEWNESS IN TRANSJUDICIALISM'S COMING OF AGE

*Mark Toufayan**

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INTRODUCTION

The ascendancy and mysticism of supranational human rights adjudication have exerted a stronghold on human rights lawyers' liberal cosmopolitanism. This exuberance is reflected today in a wide range of human rights courts, quasi-judicial tribunals, and treaty bodies within the United Nations (U.N.) and across regional settings. Most critics have gauged the concurrent, overlapping jurisdiction and activities of

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human rights treaty bodies and tribunals as signaling imminent crisis, creating a world-wide sweep of divergent or conflicting interpretations of parallel treaty texts and threatening, in turn, to create confusion and undermine the authority of these tribunals and even the jurists who serve on them.¹ Those who ultimately find credence in such “integrity-anxiety”² fail to engage the contradictions and exclusionary and distributive effects of liberalism’s fetishized culture of resistance to the politics of human rights. At a much deeper level, all of these critiques make the claim, but fail to articulate and test it, that there exists a single coherent and secularized international human rights regime. The feared divergence of results is cast as a refutation of that premise necessitating steps to rectify a problem—the enforcement of international human rights norms domestically—presented as one pertaining to the internal coherence and progress of the discipline.

Throughout the 1990s, these critiques generated demands for large-scale reform of an ailing U.N. human rights monitoring system. Independent expert Philip Alston produced three reports in 1989, 1993, and 1997 tabling blueprints for such institutional reform.³ At that time, the U.N. had, incidentally, firmly cast its stranglehold on the international community by asserting the universality, indivisibility, and interdependence of human rights.⁴ Reference to this “common lan-

1. See generally THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS. A CRITIQUE OF INSTRUMENTS AND PROCESS 229–43 (1986); Thomas Buergenthal, *International and Regional Human Rights Law and Institutions: Some Examples of Their Interaction*, 12 TEX. INT’L L.J. 321 (1977); Marc-André Eissen, *The European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights: Problems of Coexistence*, 22 BUFF. L. REV. 181 (1972); Theodor Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AM. J. INT’L L. 754 (1982); A.A. Cançado Trindade, *Co-Existence and Co-Ordination of Mechanisms of Protection of Human Rights*, 202 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 13 (1987).

2. The expression is Frank Michelman’s, who uses it in a typically Dworkinian vein to explain why U.S. judges resist participation in a global judicial conversation through a justificatory politics which cannot be reduced to parochialism, elitism or political partisanship. He defines integrity-anxiety as “a perceived threat to the integrity . . . of the historic discourse of American constitutional law respecting rights.” See Frank Michelman, *Integrity-Anxiety?*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 241, 264 (M. Ignatieff ed., 2005). For him, “[t]o speak of the *integrity* of this discourse is to speak of its unbroken identity through time as a distinctly cognizable, self-contained discursive object—a kind of discursive domain unto itself, visibly separate and freestanding from other normative discourses.” *Id.*

3. Of particular relevance to the argument developed in this Article is Philip Alston’s 1993 (interim) report. See World Conference on Human Rights, Geneva, Switz, Apr. 19–30, 1993, *Interim Report of Study on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty Régime*, U.N. Doc. A/CONF.157/PC/62/Add.11/Rev.1 (Apr. 22, 1993) (prepared by Philip Alston) [hereinafter *Alston 1993 Report*].

4. World Conference on Human Rights, Vienna, Austria, June 14–25, 1993, *Vienna Declaration and Programme of Action*, pt. 1, ¶ 5, U.N. Doc. A/CONF.157/24 (Oct. 13, 1993).

guage of humanity,"⁵ alongside the new sexy dressings of mutually reinforcing human rights in relation to development,⁶ has since become the buzzword in mainstream rights-discourse.

The need for coherent and consistent jurisprudence to fend off the "worst-case consequences" of the proliferation of human rights norms and institutions alluded to by Alston in his successive reports to the General Assembly⁷ is rarely read, however, against the backdrop of the post Cold-War crisis in international human rights in relation to Third World States. The celebratory mood for policy-based pragmatism and innovation of the 1960s and 1970s, which had given rise to this proliferation, had flattened by the early 1990s to give way to calls for institutional re-vamping and a greater focus on "effectiveness," in order to grapple with the apparent disparity between often-celebrated normative achievements in this realm and the often-lamented failures to enforce them. With the concomitant enlargement of the now-defunct U.N. Commission on Human Rights in 1990 from forty-four to fifty-three states, Third World states were seen as having a decisive say over whether a country would be investigated or not for alleged human rights violations.⁸ Faced with the risk of "politicization" of law and a much-romanticized Third World nationalist solidarity accompanying claims of cultural relativism⁹ the fault lines and links between calls for disciplinary renewal, domestic norm reception, and the extension of the global reach of international human rights norms and institutions had to be redrawn and reinforced.

Such a reconfiguration operated on two planes. On the institutional level, while Alston's 1993 interim report underscored that shortcomings in treaty implementation efforts had to be linked to the complementarity between universal and regional human rights systems, he was cautious not to advocate the consolidation of the treaty bodies and regional courts

5. Boutros Boutros-Ghali, *Human Rights: The Common Language of Humanity*, in UNITED NATIONS, WORLD CONFERENCE ON HUMAN RIGHTS: THE VIENNA DECLARATION AND PROGRAMME OF ACTION: JUNE 1993, at 8 (1994).

6. See 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 121, U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/1, (Oct. 24, 2005) ("affirm[ing] that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing . . ."). For the special case of development, see also HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT (Philip Alston & Mary Robinson eds., 2005).

7. Alston 1993 Report, *supra* note 3, ¶¶ 241, 245, 250–51.

8. LOUIS HENKIN, THE AGE OF RIGHTS 23, 26 (1990) ("The 'politicization' of human rights, and, in particular, their subordination to ideological conflict and to Third World solidarity, have resulted in more concern with human rights violations in some countries than in others, and human rights are the text, or the pretext, for attacks on particular states Inevitably, politicized scrutiny attenuates the influence of the United Nations and distorts the human rights movement."); see also *id.* at 27.

9. *Id.* at 26.

into a single entity.¹⁰ The reasons for such recalcitrance were framed as structural and technical, rather than political. First, specific attributes of the twin international human rights Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR) and issue-specific treaties (racial discrimination, torture, women's rights, etc.) adopted in the United Nations rendered the treaty bodies more amenable to consolidation with one another than to consolidation with their regional counterparts.¹¹ Second, problems of system overload, scarcity of resources, and burdensome proliferation of state reporting duties Alston identified in the reports as hampering effectiveness simply did not arise when probing the treaty bodies' relationship with their regional brethren.¹² Nor was there, for similar reasons, any underlying concern for harnessing an "interactive diversity" of professional expertise and social praxes, the impetus for both resisting and welcoming the long-term consolidation of the (now) eight sister treaty bodies with core mandates ranging from children's to migrant workers' rights, gender discrimination to economic, social and cultural, and disability rights.¹³ Alston's proposed changes, rather, consisted of improving coordination among the treaty bodies' and regional tribunals' jurisprudence by enhancing and formalizing "effective channels of communication"¹⁴ among jurists to promote an exchange of views over shared human rights standards.

While the anti-formalism advocated in these reforms could be read as a catalyst for studying the procedural means to achieve a preordained goal, such a view would appear to be seriously misleading. On the substantive level, the U.N. reform agenda of the 1990s was rationalized by post-Cold War international human rights lawyers as the occasion for the complete maturation of human rights norms and institutions under the progressive mantra of "universalism."¹⁵ This was seen as a means of sal-

10. The recent proposal by the U.N. Office of the High Commissioner on Human Rights for a unified standing treaty body is thus limited to the U.N. monitoring system. See The Secretariat, *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, U.N. Doc. HRI/MC/2006/2 (Mar. 22, 2006).

11. See generally Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OS-GOODE HALL L.J. 769, 772 (1989); Alston 1993 Report, *supra* note 3, ¶¶ 139–63.

12. See, e.g., Philip Alston, *Report on Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights*, ¶ 179, U.N. Doc A/44/668 (Nov. 8, 1989).

13. The expression "interactive diversity of knowledge" was coined and operationalized by Craig Scott. See Craig Scott, *Bodies of Knowledge: A Diversity Promotion Role for the UN High Commissioner for Human Rights*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 403, 404–11 (Philip Alston & James Crawford eds., 2000).

14. See Alston 1993 Report, *supra* note 3, ¶ 246.

15. Thus, using the metaphor of a child maturing through adolescence, Alston describes elsewhere in his scholarly work the post-Cold War evolution of international human rights law as "a necessary developmental phase and one which, if successfully negotiated, will facilitate

vaging the discipline's self-image following, on the one hand, the disillusionment of Cold-War politics, ascendancy of Third Worldism, and claims of state sovereignty and domestic jurisdiction and, on the other, the rise of "end of history"-type arguments in the immediate post-Cold War era. At their core, all the proposals tabled by Alston argued in one form or another that cross-fertilization, if properly enhanced and facilitated, could materially benefit international human rights law.¹⁶ It may have been expected that these studies would provide references to what ought to characterize an "effective" human rights legalism as a means of distancing it from the claimed ineffectual political climate of the time. But in none of Alston's reports was the key notion of "effectiveness" defined or discussed beyond a high level of rhetoric.¹⁷

By 2003, further work on coordination between the U.N. human rights treaty regime and regional bodies to achieve effectiveness was largely abandoned. Instead the focus shifted to reforming the treaty body system through harmonization and streamlining of reporting procedures and consolidation for the "effective implementation of human rights instruments" and "effective functioning of the treaty bodies."¹⁸ The post Cold-War debate on human rights regime effectiveness did not, thus, take place merely on an existential level, stripped from lawyers' exegetic task of defining and shaping positive rules. Yet its real importance was claimed to lie beyond mere legalistic quibbles, namely in explaining the technocratic problematic of "compliance" with human rights norms and decisions.¹⁹ Indeed, many international lawyers still look to enforcement as the answer to perennial debates on the perceived "ineffectiveness" of

the transition to maturity and a renewed self-confidence." See Philip Alston, *Introduction*, in *HUMAN RIGHTS LAW*, at xi (Philip Alston ed., 1996).

16. See *Alston 1993 Report*, *supra* note 3, ¶ 36 for summary conclusions and recommendations. See also International Law Association (ILA), Berlin Conference 2004, International Human Rights Law and Practice, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies, Part D, and Conference Resolution No. 4/2004*, pmb. ¶ 6 [hereinafter *2004 ILA Berlin Report*].

17. *Alston 1993 Report*, *supra* note 3, ¶ 246. Given that any descriptive or normative account of effectiveness is a function of the assumptions underlying any particular understanding of that term, it is deliberately not defined in this Article. As a conceptual matter, however, effectiveness is distinguished from "effective enjoyment" of individual rights and fundamental freedoms as this doctrinal concept has been expounded upon in U.N. diplomatic practice and European jurisprudence. *Id.* According to the doctrine of "effectiveness" developed by the European Court of Human Rights (ECtHR), the Convention's special character as a treaty for the collective enforcement of human rights requires that its provisions be interpreted and applied so as to make its safeguards "practical and effective as opposed to theoretical or illusory." See, e.g., *Allenet de Ribemont v. France*, 308 Eur. Ct. H.R. (Ser. A) at 35 (1995).

18. See G.A. Res. 57/202, U.N. GAOR, 57th Sess., U.N. Doc. A/RES/57/202 (Jan. 16, 2003).

19. As one scholar put it, "the concept of *effectiveness* has received relatively little attention" in legal scholarship and writing, "whose principal aim is the description of the valid norms of a legal system." See Pablo E. Navarro, *Legal Positivism and the Effectiveness of Norms*, 26 RECHTSTHEORIE 223, 224 (1995).

international law and its role in the progressive move to institutionalism or “tribunalism.”²⁰ This has led to a focus upon binding dispute settlement and the tracing of a trajectory of formal institutional, even bureaucratic “legalization” as the dominant liberal internationalist styles and modes of thinking about prescriptions for defining, interpreting, and promoting compliance.²¹ Recent scholarship attempting a *rapprochement* between the disciplines of international law (IL) and international relations (IR) also has struggled with questions of compliance with human rights standards.²² The narrowness of this focus, however, has relegated the question of the political conditions of the emergence of human rights norms, institutions, and doctrines, and especially of the role of power asymmetries in conditioning distributive outcomes, to the background. International human rights lawyers like Alston have located the work of effectiveness instead in matters of fit and cultural commensurability, noting “that certain inconsistencies between provisions of international instruments and those of regional instruments might raise difficulties with regard to their implementation.”²³

This disciplinary depoliticization through the “effectiveness” agenda of reform is largely due to the fact that members of human rights institutions and tribunals spend relatively little time exploring the jurisprudential and social impact of their decisions—that is, cognitively mapping and systematically articulating the normative bases for and implications of their choice of whether or not to engage in dialogue with other courts.²⁴ The role of variables such as power, hegemony, socialization, identity, culture, and knowledge in shaping effectiveness and in

20. For a critical analysis of the origins and development of institutionalism, see David Kennedy, *The Move to Institutions*, 8 *CARDOZO L. REV.* 841 (1987). See also Thomas Skouteris, *The New Tribunalism: Strategies of (De)Legitimation in the Era of International Adjudication*, 2006 *FINNISH Y.B. INT’L L.* 307, 334–39 (discussing the role of the international lawyer in the “new tribunalism,” i.e., the inter-war rise of international adjudication).

21. See Kenneth W. Abbott et al., *The Concept of Legalization*, 54 *INT’L ORG.* 401, 401–02 (2000) (explaining legalization theory generally). See generally *LEGALIZATION AND WORLD POLITICS* (J.L. Goldstein et al. eds., 2001).

22. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 107–34 (2005); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621 (2004) [hereinafter Goodman & Jinks, *How to Influence States*]; Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 *EUR. J. INT’L L.* 171 (2003) [hereinafter Goodman & Jinks, *Measuring the Effects of Human Rights Treaties*]; Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 *YALE L.J.* 1935 (2002). See generally *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse et al. eds., 1999) (discussing the domestic impact of international human rights norms).

23. See Alston 1993 Report, *supra* note 3, ¶ 245 (quoting G.A. Res. 47/125, pmb. ¶ 9, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/125 (Dec. 18, 1992)).

24. Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING*, *supra* note 13, at 15, 39–40.

capturing the methodological complexities and distributional consequences involved in cross-cultural formation of human rights norms has rarely been studied methodically in the scholarly literature. Legal scholars often view these as largely irrelevant to their profession. Political science theorists, for their part, have not considered these issues matter fit for study outside the occasional grasp of regime theory.²⁵

An attempt to engage with some of these issues was made in recent years in the context of comparative assessments of the structure and functioning of supranational courts “as a means of generating a framework for understanding the effectiveness of [supranational] adjudication.”²⁶ This approach is interesting, as it emphasizes the role of *adjudication* in effective systems of regulation and governance, and in doing so censures the dominance of regime theory in this line of socio-scientific research.²⁷ Yet unlike both macro- and micro-level analyses of human rights, which have focused largely on the receiving end of the process of norm-production and transmission, the approach is also original, because it is directly concerned with the process itself.

This Article attempts to expose and problematize the ideological connections and normative commitments between these theoretical explanations of effectiveness and the pragmatic process-oriented proposals made in the 1990s when the United Nations was searching for ways to renew the discipline of international human rights law while avoiding the dual risks of politicization and Third World normative fragmentation. The liberal theory of effective supranational adjudication was the culmination of decade-long efforts by American liberal internationalists to

25. Regime theory is the study of “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given [issue area].” See STEPHEN KRASNER, *INTERNATIONAL REGIMES* 2 (1983). For works on human rights in this tradition, see generally Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 *INT’L ORG.* 599 (1986); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 45 *INT’L ORG.* 217 (2000).

26. See Anne-Marie Slaughter & Alec Stone, *Assessing the Effectiveness of International Adjudication*, 89 *AM. SOC’Y INT’L L. PROC.* 91, 91 (1995).

27. Helfer and Slaughter claimed to “have developed the . . . compilation of the attributes of effective supranational adjudication by distilling commentary and analysis by judges, lawyers, and political scientists who have closely observed the workings of the [European Court of Justice, ECJ] and the [ECtHR], supplementing these findings with [their] own analysis” which they summarized in a “checklist.” See Laurence Helfer & Anne-Marie Slaughter, *Toward A Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 298 (1997) [hereinafter Helfer & Slaughter, *Theory*]. Among the spectrum of attributes are factors such as the extent to which the court/tribunal engages in judicial cross-fertilization and dialogue; the existence of autonomous domestic institutions that are committed to the rule of law and responsive to citizen interests; and the relative cultural and political homogeneity of states subject to the tribunal’s jurisdiction. *Id.* at 300–35. Crucially, the purpose of generating such a “checklist” was “to develop a tool that [could] be used to assess the effectiveness of *other* supranational tribunals and to guide the members of those tribunals in seeking to enhance their own effectiveness.” *Id.* at 298 (emphasis added).

provide a theoretical basis for and programmatic proposals towards achieving a more “effective” international human rights regime. Their theory aims at structuring the interface between the universal and regional human rights systems through a reconfigured account of “transjudicialism.” It can be taken to exemplify a particular liberal legal sensibility shared with post-war mainstream human rights lawyers I call “transnationalism-legal-process-antiformalism” (TLP AF).²⁸ TLP AF regards transnational governance through disaggregated processes of cooperation and dialogue in information exchange as instrumental to the development and effectiveness of supranational institutions. Formalist legal structures are, accordingly, rebuffed and displaced by the specification and enforcement of substantive human rights norms through informal, teleological procedural mechanisms.

I shall argue in this Article that TLP AF has important distributive consequences that are ignored in these theorists’ purportedly “neutral,” process-based analyses. In such a reconfiguration, the Third World and non-European regional human rights systems are reduced to sites of norm consumption and norm internalization that have no impact on norm production. An examination of how the liberal approach to adjudication fits within this broader analytic of TLP AF will necessarily reveal its limits. It will also point to an urgent need to reconstruct the transjudicial human rights landscape around political alternatives to liberalism in the discipline’s professional self-understanding.²⁹

28. David Kennedy has used the expression “Transnationalism-Legal-Process-Liberalism” to describe the new mainstream consensus in the discipline of international law that emerged in the United States in the 1990s, contrasting it with dissident voices both on the right (public choice theorists) and on the left (scholars of identity politics). Formally, this new consensus is articulated around a commitment to core ideas of which the following are a sampling: disaggregation of international law; blurring of the law/politics; national/international and public/private distinctions; anti-formalism; interdisciplinarity; a chastened economics with a humane face; embedded law and civil society; universal humanism; defense of an ethic of universal human rights (process, procedure, and machinery rather than formal legal entitlements); use of national courts to enforce human rights norms; championing of liberal world public order; skepticism about neo-liberalism; worry about governance; regimes and global management; and enthusiasm about efforts to dialogue and understand the “other.” See David Kennedy, *The Twentieth-Century Discipline of International Law in the United States*, in *LOOKING BACK AT LAW’S CENTURY* 386, 406–07, 419–21 (Austin Sarat et al. eds., 2002). In this Article, the use of the neighboring expression “Transnationalism-Legal-Process-Anti-Formalism” is intended to stress that it is less the autonomy of rational actors than a relentless insistence on a reinvigorated anti-formalism and detached processualism that distinguishes transjudicialism theorists from public or rational choice theorists.

29. Taking the “external point of view,” as it were, as opposed to a phenomenological stance such as the one adopted in this Article, would condemn us to focus on some behavioral regularities (supposedly induced by norms) and establish some correlations. See Friedrich V. Kratochwil, *How Do Norms Matter?*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 35, 63 (Michael Byers ed., 2000) (“Although we may observe a certain regularity that might be caused by some underlying norm, we have no clear idea how this hunch can be translated into

Drawing on various strands of IR theory, critical social and legal theory, feminist relational theory, and the psychology of linguistics, the Article develops a cognitive model of the interplay between supranational tribunals adjudicating human rights, sketching only the bare bones of the framework in which this interaction is situated. It is impossible to fully comprehend this interaction and its relation to human rights' core problematic of engaging and bridging cultural differences unless one factors in two elements: first, a displacement of a rationalist interest-based calculus as a progressive human rights narrative; and, second, a commitment to a more robust communicative conception that focuses on identity formation and transformation as the governing logic of institution-to-institution, and institution-to-domestic social actor dialogue. It is not possible to construe a grand theory of human rights cross-cultural fertilization and norm-internalization in unitary terms because every method of coordination of different plural legal orders is bound to some *a priori* ideological premises about social ordering.³⁰ The Article also begins to fill an important gap in the growing IL/IR scholarship on compliance by proposing a relational theoretical framework for understanding how norms influence domestic regulators, and how culture and rights structure patterns of interaction and relationships between social actors and norm-enunciators. These, in turn, affect in various ways the practice of international institutions, state decisions to comply with human rights norms, and their varying levels of compliance.

Part I begins by broadly sketching the methodological shortcomings and biases of transjudicialism theorists' "convergence thesis." According to this thesis, jurisprudential convergence, rather than divergence, is conducive to supranational human rights courts' effectiveness.³¹ Pulling together various strands of transjudicialism scholarship over the past twenty years, it then canvasses what I call the dominant "interactional" models of international rulemaking and compliance in IR/IL theory, and introduces the theoretical-methodological sketch of "judicial socio-discursive interactionism" (JSDI). Interactional models recognize that legal norms help construct national and local identities and interests through a relational process of justificatory discourse and persuasion,

a causal mechanism so that we can establish the actual aetiology between norms and resulting behaviour.").

30. As Frankenberg reminds us, a will to power and governance in comparativist studies of attempts to engage with cultural difference and cultural diversity is routinely denied and only made implicit in the underlying analyses. See Günther Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 HARV. INT'L L.J. 411, 441-42 (1985).

31. See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 195-212 (2004) [hereinafter SLAUGHTER, A NEW WORLD ORDER] (on prescriptions for government networks to create convergence and informed divergence to contribute to the construction of an "effective world order"); Helfer & Slaughter, *Theory*, *supra* note 27, at 374-75; Part II, *infra*.

while JSDI emphasizes how such relational knowledge-production seeks to foster social relationships conducive to the realization of particular values in human rights. Taking cross-fertilization and norm-internalization seriously must, then, imply unveiling the “billiard ball” conception of courts and judges as fixed units with a pre-determined configuration of interests to examine the impact of identity-building within and across adjudicatory bodies themselves,³² which are harnessed to local cultural forces. But it must also focus on the distributive effects of these processes of identity-formation and transformation.

Part II explores the politics of prescriptions to policymakers for designing “effective” supranational human rights adjudication. The Article then tests these assumptions in Part III through a highly contextual case study on the death penalty. This study illustrates how arguments about human rights regime effectiveness and judicial cross-fertilization conceal important distributive stakes and the blind spots of the underlying exclusionary analyses of human rights normativity. A brief conclusion follows.

I. “NEWNESS” IN THE RISE OF A “GLOBAL COMMUNITY OF HUMAN RIGHTS COURTS”

The liberal internationalist “thought-experiment”³³ of transjudicialism in relation to the development of human rights norms and institutions must be understood in the historical context of the rise and hegemony in post-war American international legal thought of the broader liberal approach to international adjudication on which it draws.³⁴ For international lawyers, it is commonplace, even *passé*, that Anne-Marie Slaughter has sought over the years to construct a distinctive liberal theory of international law which complements liberal

32. See generally Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT’L STUD. Q. 487 (2001). See also ORAN R. YOUNG, GOVERNANCE IN WORLD AFFAIRS 149–53 (1999) (discussing endogenous and exogenous forces within the institutions themselves, including the role of ideas and processes of social learning for affecting behavior).

33. Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503, 505 (1995) [hereinafter Slaughter, *Liberal States*].

34. Little attempt has been made in human rights scholarship to unravel TLPAP’s ideological assumptions and the normative implications to which it is wedded. To the extent that human rights lawyers engage with liberal internationalist literature, the result turns out to be a dialogue wholly internal to liberal cosmopolitans (generalists and specialists) and a wholesale borrowing of the theoretical and pragmatic insights generated by these studies. See Gerald L. Neuman, *Talking to Ourselves*, 16 EUR. J. INT’L L. 139, 142 (2005) (arguing that “[i]nternational human rights law needs to persuade outsiders and to leave space for reciprocal critique” and that “[e]nsuring conversation among human rights lawyers is not a sufficient objective”).

international relations theory, in response to the realist challenge, and through a focus on the role of adjudication by *domestic* courts in establishing an *international* rule of law.³⁵ As will be argued in Part I.B *infra*, liberal international legal theory does not, however, disrupt either realists' or rational choice theorists' reification of state and judicial identities, nor their displacement of the cultural processes through which these identities are shaped and distributed. In that sense, it could be seen as their ideological heir rather than as their opponent despite, or rather precisely because of, its legal process orientation.

Building upon Andrew Moravcsik's "positive" liberalism³⁶ and distancing herself from the pitfalls of quixotic post-war Wilsonian liberal internationalism, Slaughter argued that state preferences are neither fixed nor autonomous but are the aggregation of individual and group preferences and interests, and that these preferences are the primary determinants of what states do.³⁷ Accordingly, "how States behave depends on how they are internally constituted."³⁸ Liberal theory assumes that liberal states—that is, those having some form of representative government, constitutional guarantees of civil and political rights, and a judicial system dedicated to the rule of law—will comply more readily with the treaties they sign and that these treaties are more likely to be subject to effective judicial enforcement at the international or domestic level (or both).³⁹ This theory also assumes that judges from these states are more likely to build a transnational community of law through an increased readiness to cite one another.⁴⁰

Liberal theory offers a rather sanguine vision of the constitution of a "global community of law," which takes account of the realities of globalization by seeking to ground international law in the realism of the *domestic* rather than the false utopianism of international institutions.⁴¹ It

35. In addition to the texts cited in this Article, the following can be considered Slaughter's most representative works on her liberal theory of international law: Anne-Marie Burley, *Toward an Age of Liberal Nations*, 33 HARV INT'L L.J. 393 (1992); Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 377 (1994).

36. See Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 516–24 (1997).

37. Slaughter, *Liberal States*, *supra* note 33, at 507–08.

38. *Id.* at 537.

39. *Id.* at 530, 533–34. For a well-known, acerbic critique of this thesis, see José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183 (2001). See also Outi Korhonen, *Liberalism and International Law: A Centre Projecting a Periphery*, 65 NORDIC J. INT'L L. 481 (1996).

40. Slaughter, *Liberal States*, *supra* note 33, at 533–34.

41. But see Alex Mills & Tim Stephens, *Challenging the Role of Judges in Slaughter's Liberal Theory of International Law*, 18 LEIDEN J. INT'L L. 1, 16–23 (2005) (arguing that Slaughter's theory fails to correspond with the reality of transnational judicial communication

does not, however, aspire to a world government enforcing a monolithic rule of law, for it perceives such government as threatening individual liberty.⁴² Instead, it defends the rise of loosely organized “regulatory networks”⁴³ of municipal courts, heralded as “new” and irresistible initiatives, as an increasingly important component of global governance.⁴⁴ Building on a “presumption of an integrated legal system”⁴⁵ and a claim to “newness,” these institutions are said to overlap, engage in cross-fertilization, and apply a complex array of domestic and transnational laws with global implications due to the rapid mobility of people, capital, and services across borders in the new global political economy and the resultant overlapping and interchangeability of identities and values.

The underlying premise of TLPAF as an approach to global governance, as briefly mentioned above, assumes the power of reason, dignity, and equality, as well as the intrinsic value of widespread and diverse in-

among domestic courts, and hence fails to respond to the challenge of realist theories of international adjudication).

42. Slaughter thus resembles contemporary neo-Kantians who have attempted a more sophisticated reconstruction of Kant’s republican cosmopolitanism as a distinct philosophy of international law. See FERNANDO R. TESÓN, *A PHILOSOPHY OF INTERNATIONAL LAW* 17 (1998). For a survey of recent works, see Patrick Capps, *The Kantian Project in Modern International Legal Theory*, 12 EUR. J. INT’L L. 1003 (2001) (book review, reviewing TESÓN, *supra*).

43. Regulatory network scholarship is a body of work analyzing the rise of government networks, or networks of government interaction which are “principally horizontal, relatively informal, and driven by the basic need of government officials in one country to interact with their counterparts in another to regulate increasingly mobile and global private actors.” See Anne-Marie Slaughter & David Zaring, *Networking Goes International: An Update*, 2 ANN. REV. L. SOC. SCI. 211, 215 (2005). One question animating the work of network theorists such as Slaughter concerns the conditions under which regulatory networks are likely to be effective. Effectiveness is hardly ever defined in this literature. It appears that what these theorists have in mind is the extent to which networks are able to disseminate, interpret, and generate new standards and new meaning of credible information on best practices through increased interaction; identify problems created by the absence of coordination on important policy questions in given issue-areas (as a result of lack of credible information) and “for which the formation of a network is an optimal solution” (“complex coordination and deliberation problems”); and explore and evaluate optimal solutions to these complex coordination problems. *Id.* at 219–20.

44. SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 31, at 67. It is not entirely clear whether this characterization refers to a difference in kind or merely one of degree. As Slaughter argues elsewhere, “[t]he fruits of such interaction could be envisaged as networks of institutions, or of institutionalized relations, that would emulate the form and substance of a world government without in fact transcending or displacing nation-states.” Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 136 (1995) [hereinafter Slaughter, *Typology*].

45. SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 31, at 86.

put in a deliberative process to a tribunal's effectiveness.⁴⁶ The point is "less to borrow than to benefit from comparative deliberation."⁴⁷ Thus,

[b]y communicating with one another in a form of collective deliberation about common legal questions, these tribunals can reinforce each other's legitimacy and independence from political interference. They can also promote a global conception of the rule of law, acknowledging its multiple historically and culturally contingent manifestations but affirming a core of common meaning.⁴⁸

A global idea of law and the rule of law are presented as objective, agnostic, and neutral, with a shared understanding of law's core meaning, rather than contingent on historical and cultural exclusions. Two pivotal historical and cultural tales about the effectiveness of human rights tribunals are relied upon in support of this claim. The first portrays European courts as being historically effective and non-European human rights systems as ineffective and thus relies on an effective/ineffective dichotomy. Europe has a longer tradition of human rights norms, protection, and enforcement. Its jurisprudence is also richer, making it not only more useful but also determinative for any empirical inquiry into the constitution of norms and identities that will systematically yield conclusions on compliance, effectiveness, etc. The tribunals selected in subsequent effectiveness analyses are heavily weighted in favor of judicial dialogue, while those which are not (non-European courts) are simply discounted.⁴⁹ The theory's claim to universal applicability thus rests on an explicit Eurocentric selection bias.⁵⁰ In addition, the liberal

46. See generally JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* (Frederick G. Lawrence trans., 1987) (1985); JÜRGEN HABERMAS, *STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* (Thomas Burger trans., 1989) (1969).

47. SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 31, at 75.

48. Helfer & Slaughter, *Theory*, *supra* note 27, at 282; see also Anne-Marie Slaughter, *The Real New World Order*, 76 *FOREIGN AFF.* 183, 189 (1997).

49. Transjudicialism theorists have made no qualms about this Eurocentric disposition. They argue that from the perspective of political science research methodology, they have "selected on the dependant variable, focusing only on two relatively effective tribunals rather than correlating explanatory factors with a range of effective and less effective tribunals." Helfer & Slaughter, *Theory*, *supra* note 27, at 299. Thus, they "sought only to make the case that the ECJ and ECHR were more effective than other international tribunals and to develop hypotheses as to why this might be the case." Laurence Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 *CAL. L. REV.* 899, 918 (2005) [hereinafter Helfer & Slaughter, *Response*].

50. Selection bias occurs when a researcher intentionally or inadvertently "select[s] observations on the basis of combinations of the independent and dependent variables that support the desired conclusion." See GARY KING ET AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 128 (1994); David Collier & James Mahoney, *Insights and Pitfalls: Selection Bias in Qualitative Research*, 49 *WORLD POL.* 56, 59 (1996).

discourse of a “global community of human rights courts” treats judicial dialogue as contingent on the existence of “thin” liberal features borrowed from domestic constitutionalism—“the existence (in states subject to the jurisdiction of a supranational tribunal) of domestic government institutions committed to the rule of law, responsive to the claims of individual citizens, and able to formulate and pursue their interests independently from other government institutions”⁵¹. This tracks similar patterns of cultural exclusion stemming from reified and static identity conceptions of adjudicators. The theory neglects the power of principled ideas, identities, and norms produced by supranational institutions through the exercise of tremendous governmental power. It also downplays the identity-constitutive role of local contestation and cognitive culture as a measure of both judicial cross-fertilization and effectiveness.⁵²

A. A Genealogy of Judicial Dialogue: Disempowering Non-European Regionalism

The shift in international human rights discourse to “effectiveness” orthodoxy has involved an investigation into a tribunal’s “ability to compel compliance with its judgments by convincing domestic government institutions, directly and through pressure from private litigants, to use their power on its behalf.”⁵³ As a result of the collapse of the domestic/supranational distinction stemming from this externalization of liberal domestic constitutional politics, the boundaries between descriptive and prescriptive postures of liberal theorists towards effective supranational human rights adjudication have been blurred.⁵⁴ It was believed that the U.N. Human Rights Committee (HRC), a quasi-judicial body, could enhance its effectiveness by behaving more like a court and

51. Helfer & Slaughter, *Theory*, *supra* note 27, at 333–34.

52. Omitted variable bias occurs when an apparent correlation between a dependent variable (effectiveness) and independent variable (judicial cross-fertilization) actually reflects the correlation between the dependent variable and another independent variable that happens to be (partially) correlated with the independent variable used. See KING ET AL., *supra* note 50, at 168–69; see also Kratochwil, *supra* note 29, at 53.

53. Helfer & Slaughter, *Theory*, *supra* note 27, at 278, 290. Elsewhere, Slaughter adopted a similar definition, but using an analogy to the impact of judgments issued by domestic courts. See Slaughter & Stone, *supra* note 26, at 92. In later work however, Helfer and Slaughter have acknowledged the precariousness of any definition of effectiveness, stating that theirs was “more relative than absolute.” See Helfer & Slaughter, *Response*, *supra* note 49, at 918.

54. Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT’L ORG. 457, 478–79 (2000) (positing that liberal democracies will be more receptive to efforts to “embed international law in domestic legal systems”).

“helping to construct a global community of law.”⁵⁵ This was to be achieved in two ways: on the one hand, through a more nurtured and sustained dialogue with the European Court of Human Rights (ECtHR) “as the first step in an effort to build a global community of law”⁵⁶ beyond Europe and, on the other, by harmonizing its decisions through “a policy of thoughtful convergence with European jurisprudence, supplemented by informed divergence where there are justifiable and articulated reasons for doing so.”⁵⁷ The case for convergence with European jurisprudence, due to its supposed potential to assist in the U.N. rights-protection enhancement agenda,⁵⁸ has been mirrored in the attempt to rationalize it on grounds of institutional “effectiveness.”⁵⁹

The correspondence between these two strategies is not accidental. Its impact, however, is most discernable when examining how arguments about convergence have been deployed in transjudicialism scholarship. “Convergence” is most evident in this literature in the “slow, but pervasive processes of normalization of a hegemonic ideology.”⁶⁰ The European system, in all its avowed specificity, is somehow universal and

55. Helfer & Slaughter, *Theory*, *supra* note 27, at 381. Even Makau wa Mutua, a vocal figure among Third World Approaches to International Law scholars, appears to have been ultimately seduced by the liberal internationalists’ proposal in his own thinking about the construction of the African Human Rights system. He earlier took issue with the purportedly apolitical and objectively neutral nature of their checklist of elements conducive to tribunal effectiveness, claiming that they urge “the identification of universally generalizable European experiences so that they can be transplanted to institutions outside Europe,” with the HRC and the ICCPR relegated to “the role of toddling works in progress, projects which must be reared by the more mature intellectual, spiritual, and institutional European parents.” See Makau wa Mutua, *Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement*, 4 BUFF. H.R. L. REV. 211, 240–41 (1998) [hereinafter Mutua, *Looking Past the Human Rights Committee*]. By a year later, however, Mutua had recanted his admonishment of Helfer and Slaughter’s proposal, suggesting that the checklist “can be particularly useful if judges are independent and motivated by the drive to make the African Human Rights Court the central institution in the development of a legal culture based on the rule of law.” See Makau Mutua, *The African Human Rights Court: A Two-Legged Stool?*, 21 HUM. RTS Q. 342, 362 (1999).

56. Helfer & Slaughter, *Theory*, *supra* note 27, at 367.

57. *Id.* at 374. Divergences are said to be justified only if based on “textual or other differences between the two treaties” (ICCPR and ECHR). *Id.* The present Article refers to this argument as the “convergence thesis,” as the proposal appears to create a presumption in favor of converging jurisprudence rather than divergence as a measure of a regime’s effectiveness. See also Alston 1993 Report, *supra* note 3, ¶¶ 239, 251.

58. Alston 1993 Report, *supra* note 3, ¶ 248.

59. Helfer & Slaughter, *Theory*, *supra* note 27, at 281–82. This rapprochement should not, however, be exaggerated. Elsewhere Alston has strongly criticized the organizational structure of government networks, which Slaughter and others have described as a non-accountable, elitist network of experts, and their dominant role in shaping decision-making in the global economy. Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT’L L. 435, 441–42 (1997).

60. See Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT’L L. 369, 404 (2005).

persuasive for other regional (and even U.N.-based) human rights systems. Yet “[o]nce the ideas of the centre have been recognized as valid by the periphery”⁶¹—operating under something akin to the influence of a judicialized “standard of civilization”—“the impression of domination disappears entirely.”⁶² The overall direction of such influence, however, becomes less linear than “agonistic.”⁶³

Chantal Mouffe and Ernesto Laclau have argued that social objectivity, being constituted through acts of power, is ultimately political and has to show the traces of exclusion that govern its constitution.⁶⁴ This point of convergence—or rather mutual collapse—between objectivity and power is what they mean by “hegemony.”⁶⁵ In her own work, Mouffe distinguishes agonism from mere “antagonism,” or destructive conflict characteristic of Schmittian thought, by stressing the inevitability of conflict in political life, yet the impossibility of closure—that is, defining social reality through final, rational, and neutral decision procedures because of the ubiquity of power and the plurality of values.⁶⁶ The primacy of power over morality and hegemony over free will, which are inherent to agonistic politics, can be observed, for instance, in the spread of American and European ideas of the separation of powers, due process, and the rule of law, and the widely publicized strong role of domestic courts in safeguarding them.⁶⁷ Power, however, is constituted and mobilized through struggle in the shaping of objectified judicial and local identities rather than eliminated. This is because judges seek hegemony, or the dominance of their preferred world-view, which also means call-

61. *Id.*

62. *Id.*

63. Works on agonistic politics range from liberal democratic discourse to more critical “rationalist” accounts of deliberation or “conflict theory,” or from Habermas to Marx at one extreme to the more radicalist Gramscian and post-Marxist democratic politics of Chantal Mouffe and Ernesto Laclau on the other. The understanding adopted in this Article is much closer to the latter, and draws more generally on the classic sketch of “agonistic thinking” in the following works: HOMI K. BHABHA, *THE LOCATION OF CULTURE* 33 (2d ed. 2004) (discussing “agonism” and “liminality”); CHANTAL MOUFFE, *THE DEMOCRACY PARADOX* (2000); CHANTAL MOUFFE & ERNESTO LACLAU, *HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS* ch. 3 (2001) (discussing “overdetermination” and “antagonism”); EDWARD W. SAID, *CULTURE AND IMPERIALISM* ch. 3 (1993) (discussing “writing back”); Michel Foucault, *The Subject and Power*, in MICHEL FOUCAULT: *POWER: THE ESSENTIAL FOUCAULT* 326–49 (1997).

64. MOUFFE & LACLAU, *supra* note 63, at 122–27.

65. *Id.* at 134–44.

66. MOUFFE, *supra* note 63, at 101–04.

67. See Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 *IND. J. GLOBAL LEGAL STUD.* 383, 416–25 (2003); Krisch, *supra* note 60. One can trace this development of the spread of European laws towards “progress” and a universal normative order back to Kant’s political writings. See e.g., Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose (1784)*, in IMMANUEL KANT, *POLITICAL WRITINGS* 52 (H.S. Reiss, ed., H.B. Nisbet trans., 2d ed. 1991).

ing into question the dominant hegemony itself. American and European court decisions are increasingly cited on these and other liberal issues around the world,⁶⁸ especially in former imperial colonies, while efforts at resisting this circulation of ideas are seen as deviations from the norm and are thus rendered pathological in the literature. Similar moves are unfolding in the resolute attempt by liberalism to bring changes to the self-understanding and self-perception of non-European supranational court judges adjudicating human rights, in order to facilitate gradual acceptance of European concepts and standards.⁶⁹ International human rights law thus becomes a discursive process by which particulars combine to produce something that can function as universal.⁷⁰

In this progressive tale about supranational courts gradually achieving effectiveness, an essentialized European human rights community is pitted against an ineffective law developed by *non-European* tribunals. At the same time, it is presented as seeking to expand its reach beyond Europe.⁷¹ Liberal theorists harbor stronger intellectual affinities with the European Court of Justice (ECJ) and ECtHR's modes of judicial reasoning

68. The burgeoning literature builds on the classical statements in the following works: Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000) [hereinafter Slaughter, *Judicial Globalization*].

69. On the historical drive of the international legal order toward homogenization and unity—toward the “inclusion” of the third world *other* by leading this order to believe in the superior quality of the colonizers' practices and rules—originating with the Spanish conquest of the Indies and its justification in the works of Vitoria, see ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 28, 108, 310–11 (2005). Anghie's germinal thinking has greatly influenced the writing of this part of the Article. See also Korhonen, *supra* note 39, at 502, 523–24.

70. A global community of law, as the offshoot of a *ius publicum europeum* (European public law), thus fundamentally rests on a paradox: “In order to attain equality, the non-European community must accept Europe as its master—but to accept a master was proof that one was not equal.” MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, at 136 (2002).

71. Slaughter asserts that such borrowing between domestic constitutional courts “runs in both directions—from the developed world to the developing world and back again,”—but, to date, has provided little empirical evidence to buttress her claim. See Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, The European Way of Law)*, 47 HARV. INT'L L.J. 327, 336 n.38 (2006); see also Alvarez, *supra* note 39, at 214–20; Mills & Stephens, *supra* note 41, at 18–23. The difficulty resides in the fact that her theory rests on instances where domestic constitutional courts explicitly cite the judgments of foreign national courts, or the judgments of supranational tribunals (with the exception of the so-called “vertical dialogue” between the ECtHR and ECJ). Not surprisingly, then, she concentrates on those types of transnational interactions which exemplify and amplify the liberal paradigm and ontologically privilege liberal states by using their institutions and political tendencies as the empirical reference point. Dialogue between the Human Rights Committee (HRC) and the ECtHR is seen as merely adding a layer of supranationalism to increasing dialogue among judges from domestic courts of liberal nations. See Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 217 (2003) [hereinafter Slaughter, *Courts*].

and interpretative methodologies which they consider superior.⁷² The claim to “newness” of the rise of a global community of law beyond Europe through judicial dialogue accordingly rests on a familiar form of colonialist and imperialist narrative.⁷³ “Dialogue” ideology has shaped the very modes of professional discourse and debate about legal pluralism from the time of their origins—for, as some commentators have recorded, phenomena of cross-fertilization and transplanted plural legal orders were pervasive among the courts of imperial powers and their colonies.⁷⁴ These have had implications for the work of reconceptualizing and renewing the fundamental normative structures of international human rights undertaken by post-Cold War human rights lawyers and transjudicialism theorists. The European success story that liberal theorists have sought to transpose in extra-European contexts and portrayed as empowering and liberating for non-European systems seeking to become more “effective” appears in the disciplinary story as the “gentle civilizer” of socio-culturally differentiated subjects: the much glorified tale of two supranational tribunals operating within a select club of liberal democracies with strong domestic commitments to the rule of law.⁷⁵

Such historically sanitized visions of “effectiveness” are hardly the result of judicial dialogue but rather condition it. They rely on deeply ingrained experience, political design, and collective culture that are peculiar to the specificities of *European* colonial and imperial history. Slaughter and Laurence Helfer are of course not alien to this, concluding in 1997 that

the existence (in states subject to the jurisdiction of a supranational tribunal) of domestic government institutions committed

72. Helfer & Slaughter, *Theory*, *supra* note 27, at 276, 290–97; see also Anne-Marie Slaughter & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L ORG. 41, 58 (1993).

73. Helfer & Slaughter, *Theory*, *supra* note 27, at 377–86.

74. See generally LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900* (2002). The legal pluralist literature on this point is vast. For an excellent overview, see Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869, 872–75 (1988) (citing sources). See also Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT’L L. REV. 555, 597–602 (2002); Hannah L. Buxbaum, *From Empire to Globalization . . . and Back?: A Post-Colonial View of Transjudicialism*, 11 IND. J. GLOBAL LEGAL STUD. 183 (2004); Krisch, *supra* note 60, at 400–02.

75. Helfer & Slaughter, *Theory*, *supra* note 27, at 370 (claiming that “a true community of law is likely to be limited, at least in the short and medium term, to a group of countries or regions with a strong tradition of the rule of law”); see also *id.* at 391 (claiming that “[e]ffective supranational adjudication’ . . . has been achieved in large measure in at least one region in the world, for many distinctly non-utopian reasons” and that “[t]he search for those reasons and the effort to formulate them as preconditions is as likely to yield pessimistic prognoses for some regions as it is to bolster the prospects for others”).

to the rule of law, responsive to the claims of individual citizens, and able to formulate and pursue their interests independently from other government institutions, is a strongly favorable precondition for effective supranational adjudication.⁷⁶

Yet to consolidate and extend the universal stranglehold of the European experiment, these attributes “may even be a *necessary* (although not sufficient) condition for maximizing effective supranational adjudication.”⁷⁷

In developing a model of why some institutions are more effective than others, those attempted by “mixed” groups of states such as the HRC, or by non-European states such as the Inter-American Court of Human Rights (IACtHR), are enlisted as relatively “ineffective.”⁷⁸ The supranational judicial world is thus divided between “effective” and “ineffective” human rights systems, a mere shorthand for the nineteenth-century distinction between “civilized” and “uncivilized,” which then justified “dialogue” between imperial courts and those of the colonies. This move is critical for understating both the civilizing mission of transjudicialism theorists’ project and these regional systems’ conceptual self-understanding and identity-building. If the European experience is effective while others’ are not, the history of non-European human rights systems can only be one of gradual incorporation (convergence) of cultural differences into an “international” human rights law which, paradoxically, is explicitly European, and, at the same time, universal, secular, and broadly inclusive. Each attempt to perforate and reconfigure the peripheries of the global community of law “irritates” and leads to the creation of further differences that need to be bridged through ever-increasing norm-internalizations.⁷⁹

76. Helfer & Slaughter, *Theory*, *supra* note 27, at 333–34.

77. *Id.* (emphasis added); see also Slaughter & Burke-White, *supra* note 71, at 352; Daniel S. Sullivan, *Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy*, 81 GEO. L.J. 2369, 2374–87 (1993).

78. Slaughter, *Liberal States*, *supra* note 33, at 515. Such a claim is also routinely made about the Inter-American, African, and U.N. human rights systems. See, e.g., Andrew Moravcsik, *The Origins of International Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 219 (2000) (referring to the U.N. human rights system as “a notably weak régime”); Andrew Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, 1 EUR. J. INT’L REL. 157, 159, 178–81 (1995) (examining conditions under which effective human rights regimes are likely to emerge and concluding that the relative success of the European regime and ineffectiveness of the Inter-American system is best explained by factors endogenous to the countries concerned). For a critique of the view holding that the African human rights system is “ineffective,” see generally OBIORA CHINEDU OKAFOR, *THE AFRICAN HUMAN RIGHTS SYSTEM: ACTIVIST FORCES, AND INTERNATIONAL INSTITUTIONS* (2007).

79. See generally Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998). For a useful

The instrumentalization of the doctrine of effectiveness at the helm of the U.N. human rights reform era in the 1990s has helped bridge cultural differences and create a legal regime that, once lifted outside the domestic jurisdiction of states, could both pragmatically and philosophically account for relations between the European and non-European human rights systems. In this connection, rights discourse came to play a very powerful legitimating role. Rights language connects the objectives sought through reforms to much greater policy goals, giving these reforms “an aura of authority and legitimacy” and suggesting that they actually “provide protection against the abuse of the powerful.”⁸⁰ Pragmatic proposals tying institutional effectiveness to enhanced human rights enforcement and protection, coupled with prescriptions for normative convergence, could thus lead to further marginalizing, rather than empowering, non-European human rights systems.

Demobilization of non-European human rights courts and judges through dialogue ideology has operated on two levels. First, the ethic of cross-fertilization, coherence, and convergence advocated by these academics and practitioners amounted to perpetuating a strict paternalism with which critical Third World internationalists like Anghie have been concerned in recent years.⁸¹ In the postcolonial and supranational contexts, this pattern of judicial influence should be understood as subtly “received” by judges from these courts through the play of what Edward Said calls “contrapuntal ensembles”⁸² rather than imposed on them through coercion. By this Said means the complex, mutually constitutive power relations through interaction, appropriation, negotiation, and resistance jarred with ambivalence that animate any work of cultural production.⁸³ Such ambivalent relational patterns of judicial influence become more difficult to record and rationalize the further away one moves from the statist paradigms of law-creation and law-application

sociological description of the structural effect of the center/periphery divide (which I use as a proxy for the effective/ineffective chasm) in international human rights law on the globalized world and the argument that our practices, institutions, and conceptual frameworks help to sustain it, see BOAVENTURA DE SOUSA SANTOS, *TOWARDS A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION* 327–73 (1995).

80. KERRY RITTICH, *RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM* 68 (2002).

81. ANGHIE, *supra* note 69.

82. SAID, *supra* note 63, at 50–51.

83. *Id.* Benton similarly argues that colonial jurisdictional claims extended by colonizers over conquered people were crafted in the terms of structured legal pluralism well-known to colonizers, who were already formally plural. This, in turn, led colonized people to perceive the possibility of using these tensions “at home” to their advantage in colonial settings and devised legal strategies that exploited them, ranging from assimilation, accommodation, advocacy within the system, and subtle de-legitimation to outright rebellion. See BENTON, *supra* note 74, at 2–3, 13.

already fixed in mainstream human rights and positivist international legal scholarship,⁸⁴ as well as in liberal theory's insistence on the distinction between liberal and non-liberal states. Second, arguments about effectiveness behoove human rights institution designers and norm enunciators to take into account the distinction between liberal democracies and other states in fashioning institutional identity and reforming and designing global institutions.⁸⁵ It is only by holding the political and legal conditions prevailing in the states subject to a tribunal's jurisdiction constant through time and space that judicial dialogue could aspire to be associated in any *causal* sense with a tribunal's effectiveness.⁸⁶ By the operation of these two techniques, instances where judges of tribunals with a non-European or mixed membership (Latin America and Africa) resisted dialogue (through direct references or not) with judges of European courts are excluded or discounted in the analysis.⁸⁷ That non-European human rights systems are "ineffective" because of lower

84. For a similar argument in the context of connecting the colonial discourse of rights in Nigeria to international human rights scholarship, see BONNY IBHAWOH, *IMPERIALISM AND HUMAN RIGHTS: COLONIAL DISCOURSES OF RIGHTS AND LIBERTIES IN AFRICAN HISTORY* 17 (2007).

85. GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES. UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* 305–06 (2004).

86. Helfer & Slaughter, *Theory*, *supra* note 27, at 362 (arguing that the HRC's "diversity of membership presents the Committee with challenges that its European counterparts are less likely to face, challenges that may ultimately circumscribe its potential for becoming fully effective but that it has nevertheless proven itself prepared to meet"); *id.* at 365 (further arguing that "[t]he Committee's ability to improve compliance with its judgments will prove an important test of the cultural and political homogeneity thesis"); see also Mutua, *Looking Past the Human Rights Committee*, *supra* note 55, at 241.

87. In their study, Helfer and Slaughter provide no examples of instances in which the ECtHR engaged in dialogue with and borrowed from the HRC, the IACtHR, or the African Commission on Human and Peoples' Rights. Nor do they explain why such cases of "influence" are lacking. Their model, in addition, provides no analytical tools for assessing when and why resistance by judges from non-European bodies to engage in dialogue with their European counterparts occurs.

The ILA's Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies indicates relatively few references to the work of the U.N. treaty bodies in the jurisprudence of the ECtHR, and even fewer to the case law of the IACtHR. By contrast, the ILA report shows that the Organization of American States human rights bodies have referred on relatively more occasions to the work of the ECtHR and of the HRC, although "borrowings" have largely been limited to framework questions of general international law (such as the requirement to exhaust local remedies, interpretation and admissibility issues, etc.). The African Commission, despite its comparatively measured experience in adjudicating similar issues, has sparingly made use of findings of the more established treaty bodies and ECtHR and has not turned to dialogue to imprint its fledging jurisprudence with a badge of legitimacy. See 2004 ILA Berlin Report, *supra* note 16, ¶¶ 118–37. While the ILA study is somewhat dated, empirically formalistic, incomplete, and by no means exhausts empirical evidence on whether dialogue between European and non-European human rights tribunals actually takes place and on what terms, to the extent it disproves some of the fundamental findings (normatively asserted rather than empirically demonstrated) of transjudicialism theorists about judicial dialogue and normative convergence, it must be supplemented and reckoned with.

compliance rates is not an answer and begs the question of whose definition of “effective” ultimately matters, and whose jurisprudence is relevant for constructing the foundations of the transnational community of human rights courts.

In recent writings, transjudicialism theorists have recanted their “anti-pluralist” position,⁸⁸ with an important modification to the second technique of demobilization mentioned above. Effectiveness is no longer limited to institutions that operate exclusively in liberal democracies but rather depends on “the judges’ participation in an emerging ‘global community of law,’ which [they] defined as ‘a community of interests and ideals shielded by legal language and practice’ in which participants ‘understand themselves to be linked through their participation in, comprehension of, and responsibility for legal discourse.’”⁸⁹ Such a community is described as “a partially insulated sphere in which legal actors interact based on common interests and values, protected from direct political interference.”⁹⁰ Behind legal process and anti-formalist rhetoric, discussion is thus evaded on substantive politics. The argument stresses the primacy of *participation* of judges in an imagined “pre-existing community” shielded from politics in shaping judicial outcomes rather than the underlying political *conditions* for “networking” or transnational judicial permeability. The positive claim of liberal theory that domestic regime-type is a determinant of what judges do and how they behave is, thereby, effectively turned on its head. Yet despite the sugges-

88. Helfer & Slaughter, *Response*, *supra* note 49, at 907. Gerry Simpson uses the expression “anti-pluralist” to describe Slaughter’s liberal theory of international law. Gerry Simpson, *Two Liberalisms*, 12 EUR. J. INT’L L. 537, 538 (2001). According to such a mild conception, “the distinction between liberal and illiberal states is significant for analytical purposes, but it does not provide an automatic ground for the exclusion of that state from the international community or intervention in that state’s affairs.” *Id.* at 559. Instead, Slaughter’s theory “seeks to engage with outlaw states using a combination of old-fashioned classical international law combined with an ambitious private and public transnationalism of networks.” *Id.* at 566.

89. Helfer & Slaughter, *Response*, *supra* note 49, at 907. The other determinant in the evolution of supranational tribunals is “the judges’ skill in identifying domestic constituencies who could press national governments to comply with the tribunals’ rulings.” *Id.* at 908. This shift in emphasis suggests that some of the factors on the “checklist” for effective supranational human rights adjudication would be impossible for either states or tribunals to control without limiting the identity of participating states themselves. See Helfer & Slaughter, *Theory*, *supra* note 27, at 391 (arguing that “[m]any of the factors on the checklist, even those within the power of the tribunals themselves or of the states that create them, may simply be unattainable”). Thus, the “factors listed toward the bottom of each category in the checklist [referring to factors within and outside the control of judges] are more context-specific and likely to vary across different tribunals.” *Id.* at 299. Yet at the same time, it is claimed that “[t]he factors . . . are not culturally or geographically specific; they require political preconditions that are more concentrated in the West but that are themselves the product of a universalist political ideology and exist in states throughout the world.” *Id.* at 337.

90. Helfer & Slaughter, *Theory*, *supra* note 27, at 277.

tion that the distinction between domestic regime-types has been forever transcended and is no longer critical to the success and failure of effective supranational human rights adjudication, one wonders whether transjudicialism theorists can escape the normative implications of Slaughter's descriptive anti-pluralist theory, which she continues to use in her more recent work on government networks.⁹¹

An inquiry into judicial dialogue concerned with power distribution and knowledge production through identity-formation would look, instead, at supranational human rights judges' motives for engaging in dialogue as competent and professional discourses sharing the common cosmopolitan vernacular of "human rights," even in the face of divergent substantive outcomes. The focus would shift to questions such as: 1) Who are we? (2) What do we want? (3) How do we get what we want? and (4) What resources do we need to get what we want?⁹² Judicial deliberation confronts all of these simultaneously, bringing considerations of identity, morality (which good should be achieved collectively), professional ethics, and political pragmatism together in an uncomfortable synthesis. The liberal paradigm is simply unable to provide a viable framework for thinking about these issues beyond its European prejudices. The next section of this Article outlines a possible theoretical and methodological basis for further querying the relationship between judicial dialogue and effective supranational human rights adjudication.

This relationship is complex and contingent. At bottom, it requires asking whether any account of judicial dialogue can be conceptually coherent, normatively appealing, and pragmatically useful. What are the reasons for a specific domestic government institution making common cause with a supranational tribunal's judicial interactions? This necessitates a detailed understanding of and sensitivity to interests, perceptions, and patterns of expectations and argumentation by a wide range of actors within specific countries. It requires a more careful examination of what is implied and what is concealed by the proposition that cross-fertilization "would help to contribute to the development of a better, and

91. Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 199, 228 (Gregory H. Fox & Brad R. Roth eds., 2000) [hereinafter Slaughter, *Networks*]; see also Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS*, *supra* note 29, at 177; Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 *AM. SOC'Y INT'L L. PROC.* 240, 249 (2000) [hereinafter Slaughter, *Liberal Theory*].

92. These questions are taken from Christian Reus-Smit, *The Strange Death of Liberal International Theory*, 12 *EUR. J. INT'L L.* 573, 575-76 (2001), who applies them to political deliberation. He refers to these as the identity, purposive, strategic-instrumentalist, and material-instrumentalist question types. *Id.*

more sophisticated, human rights jurisprudence.”⁹³ How does such a claim resonate with domestic institutions and social movements at the receiving end of vertical channels of communication?⁹⁴ To substantiate the claim of a positive correlation between judicial dialogue and the effectiveness of supranational human rights adjudication, serious empirical problems of the sort must be overcome. Liberal theory, on the other hand, moves from the articulation of an explanatory framework to draw out a package of normative commitments about the *kind* of effective international human rights law we need.⁹⁵

The next section of this Article traces and re-codes the “logics of exclusion and inclusion”⁹⁶ in transjudicialism theorists’ causal explanations and normative claims. There are important political consequences of constituting the liberal discourse of TLPAF as the sole emancipatory vocabulary of human rights cross-fertilization and norm-internalization. Neither the positive liberal international relations theory on which these explanations are based, nor these theorists’ thin empirical claims about the dynamics of judicial interaction among human rights courts provide them with the epistemological resources to make their normative moves successfully.⁹⁷ The need for a global community of human rights law with Europe at its center for a coherent, well-functioning, and effective international human rights legal system is simply taken for granted. Yet the strategies of governance through the expansion of such a community beyond Europe could appear as much as the nemesis of power as its

93. Alston 1993 Report, *supra* note 3, ¶¶ 239, 248.

94. Joseph Weiler has called this phenomenon the “per se compliance pull of judicial dialogue conducted between courts in legalese.” See J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 COMP. POL. STUD. 510, 520–21 (1994); see also Stephen J. Toope, *Emerging Patterns of Governance and International Law*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS, *supra* note 29, at 91, 105–07 (on pre-legal or “contextual” regimes of informal normativity); Kratochwil, *supra* note 29, at 56.

95. In all expositions of her theory, Slaughter has not escaped the normative impulse due to her own split professional identity as a both a lawyer and political scientist. As she states, “[i]f these hypotheses hold, the next step will be to develop a corresponding set of norms within each category.” See Slaughter, *Liberal States*, *supra* note 33, at 515; see also Slaughter, *Networks*, *supra* note 91, at 202, 235.

96. I borrow this expression from UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 42 (2d ed. 2006).

97. See also Korhonen, *supra* note 39, at 491–94, 525. Korhonen argues that liberalism sustains a vision of itself and of international law’s unified modern identity by making the reality it describes correspond to legal knowledge through predictions about future behavior of actors in international relations in regulatory systems that are, however, plural and highly unpredictable. See *id.* These predictive devices, which aim at diffusion of rules of behavior, move from pure observation to prescription in creating a positive theory of international law. In such a behavioral framework, law is not conceptually grounded, and the absence of any conceptual basis is overcome by borrowing from liberal international relations theory. It remains ultimately questionable how such self-referential reliance on liberal theory can provide the epistemological foundations for liberalism’s underlying predictions.

handmaiden. The apolitical and ahistorical language of global legal community obscures the fact that a community may be most “effective” either when projected outward from a metropolis or as the product of a de-centered, agonistic dialogical process of cultural governance managed through interactions between a diverse range of judiciaries.⁹⁸ The idea of “effectiveness” becomes hijacked—just like concepts of “good governance”⁹⁹ or “humane governance”¹⁰⁰—into a counterinsurgency agenda to a wide range of oppositional and transformative social projects in international human rights law.¹⁰¹ As further discussed below in relation to the conceptualization of judicial interactions in rationalistic economic terms by liberal theorists, a global community of law may be nothing more than a neo-colonial construct erected by overzealous Western judicial and academic missionaries that serves to antagonize cultural agnostics by simply replicating the inequalities, distributions, and exclusions already experienced in globalized “free” markets.

B. Taking Identities Seriously? Domesticating/ Externalizing Cultural Difference

Up to now, the discussion of TLPAF, the liberal internationalist position underlying “newness” of transjudicialism in human rights, has deliberately bracketed the precise character of those theorists’ normative commitments to procedural norms as well as the precise nature of the relational inquiry necessitated by the turn to proceduralism. The next two sections of this Part discuss how the externalization of European liberal domestic politics that cuts across transjudicialism scholarship is compounded by narrow descriptive and normative accounts of judicial identity. First, a reliance on a static, essentialized conception of identity

98. Work linking comparativism to cultural governance projects of “assimilation” and “exoticization,” has barely begun. See David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, UTAH L. REV. 545, 614 (1997).

99. See, e.g., ANGHIE, *supra* note 69, at 262–63; James Thuo Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism*, 18 THIRD WORLD LEGAL STUD. 65, 65–74 (1999).

100. See RICHARD FALK, ON HUMANE GOVERNANCE: TOWARD A NEW GLOBAL POLITICS 125 (1995).

101. By “transformative,” I adopt the double meaning advanced by Dianne Otto and Drucilla Cornell, that is,

change radical enough to so dramatically restructure any system—political, legal or social—that the ‘identity’ of the system is itself altered. The second meaning, defined as broadly as possible, turns us to the question of what kind of individuals we would have to become in order to open ourselves to new worlds.

Dianne Otto, *Everything Is Dangerous: Some Post-Structural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law*, 5 AUSTL. J. HUM. RTS. 17, 24 (1999) (quoting DRUCILLA CORNELL, TRANSFORMATIONS: RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE 1 (1993)).

renders judicial interaction and cultural differences among judges incommensurable, even though they are initially made out to be commensurable and thus conducive to dialogue. Second, relational processes of cultural identity formation and transformation in both horizontal and vertical axes of communication among courts and local political and social actors are not perceived as a key explanatory variable that directly affects the correlation between judicial cross-fertilization and effectiveness.¹⁰² Instead, compliance with a tribunal's decisions is measured as a function of tribunal effectiveness and vice-versa. Such a technocratic correspondence approach between fact and norm makes transjudicialism theorists indistinguishable from the "nationalist" international law theorists¹⁰³ they criticize as revisionist.¹⁰⁴

1. Contours and Critique of the Liberal Procedural Paradigm

The limited instances of "transjudicial communication" claimed to be universal are amalgamated from a wide spectrum of distinct phenomena—including different types of courts and uses of foreign, comparative, and international law—and are assimilated under a unified liberal model of judicial identity. It is assumed that a thin commitment to law's "proceduralization" can mediate the perennial philosophical and epistemological tensions and power relations embedded in the purportedly neutral task of conceptualizing "cross-cultural fertilization," "genuine dialogue," and agreement between different regional and cultural traditions and value sets in human rights. Distinct normative concerns appear to be concealed by the discourse of "newness" within which human rights cross-cultural fertilization narratives are framed. Within these discursive modes of formation of judicial subjectivities, these theorists rely on (a) an economic model of judicial governance and (b) a technocratic model of the rule of law, "supranationalized"

102. See generally JOHN G. RUGGIE, CONSTRUCTING THE WORLD POLITY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION 4 (1998) (arguing that constructivism's scientific basis or explanatory variable is the transformation of identities).

103. See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005) [hereinafter *Judicial Independence*]. Alejandro Lorite has offered the "nationalist" designation in his reconstruction of "nationalist international law" scholarship in these theorists' dialogue with liberal internationalists about what he calls the "outer realm" of law as a field of scholarly intervention. Both liberal internationalists and rational choice (nationalist) theorists, in fact, take this concept of the "outer realm" as descriptive and empirical rather than as calling for value judgment. They discuss American foreign policy and are thus concerned with the relationship of the United States to the outer players of foreign relations, including the legal frame in which those relations do or should occur. Alejandro Lorite Escorihuela, *Cultural Relativism the American Way: The Nationalist School of International Law in the United States*, GLOBAL JURIST FRONTIERS, Jan. 2005, <http://www.bepress.com/gj/frontiers/vol15/iss1/art2/> (last visited Mar. 10, 2010).

104. Helfer & Slaughter, *Response*, *supra* note 49, at 902, 917–19.

through human rights policy arguments. These two models are reconstructed ideal-types and constitute the core case for a rationalist conception of transjudicial communication.

a. The Economistic Governance Model: Courts
as Market Blocks

A court whose ideas or decisions are cited by other courts is, perhaps surprisingly, not a self-conscious participant in an ongoing conversation. Its ability to communicate to foreign listeners by and large depends on the initiative of the listeners themselves and their willingness to be persuaded. This insight suggests that the identities of both “lender/donor” and “borrower” courts are crucial variables.¹⁰⁵ Transjudicialism theorists conceive that horizontally “networked” courts committed to similar values participate in a transjudicial dialogue, which binds them into a loose “community” in which they establish the respective limits of their authority and influence.¹⁰⁶ In investigating the underlying attributes that unify the wide range of discrete examples they build upon, these theorists develop a hedonistic rationalist conception of the judiciary which leads them to claim that all these instances display *commonalities of interests* among the judiciaries of liberal democracies—namely a commitment to judicial autonomy, a reliance on persuasive authority, and an implicit conception of a common judicial enterprise.¹⁰⁷ Transjudicialism is portrayed in this story as an iterated “tit for tat” rationalist game made possible only by underlying configurations of common interests between judges. There is, correspondingly, a *common professional identity* forged through such common practices and sense of purpose.¹⁰⁸

In order to ground the purportedly apolitical nature of practices of transjudicial argumentation, a formalist dichotomy is further drawn between procedural rules such as judicial independence and the “rule of law,” (which, it is claimed, can be value-neutral, apolitical, universal, and

105. Habermas sees individuals as beings that not only seek to persuade others but are themselves open to persuasion. Deliberation permits actors to achieve desired outcomes or “consensual truth” through “communicative action.” A speaker’s willingness to change his own mind in light of what he hears, often in response to what he says, is the precondition for “true reasoning.” See 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* 286–319 (Thomas McCarthy trans., 1984).

106. SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 31, at 69; William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT’L L. 1, 86 (2003); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003); Sullivan, *supra* note 77; see also *Alston 1993 Report*, *supra* note 3, ¶ 248.

107. Slaughter, *Typology*, *supra* note 44, at 122.

108. SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 31, at 103.

consonant with broad pluralism) and substantive norms.¹⁰⁹ This is done in an attempt to accommodate the paradox of diversity of policy values in human rights and the universality of liberal principles.¹¹⁰ The solution retained accepts in a sense human rights (in their substantive conception) as parasitic upon political decisionmaking enshrining egalitarian values and therefore insists on democratic deliberative politics and fair play. On such a view, judges feel a particular common bond with one another in adjudicating human rights cases because such disputes engage “a core judicial function in many countries around the world.”¹¹¹ Departing from a “presumption of identity,”¹¹² they actively engage their foreign brethren *despite* cultural and regional differences because they see themselves engaged in solving the generic legal problems characterizing liberal democracies, namely the balancing of rights and duties, individual and community interests, and the protection of individual expectations.¹¹³ The willingness of a supranational tribunal to engage in judicial deliberation further suggests prior “recognition of a global set of human rights issues to be resolved by courts around the world in colloquy with one another,”¹¹⁴ a recognition flowing from “the ideology of universal human rights embedded in the U.N. Universal Declaration of Human Rights.”¹¹⁵

The liberal legalist conception of a global community of human rights courts is less about lawmaking as such than about creating a space insulated from politics. It is concerned with putting in place an environment (process) conducive to designing an optimal set of human rights standards through developing a political consensus as to the common good to be pursued by the “community” under the banner of universalism, yet risking either to raise the global human rights baseline too high or succumb to the “lowest common denominator drag.”¹¹⁶ A pragmatist

109. Slaughter, *Typology*, *supra* note 44, at 125–29.

110. Helfer & Slaughter, *Theory*, *supra* note 27, at 389 (“The result does not deny the importance of local legitimacy and cultural diversity; nor does it assume that law can genuinely ‘float free’ of the politics, economics, and cultural traditions of particular peoples. But it assumes the possibility of universal values and professional ideals and seeks to capture and reinforce a concept of transjudicial solidarity.”).

111. Slaughter, *Judicial Globalization*, *supra* note 68, at 1111; *see also* Slaughter, *Typology*, *supra* note 44, at 134, (depicting protection of human rights as comprising the “core of judicial identity for many courts”).

112. SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 31, at 94, 102.

113. Slaughter, *Typology*, *supra* note 44, at 127; *see also* Helfer & Slaughter, *Theory*, *supra* note 27, at 326.

114. Slaughter, *Typology*, *supra* note 44, at 121–22.

115. *Id.* at 122.

116. Helfer & Slaughter, *Theory*, *supra* note 27, at 384 (quoting Andrew Byrnes, *Towards More Effective Enforcement of Women’s Human Rights Through the Use of International Human Rights Law and Procedures*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 189, 194 (Rebecca J. Cook ed., 1994)). This point recalls Dworkin’s principle of coherence (or integrity), which implies a shared set of preferences

approach might lead to a *better* understanding of what human rights and legitimate outcomes are really all about. As such, the theory is reminiscent of a Habermasian ontology and understanding of rights as legal expressions of shared moral convictions evolving from dialogical encounters between peoples in search for common positions and future agreement on deeply contested issues.¹¹⁷

This anti-formalist ethos of post-Cold War international human rights lawyers and transjudicialism theorists undercuts any wariness as to the kind and style of law, institutions, and rights we would help produce and promote *despite* the shift in the disciplinary lexicon towards proceduralism. How are we to assess the moral worth of such standards without recourse to an external norm whose objectivity and neutrality are questionable? Why are they to be preferred over other equally defensible standards derived from the cultural heterogeneity of norm-generating practices? Is there a way out of the paradox of liberalism that processes that are likely to give rise to subjective, open-ended, heterogeneous, and entirely flexible standards also require upholding and converging with the human rights jurisprudential *acquis*? A thin commitment to procedural norms should not be mistaken for objectivity and value-neutrality, for it can hardly stand as a proxy for an acceptance of and consensus on common substantive human rights norms and principles. Rather, participatory procedures serve in the liberal legalist position a circular function which is more ideological and symbolic than real. One strand in the Marxist critique of bourgeois liberal rights saw liberalism as based on a particular kind of “false consciousness” in which the exercise of universally valid civil and political rights (voting, speech, association) serves to guarantee our universally valid private rights (property and

regarding principles of justice, fairness, and due process (what he calls a “community of principles”) from which rules derive in a logical manner. See RONALD DWORKIN, *LAW'S EMPIRE* 225–26, 243 (1986). On this view, to assess the level of “systematization” of a given legal system one must look at the coherence (as described here) of its body of norms and institutional structures. Hence Slaughter’s positivistic intuition that the dialogue occurring between adjudicative bodies of the world “may be as close as it is possible to come to a formal global legal system.” See Slaughter, *Courts*, *supra* note 71, at 218. On “systematization”—the establishment of systemic relationships between legal rules—as a defining aspect of legal reasoning, see JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (1979).

117. See JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THOUGHT* 37–38, 57–58, 82, 191–93 (Ciaran Cronin & Pablo De Greiff eds., 1998); JÜRGEN HABERMAS, *Remarks on Legitimation Through Human Rights*, in *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* 117 (Max Pensky ed. & trans., 2001). For a discussion of deliberation in its more radical agonistic acceptance, which departs from the conventional Habermasian understanding and where marginalized groups are included and disparities of power acknowledged, see Dianne Otto, *Rethinking the ‘Universality’ of Human Rights Law*, 29 *COLUM. HUM. RTS. L. REV.* 1, 33 (1997).

contract),¹¹⁸ generating thus a sense of having mediated our split individualist and collectivist selves, while attainment of other legitimate social policy goals in “civil society” are rebuffed as necessarily requiring illegitimate distributive choices. Little can be gained by insisting that norms elaborated through even the most impeccable deliberative process imaginable from a liberal democratic point of view must be accepted as *ethically* legitimate: such a conclusion could result only from fetishizing the process itself. At the same time, there is something deeply disturbing with the unproblematized claim that we should value judicial cross-fertilization on the terms advanced by liberal theory because it is most likely to produce objectively “better” substantive outcomes in terms of strengthening the protection of individual human rights in global and regional contexts.¹¹⁹

A tension emerges from this distorted picture of proceduralism between, on the one hand, the neo-liberal materialism of globalization and economic governance as the lynchpin of a “trade related, market-friendly” conception of human rights¹²⁰ and, on the other hand, an attempt to maintain an attachment to a non-ideological and non-utopian vocabulary of universal freedom and rights.¹²¹ Both, however, see human rights as technocratic informal regulatory imports/exports¹²² in a free market of ideas where courts of the most powerful and influential nations (or regional blocks) are the primary stakeholders and production sites.¹²³ Such a market space in which information and ideas are continu-

118. Karl Marx, *On the Jewish Question*, in WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY 216 (Lloyd David Easton & Kurt H. Guddat eds. & trans., 1967); see also SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY* 65 (2000) (arguing that “[t]he democratic norm ... detaches the need to protect [civil and political] rights from the issue of how economic deprivation and social marginalization affect opportunities for political participation” and that “[t]he universalization of civil and political rights thus serves to confer an illusory wholeness on the divided social body”).

119. Helfer & Slaughter, *Theory*, *supra* note 27, at 326, 377 n.467. This liberal claim, although existing in different valences, can be attributed to Dworkin’s defense of a “dependent” (or outcome-oriented) rather than “detached” conception of democracy. See RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 186 (2000).

120. See BAXI, *supra* note 96, at 234.

121. On the ambiguities of human rights as both a language of suffering and sacrifice and an economic grammar of global governance, see Anne Orford, *Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice*, 18 LEIDEN J. INT’L L. 179 (2005); Anne Orford, *The Subject of Globalization: Economics, Identity and Human Rights*, 94 AM. SOC’Y INT’L L. PROC. 146 (2000).

122. See SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 31, at 19–20, 24, 69, 100 (discussing information, harmonization, and enforcement regulatory judicial networks).

123. See also Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 499 (2005). Regulatory networks scholarship has been oblivious to the distributive stakes attendant to the informality of transgovernmental networks and which cannot be captured by a focus on

ously exchanged is believed to operate devoid of political value, material distortions, and power asymmetries. The latter, however, are always fluid on both horizontal and vertical axes of networks in which knowledge “transmission” occurs.¹²⁴ The social construction of a free market of human rights courts may and often will “favour certain types of ideas which are better able to package themselves and compete as ‘products’ in the manner it [the market] demands.”¹²⁵ The “Hayekian”¹²⁶ and “ordoliberal”¹²⁷ view of human rights, in turn, portrays the reality of regional and local political and cultural identity struggles as simply norm consumption sites—as mere aberrations rather than as legitimate alternatives to conceiving the plurality of “market” arrangements. It also shies away from any discussion of the preconditions for collaborative global governance to work, “namely, redistribution of resources to counter power asymmetries among ‘stakeholders.’”¹²⁸ Regional human rights systems can both be excluded from the market of ideas or forced into it through assimilation or convergence without either being logically or

“the pure coordination game.” See Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT’L L. 113, 115–16 (2009) (“[I]nternational regulatory cooperation often raises significant conflicts over the distributive consequences of new standards, as the costs and benefits of alternative proposals fall on different states. . . . In order to solve distributive conflicts, international negotiations must involve concessions and tradeoffs across issue-areas and, in some cases, threats and other manifestations of relative power. These tasks are not easily entrusted to regulatory agencies, and are at odds with the supposedly apolitical nature of the [transnational regulatory networks] process.”).

124. See Buxbaum, *supra* note 74, at 187; Otto, *supra* note 101, at 41.

125. Mills & Stephens, *supra* note 41, at 28.

126. The expression “Hayekian” was coined by Philip Alston to describe the shifting of international human rights law “in a way which would fundamentally redefine its contours and make it subject to the libertarian principles expounded by writers such as Friedrich Hayek, Richard Pipes, and Randy Barnett.” See Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT’L L. 815, 816 (2002).

127. The classical reference to Hayek as laying down the premises of ordoliberal economics is found in FRIEDRICH A. VON HAYEK, *The Principles of a Liberal Social Order*, in STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS 174–77 (1967). Alston defines “ordoliberalism” in conventional fashion as insisting on “the importance of an appropriate constitutional and regulatory framework to provide the setting within which a private law system premised on private property, contractual freedom, open markets, etc. can flourish.” Alston, *supra* note 126, at 842 n.116.

128. Boaventura de Sousa Santos & César A. Rodríguez-Garavito, *Law, Politics, and the Subaltern in Counter-Hegemonic Globalization*, in LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY 7–8 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2003) (critiquing Dorf and Sabel’s theory of “democratic experimentalism” as masking unequal power relationships among network participants). Dorf and Sabel define “democratic experimentalism” as the idea that the diffusion of credible information along networks and the ascertainment of optimal solutions to coordination problems require deliberation and processes of disaggregated decisionmaking that rely on bottom-up local problem-solving experiments as a path to convergence around ever better rules. See Michael Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

necessarily preferable. There are, in the end, no *better* outcomes when rights are thrown into the procedural crucible than those that are *self-determined* to be so and justified as such *post hoc*.¹²⁹

Liberalism's response to such a critical challenge easily turns into a matter of semantics. Courts partake in "healthy" collective deliberation above all because of an underlying "modicum of common ground," namely a "common methodology," including a common reliance on persuasive authority, as well as a commitment to, and understanding of, the rule of law.¹³⁰ This idea of *commitment* to interaction among like-minded rational judicial subjects sharing a transnational space devoid of politics and distributions of power and governed by law is central to a further claim by which the descriptive and normative elements are collapsed: judges of supranational human rights tribunals will interact with each other in much the same way as judges from domestic constitutional courts of liberal states engage in dialogue over issues such as appropriate choice of law rules and human rights standards. The ideas of interdependence and "network" are, however, presented in transjudicialism scholarship not as the thrust of their normative argument, but rather as an accurate description of contemporary social reality that furnishes the background necessary for their normative arguments in the service of the progressive march towards a global human rights legal community. Their entire approach and prescriptions for effective supranational human rights adjudication are therefore built on what they imagine as the transnational *virtues* of the rule of law and the *reality* of such interactions.

b. The Technocratic Policy Structure Model: The Supranational Rule of (Human Rights) Law

Supranational human rights adjudication enthusiasts share with transjudicialism theorists a staunch belief that the yardstick for evaluating effectiveness is the degree to which supranational courts further the possibility of enforcing supranational and transnational law. The core technocratic value that TLP AF is committed to promoting with the asserted "newness" of transjudicialism is the juridical fiction of the supranational/transnational rule of law. But the claim, often made and rarely justified, raises more questions: What exactly does the ideal mean? Do its rationalization and realization necessarily require supranational human rights tribunals to engage in the kind of cross-fertilization and to discharge the specific role envisaged by liberal legalist theory?

129. As Baxi poignantly puts it, "[b]oth the inputs and outputs in the portfolio investment in human rights protection and promotion remain indeterminate; nevertheless, these have to be ledged, packaged, sold, and purchased, on the most 'productive' terms." BAXI, *supra* note 96, at 221.

130. Slaughter, *Typology*, *supra* note 44, at 125–29.

Realist and Marxist and critical legal scholarship have long been intent to counter the idealized contrast set up by liberal theory between a “zone of law” and a “zone of politics beyond law,”¹³¹ with one reflecting order and justice, and the other brute power.¹³² It insists on refashioning the image that concepts such as “democracy,” “rule of law,” and “persuasive authority” operate exclusively within the former, are devoid of asymmetrical power constraints, and can be reduced to singular and determinable historical, social, and cultural constructs.¹³³ This leftist strand in internationalist scholarship has important implications for the viability of the ascendancy of transnationalist policy consciousness in international law. The extent to which a liberal focus on procedure establishes the foundations for a “transnational community of human rights courts” remains controversial for theorists who are not committed to mainstream procedural and institutional renditions of democracy and rule of law and associated hegemonic explanatory claims. This is particularly so for scientific or rationalistic accounts pertaining to the inclusiveness of participation of all concerned, the power of the better argument, and the principles directing deliberation within established hegemonic social structures. Factors such as loyalty, autonomous judicial identity, and engagement in a common purpose, allowing for the emergence of a “zone of overlapping consensus,”¹³⁴ also display a very thin instrumentalism

131. Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1917–22 (1992).

132. For foundational works applying critical and Marxist approaches to international law through the tool of “ideology critique,” see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005 reissue); CHINA MIÉVILLE, BETWEEN EQUAL RIGHTS (2005); Bhupinder S. Chimni, *An Outline of a Marxist Course on Public International Law*, 17 LEIDEN J. INT’L L. 1 (2004); Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 3 EUR. J. INT’L L. 449, 470 (1997).

133. Dworkin argues that judges argue and disagree about what the “gravitational force” of a given norm or judicial decision is because they might be in substantive disagreement about what the background rules in a legal system provide. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1089–93 (1975). However, he fails to acknowledge that neither this interpretative support of the community in which the court is embedded nor the “orbit” of a particular norm or judicial decision is “given” but is socially and culturally constructed to connect the justification for a particular decision with those that other courts have given in similar cases.

134. John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987). Rawls’ approach appears to represent a deeply engrained pluralism. However, the consensus he requires for liberal politics to succeed can only be achieved if subjects refrain from expressing deeply held religious or philosophical convictions in public argument. This removes almost all specificity of culture from pluralist theory. Abdullahi Ahmed An-Na’im’s relativist critique supports aspects of Rawls’ theory. He argues that “interculturalism” and diversity are necessary to create universal rights and a more inclusive, polyvocal, grassroots-based universality. For An’Naim, dialogue between cultures will help achieve an overlapping consensus on human rights and peaceful co-existence, but each culture must internally accept the human rights standards to create legitimacy for these standards. See ABDULLAHI AHMED

and paint a distorted view of identity. Liberalism's emphasis on proceduralism does not explain why human rights judges would be likely to cite one another (or resist such a practice) from the point of view of *cognitive culture* (both consonance and dissonance).¹³⁵

The pervasiveness of the language of identity in transjudicialism scholarship is, paradoxically, what obfuscates and undermines the conceptual clarity of identity as a conceptual variable in the social sciences as well as a tool for understanding the distributional effects of transnational identity politics. Central to a long genealogy in the sociological tradition, identities describe individual and collective self-understandings about the traits, characteristics, and worldviews one possesses as a member of a social field or category. Slaughter's conceptualization of liberal judicial identity, for example, is problematic for two reasons. First, it atomizes and homogenizes the group by virtue of stereotyped, reified, static, and non-graduated characteristics.¹³⁶ In so doing, it sublimates the individuality of judges, recasts their role as servants of *transnational norms* while denying the constraints they experience from local and regional sensitivities,¹³⁷ and ultimately trivializes the plurality of voices both within and outside the Western liberal tradition itself. Undue emphasis on the "neutrality" of

AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 164 (1990); HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (Abdullahi Ahmed An-Na'im ed., 1992).

135. See Basil Markesinis, *Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law*, 80 TULANE L. REV. 1325, 1346–50 (2006). Slaughter recently identified the *cognitive* dimension of judicial dialogue and how it links to judges' identity construction. Yet her conception of identity is made a question of psychological and epistemological understanding by judges, who question who they are in relation to members of a profession (the "others"), i.e., as a matter of *collective* rather than *individual commitment* and social positioning in a globalized world where supranational, national, and sub-national identities are mutually constructed. See Anne-Marie Slaughter, *A Brave New Judicial World*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 277, 297 (Michael Ignatieff ed., 2005) [hereinafter Slaughter, *A Brave New Judicial World*].

136. See Slaughter, *Typology*, *supra* note 44, at 136 ("Transjudicial communication . . . presupposes that the courts involved conceive of themselves as autonomous governmental actors even beyond national borders; that they speak a sufficient common language to interact in terms of persuasion rather than compulsion; and that they understand themselves as similar entities engaged in a common enterprise The reinforcement of courts as autonomous international and transnational actors is a step toward the disaggregation of state sovereignty . . .").

137. See Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 115–16 (2008) (sounding the cautionary note that "[t]o the extent that the [IACtHR] is pursuing the institutional goal of coordinating states' global and regional obligations, prematurely hardening global soft law at the regional level does not necessarily serve that goal Soft law formulations often assert categorical claims that would require qualifications and exceptions to take into account countervailing interests, including other rights and resource constraints."); see also Verdier, *supra* note 123, at 50 (arguing that "regulators acting within TRNs can—and should—develop a dual loyalty to domestic interests and to "the rights and interests of all peoples").

such norms raises important *agency* questions for the role constraints of adjudicators, who are at once managers of “objective,” context-specific human rights regimes and “subjectified” members of a transjudicial community.¹³⁸ This dual stance of the transnationalist subject of politics often requires him to *balance* and mediate his roles in enhancing regime effectiveness against legitimacy concerns and competing identities, perceptions, and interests at home. Yet such balancing is inimical to a robust transnationalist policy consciousness, which denies that such “role constraints” take place.

The second difficulty with such a romanticized view of identity is that it too quickly assumes that judicial behavior generally follows an instrumental rationality, a patterned economic calculus of costs and reciprocal benefits based on preferences and identities that are fixed, that is, somehow exogenous to and ontologically prior to the international system.¹³⁹ On this background, by engaging in repeated interactions with other tribunals and in creating greater predictability in substantive outcomes, judges actually believe that judicial dialogue (and normative convergence) can be easier, quicker, and, most importantly, cost-effective for international cooperation beyond pareto-optimal levels.¹⁴⁰ Dialogue

138. See generally PIERRE BOURDIEU, *THE FIELD OF CULTURAL PRODUCTION: ESSAYS ON ART AND LITERATURE* (Randal Johnson ed., 1993) (emphasizing a system of dispositions, or habitus—lasting, acquired schemes of perception, thought, and action in his analysis of the structure of social fields—an analysis that responds to the divide created by structuralists’ emphasis on the subjective (internal) perceptions of actors and Kantians’ grounding of the influence and determinism of social forces on human interactions on transcendental (external) claims of objectivism); ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY* 3–16, 281–85 (1984) (explaining agency as part of his theory of structuration in which “capacity” means autonomous centers of deliberation and action). For Bourdieu in particular, the individual agent develops a system of dispositions in response to the objective conditions he encounters. PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 54 (1990). Bourdieu thus theorizes the inculcation of objective social structures into the subjective, mental experience of agents. Having thereby absorbed objective social structure into a personal set of cognitive and somatic dispositions, and the subjective structures of action of the agent then being commensurate with the objective structures and extant exigencies of the social field, a doxic relationship emerges. See *id.*

139. On the methodological basis of such a rationalist approach, see ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 5–31 (1984) (explaining that such an approach “takes the existence of mutual interests as given and examines the conditions under which they will lead to cooperation,” where cooperation is analyzed “less as an effort to implement high ideals than as a means of attaining self-interested economic and political goals”); *id.* at 6, 24–25.

140. Raustiala argues that “the existence of a network strengthens incentives for jurisdictions to seek convergence because convergence allows for deeper and broader cooperation.” See Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 68 (2002); see also SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 31, at 169. Pareto optimality is an important concept of economics with implications for game theory and translates generally into a measure of economic efficiency and distribution of income or goods. For game theorists, given a

can significantly reduce the “transaction costs” of independent regulation and administration of the relevant human rights regimes. The most cost-effective way to enforce substantive human rights would be to put in place processes that will alleviate the task of devising distinctive regulatory, administrative, and enforcement strategies through information exchange and networking opportunities.¹⁴¹ The apparent facticity of such a claim rests, however, on a theory that remains state-centric, domestic, and domesticated by fetishizing and calcifying preferences within states. It is assumed that states simply act as agents of a particular topography of individual and group preferences and interests determined domestically.¹⁴² “Government officials and institutions participating in transnational government networks represent the interests of their respective nations, *but as distinct judicial . . . interests.*”¹⁴³ The theory thus embraces a rationalist conception of agency that reduces all political (and judicial) action to strategic interaction.¹⁴⁴ At this point the collapse of a state’s liberal identity with judicial identities becomes crucially relevant in the argument. Following something analogous to a vulgar historical deterministic orthodox Marxist claim of “determination in the last instance”¹⁴⁵ by the base of the supranational human rights legal superstructure—a claim that judges represent the “executive committee”¹⁴⁶ of ruling societal interests—individuals and societal groups define their interests at home independently of and beyond politics, and judges define judicial preferences instrumentally and act purposively as the

set of alternative allocations of income or goods, an outcome of a game is Pareto-optimal if there is no other outcome that makes every player at least as well off and at least one player strictly better off. That is, a Pareto-optimal outcome cannot be improved upon without hurting at least one player. Crucially, Pareto optimality does not necessarily result in a socially desirable distribution of resources, as it makes no statement about equality or the overall well-being of a society. See YEW-KWANG NG, *WELFARE ECONOMICS: TOWARDS A MORE COMPLETE ANALYSIS* (2004).

141. SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 31, at 19–20, 24, 171–72, 177–78, 213, 249–50.

142. For a critique of this understanding by rational choice theorists, see Kratochwil, *supra* note 29, at 61–62.

143. Slaughter, *Networks*, *supra* note 91, at 200 (emphasis added).

144. For a critique of a legal theory based on a positivistic liberal understanding of international relations as undermining the capacity to reason normatively about international change, see generally Reus-Smit, *supra* note 92.

145. For a famous critique of this idea that nevertheless supplements Marx’s thought, see Louis Althusser, *Contradiction and Overdetermination in FOR MARX* 111 (Louis Althusser ed., Ben Brewster trans., 1969).

146. Karl Marx & Frederick Engels, *The Communist Manifesto*, in 1 KARL MARX & FREDERICK ENGELS, *SELECTED WORKS* 36 (1969).

mouthpieces for these local interests through judicial exchange and collective deliberation supranationally.¹⁴⁷

Such a view is difficult to sustain historically, as it downplays the traditional liberal emphasis on the role of a thick “sense of community and justice” and the emergence of norms and institutions through the growing perception of common interests in relation to specific sets of *substantive* human rights issues and values. In so doing, however, it also eschews a thin commitment to rights as relational norms that structure and sustain significant relationships of mutual constitution of meaning between social actors, without any *a priori* commitment to any particular kind of substantive relationships and values fostered through these interactions.¹⁴⁸ Harold Koh has thus effectively mounted a scathing critique of the thinness of liberal theory’s descriptivism, arguing that “identity theories”¹⁴⁹ do not fully account for the *normativity* of one’s *participation* in “transnational legal process.”¹⁵⁰ But what he misses is that identity *does* have a bearing precisely on how that process will take shape relationally, the underlying conditions that make it work, the kind of relationships that are fostered through these transnational interactions, and who will ultimately join and benefit from it. He only partly answers the question he is concerned with (“*Why Do Nations Obey International Law?*”), and does not ask why certain transnational legal process actors internalize certain norms as part of their internal value set and not other norms. He is also not self-critical about which assumptions about the culture of the dominant group underlie such a “top-down” process of norm internalization.¹⁵¹

147. This claim is based on Moravcsik’s liberal theory of international politics and its thin account of state preferences derived from ascendant individual and group preferences. See Moravcsik, *supra* note 36, at 517.

148. Relational theory, mostly in its feminist incarnation, distinguishes the liberal conception of “rights” from “rights relations,” where emphasis shifts from questions of pedigree, hierarchy, boundaries, and rights-talk to structuring “relationships—of power, of responsibility, of trust, of obligation.” Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1, 13 (1993). Thus, “this reality of relationship in rights becomes the central focus of the concept itself, and thus of all discussion of what should be treated as rights, how they should be enforced, and how they should be interpreted.” *Id.* at 14.

149. Slaughter would resist her classification amongst constructivists, whose central tenet is identity formation. Her agenda is closer to the neo-liberal rationalist paradigm though her work can be enlisted in support of different constructivist conclusions.

150. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646 (1996) [hereinafter Koh, *Why Do Nations Obey?*]. Koh explains this complex process as one of transnational interaction whereby global norms are not just debated and interpreted, but ultimately “internalized” by domestic legal systems as an aspect of identity transformation. See Koh, *supra*, at 2646–51; Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 202–03 (1996) [hereinafter Koh, *Transnational Legal Process*].

151. See Umut Özsu, *Towards a Critical Constructivist Theory of Legal “Norm-Internalization”: Two Cases from Early Republican Turkey*, at 30 (2007) (unpublished L.L.M. Thesis, Univ. of Toronto) (on file with author). I am grateful to Umut Özsu for discussions on

Identities in judicial dialogue are significant in that they provide the basis for interests and preferences,¹⁵² a point that has often been neglected in both legal and political science studies. Interests, in turn, develop “in the process of defining situations” and social relations.¹⁵³ Identities and their discursive modes of production and distribution, on one hand, and norms, on the other, are *mutually constitutive* and *relational* and inform explanations of both continuity and change in social relationships fostered in the deliberative process, regularized patterns of practices and behaviors, and moments of discontinuity in (judicial) dialogue.¹⁵⁴ The human rights judge is a social actor belonging to a multitude of social groups with which he shares an “identity affiliation” that can be challenged or reinforced through interactions and with which he might exchange meaning or share a geographical, experiential, or other characteristic through collective deliberation and argumentation without necessarily gesturing at convergence of worldviews.¹⁵⁵ Notions like “human rights” differ in the extent to which and the manner in which the self is identified cognitively with the other. It is upon this cognitive variation and mapping onto the socio-cultural environment that the meaning of norms and the distribution of political rationalities and power among the different human rights cultures (global and local) largely depends. This opens up a horizon of possibilities by which the many particularisms of judges and legal regimes may be articulated but which are impossible to realize all at once.

From this perspective, it appears the “network” concept in transjudicialism scholarship is not really doing much analytic work at all beyond rhetorical and historicist “interpellation.”¹⁵⁶ It tends to make us forget the

this point. Brunnée and Toope refer to this as “the features that give legal norms a distinctive ability to gain internalization and to shape actor identities.” Jutta Brunnée & Stephen J. Toope, *Persuasion and Enforcement: Explaining Compliance with International Law*, 2002 FINNISH Y.B. INT’L L. 273, 291. Yet this emphasis on the *internal* features (based on some notion of morality) of norms seems to downplay the relevance of the formative role of identity and culture as *constitutive* of norms and social interactions. I discuss this more fully below.

152. Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391, 397–98 (1992) [hereinafter Wendt, *Anarchy*].

153. ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* 224, 231 (1999) [hereinafter WENDT, *SOCIAL THEORY*].

154. Wendt, *Anarchy*, *supra* note 152, at 397–99.

155. Thomas Risse, *Let’s Argue!: Communicative Action in World Politics*, 54 INT’L ORG. 1, 10, 22, 28–33 (2000); Wendt, *Anarchy*, *supra* note 152, at 398, 401.

156. “Interpellation” has been used by Louis Althusser to describe the process by which ideology addresses the (abstract) pre-ideological individual, producing him or her as subject proper. The situation always precedes the (individual or collective) subject, who, precisely as an ideological subject, is “always-already” interpellated. LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 127, 170–76 (Ben Brewster trans., 1971). In the context of the social sciences, to be interpellated is to identify with a particular idea or identity which already constitutes us, such as a sense of

spectrality of identity affiliations of an individual judge and their “intersectionality”—that is, the holistic impact of the multiplicity of these affiliations on his perception of each of these.¹⁵⁷ Only a truly intersectional analysis allows for the broadest possible examination of the totality of relationships of power and knowledge formation on grounds of gender, race, class, etc. implicated in transjudicial dialogue in human rights. The “network” concept also provides an incomplete ethnographic map of *why* network members interact and to what extent informal network structures influence their behavior.¹⁵⁸ Political questions about *how* judges as subjects come to be constituted in the first place are blithely ignored. The next section of this Article argues that the competing identity-based narrative highlighted by an exploration of the *discursive* or *communicative* constitution of identity and social connections—through relational structures of language and rhetorical practices harnessed to local culture—endanger this assumption and hence the very possibility of the theory. Liberalism seeks to foster diversity and difference in individual or group identities but only under the allure of a robust and static Western liberal construction of the self.¹⁵⁹ Yet as Martti Koskenniemi reminded us, without specific *contextual* articulation, “we know virtually nothing of ‘understandings’ or ‘beliefs’: the insides of social agents remain irreducibly opaque.”¹⁶⁰ In refusing to engage with the implosion of the judicial self in its encounter with local culture, TLPF’s liberalism appears, in the end, strikingly illiberal.

belonging to a “networked” human rights world as an international lawyer’s real condition of existence.

157. A focus on “intersectionality” and distribution in tackling a wide range of socio-economic consequences of legal rules and regimes and adjudication owes a great deal to the work of relational feminists and critical race theorists. *See generally* RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF (Catriona Mackenzie & Natalie Stoljar eds., 2000); Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 195 (David Kairys ed., 2d ed. 1990); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN L. REV.* 1241 (1991).

158. *See generally* ANNELESE RILES, *THE NETWORK INSIDE OUT* (2001). In describing and theorizing an aspect of transnational existence through which institutional knowledge practices are produced and reified and which she calls “analytical forms,” Riles enacts a new ethnographic method for apprehending networks such as the U.N. Fourth World Conference on Women in 1995, from the perspective of those inside the network (bureaucrats and activists) who, rather than being mere observers of the artifacts of transnational life, are producers, consumers, and “aesthetes” of these artifacts.

159. Franck sees “imagined” communities as borderless, and he transposes the concept to predict a growing liberal hegemony through recognition of the increasing power of individualism. The self can be constructed at the expense of interaction and socialization of agents and structures. His arguments suggest that individuals come to society pre-formed, having “chosen” or “defined” their identities. THOMAS M. FRANCK, *THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM* 40–60, 100 (1999).

160. KOSKENNIEMI, *FROM APOLOGY TO UTOPIA*, *supra* note 132, at 597.

Such a legal process orientation entails a rationalist, empirical viewpoint that prevents any study of identity as a causal variable explaining a wide variety of modes of transjudicial communication and resistance taking place among judges of supranational human rights tribunals. This has important implications for projects of reform because of the ways in which internationalists argue about the strengthening/renewal of international human rights law to overcome institutional inertia and compliance gaps and achieve effectiveness. These deficiencies in transjudicialism scholarship are glaringly symptomatic of many conceptual and methodological shortcomings, as well as of coordination problems of a generation of social identity scholarship.¹⁶¹ The omission, however, cuts much deeper in the field of international human rights, for, as will be further discussed below, human rights do not yield so readily to the calculus of a pre-determined configuration of interests that rational choice and transjudicialism theorists appear to have taken renewed delight in uncovering.¹⁶²

This methodological problem resulting from contradictions in the combination of the two models exposed above is perhaps best exemplified by the claim that a global community of courts will engage in dialogue systematically because of some common features shared by judges. It is not denied that the nature of the interactions within the transnational legal community will often be “conflictual,” in the sense used by Mouffe in her critique of the Schmittian democracy postulate of destructive conflicts among equal antagonistic actors (friend-enemy, us-them).¹⁶³ But out of such conflict will *necessarily* emerge greater dialogue and ultimately a doctrine of convergence, under which judges will listen to their foreign counterparts unless their judicial systems do not “measure up to minimum standards of international justice.”¹⁶⁴ Yet a transnational legal community or a global community of law is precisely

161. Thus,

[t]he main conceptual questions that the field has yet to answer satisfactorily are: how can we compare different *types* of identities; and how can we exploit theoretical advances in operationalizing identity as a variable? Among “coordination” problems we include the lack of consistency and clarity in defining and measuring identities, the lack of coordination of identity research at both the cross-disciplinary and cross-sub-field levels, and missed opportunities to take advantage of expanded methodological options.

Rawi Abdelal et al., *Identity as a Variable*, 4 PERSP. ON POL. 695, 696 (2006).

162. See GOLDSMITH & POSNER, *supra* note 20; Helfer & Slaughter, *Theory*, *supra* note 27.

163. See Chantal Mouffe, *Carl Schmitt and the Paradox of Liberal Democracy*, in THE CHALLENGE OF CARL SCHMITT 38, 42–44 (Chantal Mouffe ed., 1999); see also CARL SCHMITT, THE CONCEPT OF THE POLITICAL 27 (George D. Schwab trans., 1996).

164. Slaughter, *Courts*, *supra* note 71, at 194.

what is purported to emerge out of these interactions.¹⁶⁵ By asserting that transjudicial communication is both a step towards (cause) and an effect of a transnational community of law,¹⁶⁶ the one is substituted for the other *and* used as the measure for the other. This collapses the independent and dependent variables, rendering measurement of judicial human rights cross-fertilization and effectiveness, and empirical verification of any causal relationship between the two variables virtually impossible. This, in turn, masks the contradictions within proceduralism itself, and serves to legitimize the liberal project of transjudicialism and undermine alternative explanations of this complex phenomenon that are based on relational cultural identity construction.

2. Contradictions Within the Paradigm: Judicial Communication and the Dilemmas of Culture

A robust commitment to procedural norms appears to deny that compliance (as a measure of effectiveness) may be enhanced through factors other than communication itself: the normative force of human rights law, the discursive power of ideas and norm-making processes and institutions,¹⁶⁷ and the relationally constitutive influence of cognitive culture and local cultural forces on sustaining social relationships and producing identities. The reasons for rejecting the relevance of existing normative (ideational, constructivist) approaches to compliance that take identity seriously are nowhere explained in transjudicialism scholarship. Yet it seems that an approach that takes human rights normativity seriously also cannot avoid exploring the interplay and tensions between these methodologies. Indeed, this may be crucially relevant for any attempt, such as the one made in this Article, at radically reconfiguring the liberal account of effective supranational human rights adjudication while framing cautions for constructivist accounts of identity construction, which fail to problematize the role played by culture.

a. The Paradox of Communication Exposed: Loving and Loathing Identity

Human rights courts and judges are treated in transjudicialism scholarship as fungible “like units,”¹⁶⁸ bound together by a “prior convergence of deep-seated principles and values, as well as modes of legal reasoning

165. See SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 31, at 78 (opining that where judges “are persuaded [by their foreign colleagues] to the point of actual convergence of decisions on certain issues, judicial cross-fertilization begins to evolve into something deeper, resembling an emerging global jurisprudence”).

166. Helfer & Slaughter, *Theory*, *supra* note 27, at 298.

167. A similar point is made by Kratochwil, *supra* note 29, at 57, 59.

168. Slaughter, *Liberal States*, *supra* note 33, at 524.

about those principles and values.”¹⁶⁹ This anthropomorphic conceptualization of judicial identity assumes it to be a culturally bounded category and, more importantly, needs it to be so if “identity” is not to immediately endanger the liberal internationalist project. The unity of identity “black-box”¹⁷⁰ fiction, a realist assumption about the ontological foundations of classic public international law that liberals once fiercely attacked but which, paradoxically, they now desperately need for their approach, is introduced through multiple regional and culturally rooted exclusions. These concern the genesis and type of actors that judges are and, most fundamentally, the *kind* of political project advanced by transjudicialism theorists.¹⁷¹ The resistance of European judges to judicial cross-fertilization with their non-European human rights judicial counterparts provides ample material with which to demonstrate that these exclusions and disciplining of culture and the normative, on the one hand, and transjudicialism theorists’ bracketing of domestic politics, on the other, are not innocent methodological choices but a political move which threatens the very plausibility of their argument. It is, in other words, precisely the *possibility* of such an approach that is compromised by its perilous liaison with identity and culture.

At the cost of foregoing analytical rigor, transjudicialism theorists eschew the extensive and growing body of constructivist literature that explores how actor identities are socially constructed products of social learning, knowledge, and ideology through iterations of interaction.¹⁷² Constructivists describe a world in which shared understandings or behavioral expectations can effectively be generated *across cultures* through processes of institutionalization and social learning, and that this matters in carving out social reality. At one level, this is a point of simi-

169. Slaughter, *Typology*, *supra* note 44, at 133. Wendt distinguishes “corporate” from “social” (or “role”) identities of states: the former, which can readily be associated with Slaughter’s liberal conception of judicial identity, are composed of “intrinsic, self-organizing qualities that constitute actor individuality,” while the latter are social constructs through interaction, that is, “sets of meanings that an actor attributes to itself while taking the perspective of others.” Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 385 (1994) [hereinafter Wendt, *Collective*].

170. Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205, 207 (1993).

171. See SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 31, at 187; Helfer & Slaughter, *Theory*, *supra* note 27, at 373.

172. Constructivism is not only a political theory distinct from liberalism, but also, and more appropriately, a distinct ontology based on the beliefs that the “structures of human association are determined primarily by shared ideas rather than material forces” and that “the identities and interests of purposive actors are constructed by these shared ideas rather than given by nature.” WENDT, *SOCIAL THEORY*, *supra* note 153, at 1. For structurationists like Giddens and Wendt, then, neither agents (actors within a given setting) nor social structures are logically pre-existent or determining; each is constituted through interaction with the other. For Giddens’ theory of structuration, see generally GIDDENS, *supra* note 138.

tude with various strands of post-colonial and post-structuralist critique of the “aggressive” version of the universalist idiom of human rights¹⁷³ on which liberal theory rests. By contrast, transjudicialism theorists imagine an “interactionist convention”¹⁷⁴ in which they undertake two intricately related yet contradictory moves. First, they assume two judicial actors (or judges) who come to interact only after we have imagined them on their own, that is, prior to and independent from social and cultural context.¹⁷⁵ Second, they argue that compliance with human rights norms and institutions depends largely on whether or not a state can be characterized as having an *identifiable* and *pre-existing* “liberal” identity.¹⁷⁶ This two-fold strategy of at once detaching judicial interactions from, and embedding them within, culture downplays the role cultural identities play in shaping political action and behavior at the level of domestic structure beyond the pale of instrumentalism, Marxist determinism, functionalism, and the statist paradigm.¹⁷⁷ These identities are neither liberal nor preexisting. Rather, they are constructed through complex interactions at multiple levels of governance between judges, domestic regulators, and transnational and local social movements.

In a “disaggregated” judicial world,¹⁷⁸ judges are powerful actors capable of deploying the discourse of human rights ideologically both to insulate themselves and the profession from political interference and to hide their political agendas, particularly those not predominant in the life of their institution or refractory to the social community in which they are embedded.¹⁷⁹ This is by and large tributary of a certain role-splitting in the ways in which the judicial function has traditionally been

173. See Otto, *supra* note 101, at 21.

174. This expression is derived from WENDT, *SOCIAL THEORY*, *supra* note 153, at 328, who uses it to describe the social interaction, or relational experience, of two actors, *ego* and *alter*, through which social learning occurs, *id.* at 329–35.

175. Maja Zehfuss, *Constructivism and Identity: A Dangerous Liaison*, 7 *EUR. J. INT'L REL.* 315 (2001) (critiquing Wendt's alter-ego scheme as actually assuming that social actors precede their social context of interaction).

176. This is an empirically unproven hypothesis by transjudicialism theorists' own admission. See Helfer & Slaughter, *Theory*, *supra* note 27, at 331.

177. Koh argues that to the extent Slaughter's theory engages with identity, it “becomes uncomfortably reminiscent of the ‘cultural relativism’ debate in international human rights law.” Koh, *Transnational Legal Process*, *supra* note 150, at 203.

178. The cornerstone of Slaughter's theory is the idea that one should look beyond the veil of sovereignty to the component parts of liberal states, sub-state actors, and citizens interacting with each other—that is, to the “disaggregated” state. I use this neologism against Slaughter to underscore that it is less courts as identical units operating within a “free market of ideas” than judges with distinct interests and identities that are relationally produced through relationships sustained through patterns of interaction with various social and political actors at different levels of governance.

179. Balakrishnan Rajagopal, *Judicial Governance and the Ideology of Human Rights: Reflections from a Social Movement Perspective*, in *HUMAN RIGHTS, JUSTICE, AND CONSTITUTIONAL EMPOWERMENT* 200, 203, 212–17 (C. Raj Kumar & K. Chockalingam eds., 2007).

conceived. Courts (and judges) now increasingly take on functions of local and supranational “governmentality.”¹⁸⁰ It is therefore misleading to depict judges as merely engaged in a series of bilateral relations with the discrete individuals and states coming before them when adjudicating human rights. “Judicial governance” actually plays a crucial role in the reflexive construction of judges’ own identity structures and in how they identify with other judges. It also structures relationships through the work of defining rights and obligations of addressees of judicial decisions in the process of shaping an expanding human rights normative order.¹⁸¹ The liberal understanding of judicial identity cannot, however, cope with the complexity and over-determination of identities which are unstable in themselves for it is mainly concerned with policing the boundaries rather than probing the *content* of localized constructions about the self.¹⁸² Their overriding concern is that, in the “final instance,” judges can always reinforce their pre-existing “common” judicial identity through interaction and harmonization (what they share as a matter of dominant, objective, community-wide rather than subjective, individual, particularized commitment). Without this common identity, judges would likely see themselves as effectively caught up in a prisoner’s dilemma: reluctant to enter into a dialogue with other judges or willing to defect from an ongoing conversation, despite an ethical endorsement of the idea of “dialogue,” without the availability of reliable information about the likelihood of repeated iterations or others’ defections, or assurances about reciprocation or defection, or about the fact that, as a result of such interaction, they will all be “better off.” A deeper account of how cross-cultural knowledge and norm-production occur in supranational human rights adjudication would focus instead on such judicial interactions as both a function of broader interactional processes of identity and knowledge-building (of both “imagined” epistemic communities and “real-world” legal orders), and a function of power deployment and resource distribution.

180. “Governmentality” as a purely instrumental attitude to the activity of “governing,” in which rules have at best a tactical role and are legitimated *through* the exercise of individual freedom (self-governance), famously derives from the later Foucault. See MICHEL FOUCAULT, *THE CARE OF THE SELF: VOLUME 3 OF THE HISTORY OF SEXUALITY* (Robert Hurley trans., 1986); Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 87 (Graham Burchell et al. eds., 1991).

181. As Wendt explains, “[s]uch structures are often codified in formal rules and norms, but these have motivational force only in virtue of actors’ socialization to and participation in collective knowledge. Institutions are fundamentally cognitive entities that do not exist apart from actors’ ideas about how the world works.” Wendt, *Anarchy*, *supra* note 152, at 399.

182. See Slaughter, *A Brave New Judicial World*, *supra* note 135, at 292.

b. On the Blurred Methodological Matrix: Towards an “Interactional” Approach to Human Rights Cross-Cultural Fertilization

To trace the relative potency of TLPAF, one must therefore look beyond transjudicialism theorists' thin commitments to procedural norms to examine the relationships fostered through a focus on deliberation. The most likely candidate seems to be the laudable feat expended by IL and IR scholars over the last twenty years to demonstrate that “interactional” processes of law- and decisionmaking are necessary to ensure compliance with international regimes.¹⁸³ The late Abram Chayes, and Antonia Handler Chayes, for example, developed a “managerial” theory of compliance that emphasizes capacity-building, diplomatic “jawboning,” and sustained participation, engagement, and interaction with other actors in international regulatory regimes, accomplished through mostly verbal interchange and persuasion.¹⁸⁴ The theory assumes that “a successful compliance management process is explicitly cooperative and interactive,”¹⁸⁵ features also characteristic of transjudicial communication. On the other hand, Koh's theory of norm internalization, briefly evoked above, emphasizes law's normativity: how legal rules generated by interactions among transnational legal actors shape and guide future transnational interactions.¹⁸⁶ It is not the place here to sketch these theories in any greater detail. Suffice it to say that both approaches recognize that international legal norms help construct national identities and interests through a process of justificatory discourse and persuasion. But by focusing less on particular substantive issue areas than on the transsubstantive continuities of process, Koh's theory carries the additional benefit of emphasizing that transnational law is both dynamic—mutating from public to private, domestic to international, and back again—and constitutive, in the sense of operating to shape and reconstitute national identities through interaction, interpretation, and norm-internalization in domestic legal structures.¹⁸⁷ As Brunnée and Toope have pointed out,

183. On an “interactional” conception of international law which draws upon Lon Fuller's interactional theory of law by linking it to the insights of constructivist IR literature, and which has deeply influenced this Article, see Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 *COLUM. J. TRANSNAT'L. L.* 19 (2000).

184. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 22–28, 118–23 (1995); see also Kratochwil, *supra* note 29, at 60–61 (explaining the relevance of interactional accounts of the effect of norms on state behavior).

185. Raustiala, *supra* note 140, at 79.

186. Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 *HOUS. L. REV.* 623, 642, 675 (1998).

187. See Koh, *Transnational Legal Process*, *supra* note 150, at 204; Koh, *Why Do Nations Obey?*, *supra* note 150, at 2627, 2631, 2654.

Koh's central contribution to identity-building is "to break the path of 'obedience' down into a series of interactional processes."¹⁸⁸

Both of these theories, those of other theorists of "persuasion" such as Helfer and Slaughter, but also of constructivist scholars of "acculturation" such as Ryan Goodman and Derek Jinks (as we shall see below),¹⁸⁹ remain deficient to the extent they operate within specific paradigms of western modernity and rationality that predetermine, within a highly homogenized, global, cultural policy and normative environment, the actors for whom international human rights law exists. First, states are the primary units whose identities are being constructed through interaction with supranational institutions. Second, there is a shift away from the relevance of judicial dialogue to global/local identity-formation, to traditional and new forms of dispute resolution (inter-state and transnational public law litigation), executive action, administrative decisionmaking and enforcement, and legislation as part of an emerging transnational legal process in which statecraft still remains a primary attribute. Such statist historiography remains blind to how the *transnational link* between horizontal communication among supranational human rights institutions and vertical channels between the domestic, grassroots, and supranational levels operates in human rights praxis. It is this very intersection that will determine how and the extent to which the "managerial process" of judicial dialogue at the supranational level will actually construct, and not merely reflect, power relations, and the identities of all participants and stakeholders and the cultural legitimacy of norm diffusion patterns, as well as how and the extent to which it will, in turn, be shaped by these encounters.

An approach premised on the significance of actor identities (broadly construed) in shaping and being constructed by transjudicial communication, rather than on the subject-matter of disputes, or the disputes themselves, has much to contribute to human rights scholarship in the ongoing architectural discussions of a "post-national constellation."¹⁹⁰

188. See Brunnée & Toope, *supra* note 151, at 291.

189. See *infra* note 279 and accompanying text.

190. Constructivist formulations have been strongly influenced by the philosophy of language and communication. Some constructivists have found support in Jürgen Habermas's writings for the proposition that identities of international actors are constructed in large part through "communicative action." Processes of deliberation require of actors, namely states, that they learn to be "discursively competent," that is, capable of persuading. See FRIEDRICH V. KRATOCHWIL, RULES, NORMS AND DECISIONS 124, 230 (1989); Nicholas Onuf, *Do Rules Say What They Do? From Ordinary Language to International Law*, 26 HARV. INT'L L.J. 385, 397-402 (1985); Risse, *supra* note 155, at 5. By replacing the paradigm of knowledge of objects beyond the subject with the paradigm of understanding among subjects capable of speaking and acting, however, the focus is on the performative attitude of discursively competent participants in interaction. This shift of focus and perspective will raise tolerance for conflict only insofar as judges understand each other as contenders in a common judicial en-

As Brunnée and Toope explain in articulating their “interactional theory of international law,” “[i]n focusing upon the construction of actor identity, constructivists complement Fuller, helping to explain the impact of interaction, and why it may lead to cooperation and the emergence of norms.”¹⁹¹ In turn, “[r]ules and norms constitute the international game by determining who the actors are, [and] what rules they must follow if they wish to ensure that particular consequences follow from specific acts”¹⁹² Constructivists are concerned to show that identities may be sustained or may change through interaction and that this also matters to compliance or deepening forms of enforcement.¹⁹³ The claim that shifting judicial and local identities influence human rights norms through repeated interaction and reinterpretation of rules, and ultimately the nature of the legal regime that states are invited to internalize, signifies that this regime, although ingrained at any given time, is not an unchanging fact. It may, however, not always be easily transformed. This is particularly the case when judges have an important distributive stake in maintaining stable identities (due to internal constraints they experience such as a commitment to a common European history, sensibility, hegemony, or cultural tradition).¹⁹⁴

Such a reconfigured approach to judicial dialogue, which accounts for an integrated model of law's dialectical influence on state and local cultural identities, offers two main advantages to which existing sociological accounts are not sufficiently sensitive. First, it avoids the pitfalls of a purist or ethically “ideal” conception of communication by recognizing all contributors on equal footing and *both* the formative and

terprise with deep respect for each other's competence. To the extent the latter is modeled largely on theories of citizen participation and tailoring to local circumstances that tend to assume the existence of more or less democratic polities in which these processes can take place, and thus is associated with certain features common to liberal democracies, such as a common understanding of and commitment to the rule of law, it remains confined to a rationalist analysis that would almost expect courts, as a pre-condition to dialogue, to be “strategically competent,” that is, capable of identifying common interests and pursuing them rationally through judicial interaction and suasion. Liberal theory's commitment to methodological individualism thus idealizes how the conversation will be performed, excluding not only the range of participants in the process (or *demos*), but also the importance of identity formation measured by social communications.

191. Brunnée & Toope, *supra* note 183, at 67 (building upon Lon Fuller's work on the interactional nature of law and the role of principles and values in adjudication against the widely-held positivistic ethos of a rule-based conception of law). Fuller's thesis is developed in his classical work. LON L. FULLER, *THE MORALITY OF LAW* (1964).

192. Ngairé Woods, *The Uses of Theory in the Study of International Relations*, in *EXPLAINING INTERNATIONAL RELATIONS SINCE 1945*, at 26 (Ngairé Woods ed., 1996).

193. Brunnée & Toope, *supra* note 151, at 285.

194. See also Wendt, *Anarchy*, *supra* note 152, at 328, 339. Thus, following Bourdieu, once structures of identity have been created, they are not easy to transform because the European human rights regime becomes, in a sense, an objective social fact to judges and a law unto itself.

transformative effects of repeated participation of judges in deliberation and adjudication through the use of language. Second, it also acknowledges the “bottom-up,” constitutive role of norms (legal but also socio-cultural), power, material resources, values, relationships, and identities at horizontal and vertical levels in that process.¹⁹⁵ This reconfiguration would serve as an important corrective to the prevailing understanding of scholars and practitioners, most of whom are Western, who debilitatingly address the glaring absence of effective enforcement of human rights norms and decisions in the Third World without offering a comprehensive picture linking it to the cultural and social processes and resistance struggles by which these norms come to be articulated in the language of human rights both at the domestic and supranational levels in the first place.

In developing the methodology of such an approach, I draw first on the psychology of linguistics, and particularly Socio-Discursive Interactionism (SDI), a movement in the socio-cognitive sciences that branched from Social Interactionism as a result of various authors’ studies, for example those of Vygotski and Mead, that went beyond the Piagetian image of linear cognitive development of the child through speech.¹⁹⁶ SDI defends the idea that the processes of social and cultural structuring of human relations and the processes of self-structuring are two inseparable sides of the same issue: the human development process.¹⁹⁷ The specificity of the SDI project comes from the central role given to language not only in the construction of texts and works but also of conscious thought of individuals and their identities.¹⁹⁸ SDI is based on the principle that human behavior is the result of organizing reality semiotically by the appropriation and internalization of socially and historically produced semiotic instruments through the development of

195. For a rare foray into processes of judicial identity building in transjudicial communication which acknowledges the dearth of theoretical and empirical analyses on the dialectical production of legal norms and culture in the existing literature on networks and transnational legal process, see Waters, *supra* note 123, at 502–03 (relying on “co-constitutive theory” to describe the “mutually reinforcing relations between international legal norms and domestic cultural and societal norms” and emphasizing iterative processes of “norm export” and “norm convergence,” but where the emphasis, just like in transnational legal process scholarship, is placed on a narrow range of actors, namely “‘law-declaring fora’—domestic courts, legislatures, foreign ministries, and the like”).

196. For the principal works upon which proponents of SDI rely in constructing their model, see LEV SEMENOVICH VYGOTSKI, *THOUGHT AND LANGUAGE* (1962); GEORGE H. MEAD, *MIND, SELF, AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* (1934).

197. See JEAN-PAUL BRONCKART, *ACTIVITÉ LANGAGIÈRE, TEXTES ET DISCOURS: POUR UN INTERACTIONISME SOCIO-DISCURSIF* 19 (1997). This work is considered by scholars in the psychology of linguistics as the leading text on SDI by one of its founders.

198. *Id.* at 20.

conscious thought and the capacity to act.¹⁹⁹ Research in this area aims to demonstrate, on the one hand, the crucial role of language in the development of conscious thought and, on the other, the role that language assumes at later stages of peoples' development, in the epistemic and praxeological areas of that same development.²⁰⁰ On this background, the place of human psychology in the reshaping of the human/social sciences is at the same time nodal—in that all these sciences are concerned with topics of a representative nature, that is, the elaboration of a discursive universe, and secondary to them in so far as psychological functioning is socially and culturally produced.²⁰¹ Thus, all discursive production, including a human rights norm, text, or judicial decision, is negotiated in specific situations and deployed in an interactional space in which discourse-producing and receiving agents verbally interact.²⁰² The broad methodology of the approach briefly sketched here is related to an inquiry into what can be called textual understanding and textual production as “action” (*action langagière*)²⁰³ as the basic unit of analysis of human behavior, while discourse is the linguistic unit corresponding to action.²⁰⁴ This kind of action has a social dimension in that it is inscribed in a form of interaction between discourse-producing and receiving agents which predetermines the goals that may be jointly pursued and which endows these agents with a specific social function in relation to the world.²⁰⁵ Rights discourse is “shaped by social action in the sense that it is interpreted and described in relation to specific contexts and speech genres.”²⁰⁶ What is postulated here is that a judge is always confronted with multiple and multifaceted interpretations of human actions and human rights texts and norms which he comprehends as lived textual “realities,” which over time become grounded in his habitus and in which he must make distributive choices within his mental map and rights consciousness.²⁰⁷

A second strand in this reconstructive project draws on relational theory. Feminist relational theorists find value in the rhetorical force of rights discourse, but consider discussions of the normative source of

199. *Id.* at 59–60.

200. See LAURENT FILLIETTAZ & EDDY ROULET, *The Geneva Model of Discourse Analysis: An Interactionist and Modular Approach to Discourse Organization*, 4 DISCOURSE STUD. 369, 380–83 (2002).

201. BRONCKART, *supra* note 197, at 22–31.

202. *Id.* at 33–34, 46.

203. *Id.* at 39, 42–43, 101–02.

204. *Id.* at 13–14, 139–40.

205. *Id.* at 96–97.

206. FILLIETTAZ & ROULET, *supra* note 200, at 373.

207. See generally MINDING THE LAW (Anthony G. Amsterdam & Jerome Bruner eds., 2002).

rights and questions of hierarchy and fit unhelpful.²⁰⁸ They analyze rights instead as relational and recast them as tools revisable in the service of desirable or optimal relationships in particular settings.²⁰⁹ Their key insight is that in defining and enforcing rights, judicial decisionmaking structures relationships, although it seldom is self-conscious about it.²¹⁰ The core value they are committed to is relational autonomy, which they define as the capacity “to find and live in accordance with one’s own law.”²¹¹ Consistent with the values to which feminist relational theorists remain committed and their attentiveness to context, relational autonomy “requires attention to the ‘impact of social and political structures, especially sexism and other forms of oppression, on the lives and opportunities of individuals.’”²¹²

Robert Leckey distinguishes relational theory’s descriptive premise or contextual methodology from its substantive conceptions or normative commitments, and a relational inquiry’s weak and strong conceptions, in a way that is useful for understanding the thin constructivist insights generated by transjudicialism theorists’ commitment to proceduralism. The descriptive premise merely refers to the idea that selves are relationally constituted through social interactions; it directs judges and jurists, in turn, to focus on relationships in interpreting and understanding claims arising out of relationships of mutual interdependence. The weak version of this relational approach to law production and adjudication is content-neutral and “attempts to identify the constellation of relevant relationships around a given individual or the parties to a dispute,”²¹³ while leaving open the question of what kind of relationships we want to foster. The strong conception is normative and remains committed to promoting optimal relationships, “ones that foster or promote relational autonomy.”²¹⁴ A contextual methodology, for its part, means looking at structures of power, gender, race, or class relationships that extend beyond the particular circumstances of a dispute. Contrary to relational

208. Nedelsky, *supra* note 148, at 3.

209. *Id.* at 8, 12.

210. *Id.* at 14.

211. See, e.g., Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 10 (1989); see also *Introduction to RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF*, *supra* note 157, at 4, 21–22. Elsewhere Nedelsky characterizes autonomy as “self-governance,” which “requires the capacity to participate in collective as well as individual governance.” See Nedelsky, *supra* note 148, at 8.

212. ROBERT LECKEY, *CONTEXTUAL SUBJECTS: FAMILY, STATE, AND RELATIONAL THEORY* 10 (2008).

213. *Id.* at 13.

214. *Id.* at 14.

theorists' normative commitments, it is not associated with particular normative views of optimal relationships.²¹⁵

Administrative law is a site that relational theorists have investigated and that presents crucial insights for supranational human rights adjudication, for both focus on the problem of how to reconcile interdependence, individual autonomy, and collective power in decisionmaking—which takes form in the relationships between individuals or groups and bureaucratic institutions. Reviewing extensively the work of relational theorists such as Jennifer Nedelsky and Joel Handler, Leckey criticizes these theorists' administrative law scholarship for their attempts to pass off their ideas of the "good life" (or the promotion of relational autonomy through fostering "thick," "interdependent," and "intimate relationships" between citizens and the administrative state) as necessarily entailed by the relational inquiry they call for, when such a setting is unsuitable to fostering such relationships in the service of relational autonomy.²¹⁶ He also faults relational theorists' work on administrative law for obstructing broader structural elements of bureaucratic processes and by suppressing different interests by focusing on the optimal citizen-bureaucrat relationship.²¹⁷ Such processes of social interactions are characterized by "strategic imperatives, domination, and violence" and dependence rather than interdependence, at least to the extent that the liberal conception of rights is one which falls within the view of rights-protection as the allocation of or securing of benefits to vulnerable individuals against the state.²¹⁸

It is, of course, only from a normative standpoint that one can criticize human rights decisions or norms and their effectiveness, and undertake the kind of evaluative work necessary for a critical political project such as the one pursued in this Article. This would require tracing out the implications of one's normative commitments to a particular kind of good relationship. Those working within the weak, neutral conception of the relational inquiry place, however, "too high a premium" on what they present as accurate descriptions of "embedded selves" and their autonomy vis-à-vis bureaucratic institutions,²¹⁹ whether at the level of the individual, the group, the state, or a supranational court. This

215. *Id.* at 18–19.

216. *Id.* at 21.

217. *Id.* at 26–27, 227–36.

218. *Id.* at 223 (arguing that "relational theory can slip into an unattractive imperialism in claiming that all, or at least too many, relations should be thickly relational—indeed intimate—in relational theory's normative sense"); *see also id.* at 235 ("The conception of rights bearer instates an entitlement to treatment with dignity and fairness, qualities that are better understood as palliating a relation of dependence rather than characterizing one of interdependence.").

219. *Id.* at 226, 229–30.

focus on enhancing existing relationships has the effect of precluding a radical reconstruction or transformation of a relationship marked by a particular distribution of power and resources by altering the material conditions that render the individual or group vulnerable *vis-à-vis* the state, non-state entities, and supranational institutions.²²⁰ But, in looking at transjudicialism scholarship, there is little sense, even in this weak form of the relational inquiry that relational theorists latch onto, of any awareness of relationships to be sustained and enhanced through the interactions between supranational human rights judges, states, social movements, and those who appear to be beneficiaries of their decisions—that is, relationships through which identities are produced. What is demanded here goes well beyond a requirement that the decision-maker apply a human rights norm through a contextual method, namely by customizing the norm or decision to the individual claimant in his or her context or merely particularizing the universal to tailor it to local values.²²¹ Such awareness would insist, instead, on the idea that human rights judges' contextualism has discursive and material effects in producing identities and reproducing hierarchies of power and structures of oppression through the promotion of particular configurations of relationships (some pertaining, for example, to structural market conditions, racism, and patriarchy).²²² It would assist in generating among various actors different experiences of subjectivity beyond the conventional liberal understandings of an alienated sense of a human rights judge, human rights violating state, rights-holder, or victim of a human rights abuse.

Consistent with, complementing, and yet outside of Koh²²³ and Brunnée and Toope's work is such an approach that I call "judicial socio-discursive interactionism," which suggests that heightened interaction among judicial regulators, domestic political administrators, local groups, and elites can reinforce or dilute human rights norms through "rhetorical persuasion" within practices of argument and contestation. Rights, in turn, can structure and sustain patterns of relationships that foster particular values that are not reducible to those liberalism associates with "human rights" but that are, instead, more sensitive to distributive issues. Such relations affect the outlook and actions of Third

220. *Id.* at 239, 241–43.

221. For an interesting collection of essays probing this dimension of human rights activist praxis, see *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* (Mark Goodale & Sally Engle Merry eds., 2007).

222. See Nedelsky, *supra* note 148, at 16–18.

223. See Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 *IND. L.J.* 1397, 1399, 1409–10 (1999); Harold Hongju Koh, *International Law as Part of Our Law*, 98 *AM. J. INT'L L.* 43, 44 n.5 (2004).

World regulators and social movements at the domestic level and these, in turn, influence levels of state compliance with human rights commitments. Transjudicialism theorists, on the other hand, set artificial limits on the transformational potential of discursive rights strategies deployed by supranational courts' judges, states, and Third World social movements both at the supranational and domestic levels through their interaction by ossifying state and judicial identities²²⁴ and rooting out local popular identities, contestations, and resistance altogether.

The account sketched here also finds strong affinities with some important ethnographic work being done in the field of transnational advocacy. For Margaret Keck and Kathryn Sikkink, domestic regime-type is only a starting point for understanding why and how actors (such as courts) form networks or for explaining their differing impact on governmental policy.²²⁵ They suggest that liberal theory's prescriptions acknowledge that preferences *within states* take shape through identity-formation and transformation, but that these theorists remain agnostic about how identities of actors through their interactions are configured.²²⁶ Yet equally important, their case studies conclude that the *effectiveness* and viability of such networks turn on the characteristics of the subject matter sought to be regulated, the types of actors sought to be affected (including their vulnerability to both material and moral leverage, ideology,

224. Kratochwil, *supra* note 29, at 65–67 (taking a skeptical view of the possibility of unique causal explanation in norms research).

225. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 202 (1998). Similarly, Helfer et al. question, by reference to the Andean legal context, the liberal thesis that liberal democracy is “an all-or-nothing category,” for “fragile democracies may have areas where the rule of law functions effectively, while robust democracies can have weak spots.” See Laurence R. Helfer et al., *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 103 AM. J. INT’L L. 1, 43 n. 223 (2009). They argue that the Andean Tribunal of Justice has helped to build an island of effective international adjudication—but only in the area of intellectual property—in a region where democratic regimes are not fully entrenched, the rule of law is fragile and often ignored, and domestic courts are not fully independent “because domestic IP agencies act as compliance constituencies for its rulings.” *Id.* at 5–6, 43.

226. KECK & SIKKINK, *supra* note 225, at 214. Moravcsik explicitly recognizes this point. See Andrew Moravcsik, *Liberal International Relations Theory: A Scientific Assessment*, in *PROGRESS IN INTERNATIONAL RELATIONS THEORY: APPRAISING THE FIELD* 159, 162 n.4 (Colin Elman & Miriam Fendius Elman eds., 2003) (“Cultural or sociological arguments that privilege collective social beliefs, either domestic or transnational, as sources of such social preferences, are not excluded.”); see also Anne-Marie Slaughter, *International Law and International Relations Theory: A Prospectus*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES* 39 (Eyal Benvenisti & Mosche Hirsch eds., 2004) (arguing that liberalism incorporates constructivist causal mechanisms but that “[l]iberals take no distinctive position on the origins of social identities . . . nor on the question of whether they ultimately reflect ideational or material factors,” and that such constructivism in liberal theory is thus unsurprisingly thin) (citing Moravcsik, *supra*, at 168–69 n.14).

and symbolic violence), and, *in addition*, the types of regimes involved.²²⁷ Keck and Sikkink's shift in focus to sites of social contestation and mobilization of human rights discourse in their account of the operation of transnational networks may provide a much more plausible and normatively deeper explanation for the scope and nature of judicial communication and the relationships that are promoted in the process among supranational human rights courts and local culture than liberal theory does. As José Alvarez explains:

The transnational impact of human rights decisions . . . is not necessarily evidenced by whether [a] case is cited by other courts or even consciously accepted by domestic judges as persuasive precedent. Its greatest impact may not be felt within other liberal courts. . . . [I]t may have the greatest resonance precisely in those fragile democracies subject to the "boomerang pattern of influence" that [Keck and Sikkink] describe as characterizing much transnational network activity²²⁸

The impact of the persuasiveness of a court's effort to engage in sustained dialogue with other courts as well as local and transnational advocacy groups, and its awareness of contextual sensitivity to relations structured by power, cultural contestations, and economic distributions, are dependent upon politics *both* within and outside states, rather than merely on peer pressure or judicial socialization. Non-governmental organizations, intergovernmental expert networks, mass Third World social movements, advocacy groups, and a variety of other norm-promoting actors such as the atomized rights-bearer, the media, scholars, and judges are actively engaged in what ideational scholars call a "spiral model" of human rights change.²²⁹ In this model, these actors link up with "principled issue-networks"²³⁰ and create shared understandings, thus promoting learning *within* states about how and when to receive or internalize a

227. KECK & SIKKINK, *supra* note 225, at 29–30.

228. Alvarez, *supra* note 39, at 232 (citing Keck & Sikkink, *supra* note 225). According to Risse and Sikkink, "a 'boomerang' pattern of influence exists when domestic groups in a repressive state bypass their state and directly search out international allies to try to bring pressure on their states from outside." Thomas Risse & Kathryn Sikkink, *The Socialization of Human Rights Norms into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE*, *supra* note 22, at 1, 18; Keck & Sikkink, *supra* note 190, at 12–13.

229. Risse & Sikkink, *supra* note 228, at 17–35.

230. Sikkink describes such networks as linked by shared values or principled ideas—beliefs about what is right or wrong in the "real world." See Kathryn Sikkink, *Human Rights, Principled Issue-Networks, and Sovereignty in Latin America*, 47 INT'L ORG. 411, 411–12 (1993).

given human rights norm or decision *produced through such interactions*.²³¹

Transjudicial communication among supranational human rights courts invites important work in generating a “middle-range theory”²³² of persuasion and social influence supplemented by empirical data that transjudicialism theorists fail to deliver.²³³ Specifying what this might entail, however, is beyond the scope of this Article. I conclude this part by suggesting a set of questions that might usefully orient the elaboration of such a prospectus for judicial socio-discursive interactionism and for future socio-legal research attentive to the kind of relationships fostered through encounters between judges, states, the individual right-bearer, and local and transnational social movements. These questions should make it clear that those studying compliance issues in relation to human rights can no longer remain myopic to the relevance of identity as a causal variable in what governments, judges, and other social actors do and how they perceive their relationships to one another.

The key question could be broadly framed as entailing an examination of how concretely identities of different actors are constituted and transformed through language at multiple levels of governance within and beyond the nation-state through judicial cross-fertilization among supranational human rights courts. More specifically, how do human rights norms emerging from these interactions both *persuade* and exert *social pressure* on domestic actors to alter their behavior? Do differences among types of norms (for example, “soft law” agreements versus binding human rights instruments), social structures, and patterns of behavior

231. For a critique of the pragmatist approach of network theorists to defining and enforcing labor rights based on a Habermasian discursive understanding of rights (while recognizing the theoretical merits of an “interactional” approach to norm creation), see Philip Alston & James Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?*, 36 N.Y.U. J. INT'L L. & POL. 221, 249–53 (2004).

232. The expression is Jeffrey Checkel's, who argued that constructivists (or norm-driven theorists) lack such a convincing theory connecting agents and norms, one which would explain more precisely the operation of (legal) norms in influencing the identity and behavior of agents. See Jeffrey T. Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POL. 324, 325–26 (1998). For a related discussion, see Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 19 CAL. L. REV. 1823, 1832 (2002) (arguing that “observing that a norm generates compliance does not offer an explanation for compliance since we have no theory of why norms operate as a force for compliance”). A similar charge can be leveled against Koh's account of norm-internalization, which is primarily descriptive. Habermas' speech-act theory is one such theoretical project which some international relations scholars use to bridge the gap left by constructivism, although one should keep in mind its abovementioned underlying ideological premises and its operationalizing difficulties.

233. Slaughter argues that the ultimate value of her “thought experiment” “must await empirical confirmation of specific hypotheses distilled from [her] model.” Slaughter, *Liberal States*, *supra* note 33, at 505.

matter and, if so, how? What are the particular processes by which “rhetorical knowledge”²³⁴ is created and shared among human rights tribunals and judges, and appropriated by local constituencies to further their own agendas? And *on what (or whose) cultural terms* should such discursive processes be analyzed? What values do various social actors interacting with each other through the deployment of rights discourse want to promote, and what kinds of relationships structured by rights discourse are conducive to enhancing those values? If states obey human rights law as a result of repeated interaction between these tribunals and local culture, to what extent does a judicial decision itself help constitute the cultural identity of a state and other actors over time through the relationships fostered through their encounter, not merely as a *law-abiding* or compliant social actor in the “here and now”? One might further ask what role lawyers, scholars, activists, and social movements play before courts and in the background to litigation and advocacy strategies in processes of transjudicial communication in advancing their “clients’” interests and ensuring that defendant governments’ policies ultimately conform to human rights norms and decisions issued by supranational institutions.

Substantial parts of the architecture of human rights law—namely supranational adjudicatory institutions—have historically evolved in a rather ambivalent relationship with transnational activist groups as well as with the concept of identity, and this has impacted the way disciplinary narratives of critique and renewal in international human rights have been written since the early 1990s. But this does not require elevating constructivist accounts (or a particular version of constructivism) of judicial cross-fertilization and dialogue over and above other equally plausible socio-scientific approaches. If anything is to be redeemed from a deconstructive exercise such as the one undertaken in this Article, it must lie in a careful blending of elements derived from sociological, normative, philosophical, instrumental, and liberal inquiries. Yet this is precisely what transjudicialism theorists refrain from doing by establishing the analytical priority of liberal theory’s “causal paradigm.”²³⁵ That transjudicialism scholarship has no concrete conceptualization of identity-production and contestation that engages the actual levels of state sociability and interactions of social movements with supranational hu-

234. Brunnée & Toope, *supra* note 183, at 71. This rhetorical function of knowledge production through interaction brings Brunnée and Toope’s position fairly close to the tenets of Socio-Discursive Interactionism.

235. See Moravcsik, *supra* note 36, at 540; Slaughter, *Liberal Theory*, *supra* note 91, at 243.

man rights institutions (identity as effect)²³⁶ and, further, no theory of the causal effect of identity on the formation of human rights norms and institutions (identity as cause) remains to this day a serious shortcoming. "Identity" is rendered in essentialist ways by its association with TLPAF as a variable that can be inserted into already existing normative commitments and a package of views about world ordering and disciplinary renewal.

Part II of this Article argues that this parochialism of transjudicialism scholarship has profound distributive implications for the enduring viability of those theorists' normative proposals for enhancing the effectiveness of human rights regimes.

II. RE-CODING IDENTITY IN CONSTRUCTIVIST GEOGRAPHY: MEASURING HUMAN RIGHTS REGIME EFFECTIVENESS

Imported laws or "legal transplants" are usually claimed to function less well than internally developed laws because of the foreignness of uprooted elements of a legal system to the cultural realm and social structures in which they become embedded.²³⁷ For law and economic theorists, it is presumed that the expected "efficiency" of the law and legal institutions is the predominant factor in determining which laws are transplanted, from where, and to where.²³⁸ But explanations of "legal effectiveness" differ. Most studies of regime effectiveness employ a behavioral definition, looking not to actual changes in patterns of conformity of state conduct with rules, norms, and decisions but rather to behavioral vicissitudes that are *causally linked* to the regime.²³⁹ In expounding their "convergence" thesis for enhancing the effectiveness of non-European human rights tribunals such as the HRC, transjudicialism theorists, however, have analyzed the comparative *effectiveness* of ECJ

236. See Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1753 (2003); Goodman & Jinks, *How to Influence States*, *supra* note 22, at 642-43, 648, 700.

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

238. For a useful exposition of this scholarship and critique from the left, see generally Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3 (1994).

239. See generally THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE (David G. Victor et al. eds., 1998); Oran R. Young & Marc A. Levy, *The Effectiveness of International Environmental Regimes*, in THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL REGIMES: CAUSAL CONNECTIONS AND BEHAVIORAL MECHANISMS 1 (Oran R. Young ed., 1999).

and ECtHR judgments as measured by *compliance* rates.²⁴⁰ Compliance has caused legal scholars ample difficulties in formulating clearly what the concept would mean,²⁴¹ marking a professional turn to quantitative measurement by way of benchmarks and “indicators” disguised in the technical languages of science, objectivity, and neutrality.²⁴² But liberal theorists have acknowledged that collapsing the two related but distinct concepts of compliance and effectiveness rather than examining their interaction also creates “difficulties.”²⁴³ In proceeding to make visible the entanglement of these two concepts with human rights cross-cultural fertilization and norm-internalization, this Part foregrounds how their distributional politics affect their path-dependency in liberal theory.

A. “Effectiveness” and the Distributive Politics of Expertise

Effectiveness is a concept with manifold denominations that are part of legal and political rhetoric and are based on contingent perceptions of the importance of certain objectives to be achieved in the world and the costs of their achievements.²⁴⁴ The previous Part of this Article illustrated how this concept is embedded in TLPAF—that is, a liberal cosmopolitan sensibility shared by transjudicialism theorists and post Cold-War human rights lawyers of governance as/by expert rule,²⁴⁵ which contributes to a structural vision hinging on uniformity and homogeneity in international human rights law despite claims to cultural sensitivity. The modern claims to newness, uniformity, coherence, and consistency are still legitimized today by the use of binary and colonial language (of effectiveness and ineffectiveness) to describe non-European differences and to mediate the relationships between the European and non-European human rights universes in specific ways. It is the concept’s significance in practice, however, which renders arguments based on effectiveness and on related aspects such as compliance, implementation, and enforcement²⁴⁶ an essential and frequently used agent in legal and

240. See also Posner & Yoo, *Judicial Independence*, *supra* note 103, at 27–29 (adopting this measurement tool in addition to two others: “usage rates” and the “overall success of the treaty regime that established the court”).

241. Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT’L L. 345, 346 (1998).

242. AnnJanette Rosga & Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. INT’L L. 253, 289 (2009).

243. Helfer & Slaughter, *Response*, *supra* note 49, at 917.

244. See e.g., *id.* at 917–18; Michael A. Mehling, *Between Scylla and Charybdis: The Concept of Effectiveness in International Environmental Law*, in 2002 FINNISH Y.B. INT’L L. 129, 132, 138–74, 181.

245. David Kennedy, *The Politics of the Invisible College: International Governance and the Politics of Expertise*, 5 EUR. HUM. RTS. L. REV. 463 (2001).

246. I refer to these related concepts more broadly as a measure of the validity of law and, by extension, its resultant binding force, from the perspective of descriptive and analytic

political discourse. Such arguments are used alternatively and indeterminately, either to promote a measure or to argue against its expedience and legitimacy as part of a program of disciplinary renewal.²⁴⁷ The notion has, like the much-romanticized idea of “unity,”²⁴⁸ a very powerful and universal appeal: surely, all individuals and societies should seek effectiveness! The appeal of the idea is, however, no panacea for what remains an “essentially contested concept,”²⁴⁹ which is largely a function of competing conceptions of the political morality of international human rights law.

A specific “expert” view on the effectiveness of concerted action to protect human rights through law and institutions might well serve to epitomize unsettling doubts regarding the foundational and universal claims guiding moral and scientific forms of thought. For this reason, the concept cannot, as the United Nations has attempted,²⁵⁰ be reduced to a question of how *fixed* distributive concerns about future efforts to promote normative growth in the field of human rights will be alleviated. Traditional examples of such a rigid technocratic approach²⁵¹ have included a wide range of formal and anti-formal techniques of reform, from greater accessibility to information, streamlining of working methods of human rights bodies, face-to-face meetings, professional socialization,²⁵² more equitable allocation of material resources, and technical assistance to other judges, to more radical renewalist proposals of “constitutionalizing”

jurisprudence. See HERBERT L.A. HART, *THE CONCEPT OF LAW* 100 (1962); RAZ, *supra* note 116, at 203.

247. See Karl Doehring, *Effectiveness*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 43 (Rudolf Bernhardt ed., 1995).

248. MARIO PROST, *THE CONCEPT OF UNITY IN PUBLIC INTERNATIONAL LAW* (forthcoming 2011).

249. I borrow the term “essentially contested concept” from W.B. Gallie. See Walter Bryce Gallie, *Essentially Contested Concepts*, 56 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 167, 169 (1956). Gallie used this idea in relation to abstract, qualitative notions such as art, religion, science, democracy, and social justice to describe “concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users,” and these disputes cannot be settled by appeal to empirical evidence, linguistic usage, or the canons of logic alone. *Id.*

250. See *Alston 1993 Report*, *supra* note 3, ¶¶ 252–54.

251. *Id.* ¶¶ 19, 108. For a similar list of reform techniques, see also Andrew Byrnes, *An Effective Complaints Procedure in the Context of International Human Rights Law*, in *THE UN HUMAN RIGHTS SYSTEM IN THE 21ST CENTURY* 139 (Anne F. Bayefsky ed., 2001); 2005 World Summit Outcome, *supra* note 6, ¶ 125.

252. For examples of the latter, see Raustiala, *supra* note 140, at 89–90. According to Slaughter, these are the very “same forces pushing towards convergence . . . [but] can also result in informed divergence.” See Anne-Marie Slaughter, *Sovereignty and Power in a Networked Order*, 40 *STAN. J. INT’L L.* 283, 301 (2004).

human rights in the law of worldwide organizations.²⁵³ Such an approach might impede consideration of other epistemological aspects essential to the understanding of effectiveness, such as contrapuntal cultural identity formation and transformation, aspects whose neglect would render a partial and overly simplified picture of the concept, often with little or no verifiable impact on the real world of violations.²⁵⁴

If we agree that “the question is never about realising rights that are “out there,” but always about whom we are to privilege and how scarce resources are to be allocated, then it becomes imperative to articulate the criteria of distribution that underlie such choices”²⁵⁵ in any disciplinary program of renewal. Effectiveness cannot merely be perceived in fixed distributive terms—that is, with human beings in Third World societies abstracted as “people in need of protection” and rights as luxury goods to be purchased or diffused through the natural play of judges and stakeholders within a predetermined rationalistic transjudicial frame. This would neglect important background norms and distributional arrangements for effectiveness in the definitions of persons in need, the Third World, human rights violating countries, and other popular images propagated by international and supranational human rights institutions. Identity is a contested ground where individuals constantly make shifting choices in “the shadow of the law,”²⁵⁶ with important distributional consequences. Such a mistaken view also assumes an already high level of cultural homogenization. For Alston as well as Helfer and Slaughter, writing at the onset of calls for institutional effectiveness in the field of international human rights in the early 1990s, these criteria of distribution are clearly one-sided and boil down to judging the effectiveness of the overall scheme on the basis of the coherence and consistency of its relevant parts. But the crude formalism of such a whole/part frame of analysis conceals the fact that consistency can hardly be a matter of pre-established definitions without begging the very question of *the basis on which the value of the whole regime and its real-world impact is itself*

253. See, e.g., Ernst-Ulrich Petersmann, *Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society*, 19 LEIDEN J. INT'L L. 633 (2006).

254. See Dianne Otto, *Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law*, 1997 AUSTL. Y.B. INT'L. L. 1 (discussing transformative discursive accounts of human rights law grounded in identity-building); Darren C. Zook, *Decolonizing Law: Identity Politics, Human Rights, and the United Nations*, 19 HARV. HUM. RTS. J. 95, 97 (2006).

255. Martti Koskeniemi, *Human Rights, Politics, and Love*, 2002 FINNISH Y.B. INT'L L. 79, 90; see also Kennedy, *supra* note 245.

256. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (using the phrase “shadow of the law” to refer to the impact that the legal system exerts on bargaining and negotiation outside of traditional legal forums).

supposed to be assessed and thus resorting to an external criterion whose legitimacy is placed beyond politics.²⁵⁷ Coherence goes hand in hand with our deep-seated moral convictions and our most pragmatic assessments of how things work and ought to work in the real world. The debate on the relationship between normative action and effectiveness in the discipline of international human rights law is critical because it is a proxy for a larger debate taking place within and outside the United Nations. As transjudicialism theorists argue themselves, without engaging with these issues,

[t]he effectiveness of a particular court or of courts in general quickly becomes intertwined with larger jurisprudential questions such as the nature of law and the sources of compliance. Defining effectiveness also inevitably requires asking the question “effective for what purpose?”—an inquiry that will in turn depend on a prior conception of the functions of specific courts within specific legal systems.²⁵⁸

Compliance is typically an important aspect of the invention and production by transjudicialism theorists of images of regime effectiveness, but is by no means the only one, particularly if one thinks of effectiveness in non-institutional terms. Slaughter explains elsewhere with Kal Raustiala that effectiveness can be defined in varying ways.²⁵⁹ The “wide” approach suggests the concept is best understood as the “problem solving,” “goal achievement,” or “policy suitability” capacity of a rule (or remedy) (that is, as the degree to which a rule improves the state of the underlying problem, or achieves the rule’s or regime’s policy objectives and therefore holds the aspirations of its subjects in check).²⁶⁰ The need to specify such “goals” and “problems” is occasionally

257. See KOSKENNIEMI, *supra* note 70, at 397. Koskeniemi argues:

If the institutions are invoked in order to defend (or criticize) tradition, then the tradition cannot, without circularity, be invoked to defend (or criticize) institutions. The result will be a purely institutional-pragmatic, technical discourse in which an autonomous super-criterion of “effectiveness” or “binding force” will determine the acceptability of particular outcomes. Normative politics becomes institutional technique.

Id.

258. Helfer & Slaughter, *Theory*, *supra* note 27, at 282; see also Kratochwil, *supra* note 29, at 57 (discussing the effectiveness of international institutions as a function of the conceptions and expectations of their members).

259. Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538, 539 (Walter Carlsnaes et al. eds., 2002).

260. See Kratochwil, *supra* note 29, at 53; Young & Levy, *supra* note 239, at 4–6.

avoided by supplanting them with an exogenous variable,²⁶¹ such as the achievement of tangible environmental improvements.²⁶² Other authors have been reluctant to contend with the manifold complexities involved in observing such impacts in the physical world writ large and have opted for the “narrow” view of effectiveness. This focuses on the degree to which a rule induces observable political effects²⁶³ or desired changes in behavior,²⁶⁴ with the latter often qualified circularly by its ability to further the rule’s goals or the broader goals of a treaty regime.²⁶⁵

Rules or regimes can be effective in any of these senses even if compliance is low. For example, if a legal standard is quite exacting, even widespread failure to meet it may still correlate with observable, desired change in behavior that otherwise would not have occurred.²⁶⁶ Thus, low levels of compliance are not inherently an indication of ineffectiveness. And while high levels of compliance can indicate high levels of effectiveness, they can also indicate low, readily met, and ineffective standards. This is so because many international agreements (although arguably not all human rights treaties) reflect a lowest common denominator dynamic that makes compliance easy and almost automatic, but has a negligible influence on behavior.²⁶⁷ Compliance (or lack thereof) with a commitment that states have asked a supranational tribunal to police, or with a tribunal’s decision regarding a norm states are asked to internalize thus tells us little about the nature of the commitment or decision.²⁶⁸ It also doesn’t say much about its utility and psychological and sociological impact on behavior through the deployment of rights discourse. According to Raustiala, “the critical factor is the relationship between the stringency of the legal standard and the baseline of behav-

261. Thomas Bernauer, *The Effect of International Environmental Institutions: How We Might Learn More*, 49 INT’L ORG. 351, 369 (1995).

262. Robert O. Keohane, *Analyzing the Effectiveness of International Environmental Institutions*, in INSTITUTIONS FOR ENVIRONMENTAL AID: PITFALLS AND PROMISE 3, 14 (Robert O. Keohane & M.A. Levy eds., 1996).

263. Peter M. Haas et al., *The Effectiveness of International Environmental Institutions*, in INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION 3, 7 (Peter M. Haas et al. eds., 1993).

264. Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT’L L. 387, 394 (2000); see also Kingsbury, *supra* note 241, at 361 (criticizing the “purposive approach” to effectiveness).

265. Young & Levy, *supra* note 239, at 1.

266. Raustiala, *supra* note 264, at 394, 396.

267. *Id.* at 392. Many international environmental agreements, for example, have this characteristic.

268. *Id.*; see also Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171, 187, 189 (2008); *id.* at 188 (nonetheless defining effectiveness as “the tribunal’s ability to enhance compliance with the associated substantive obligation”).

ior."²⁶⁹ Because compliance levels are largely “an artifact of the legal rule or standard chosen,”²⁷⁰ “ascertaining *why* compliance or noncompliance occurs is more challenging”²⁷¹ than merely evaluating whether it has, in fact, occurred.

B. *Human Rights, Cross-Fertilization, and Effectiveness:
Constituting Path-Dependency*

In attempting to conceptualize “effectiveness” in the context of judicial cross-fertilization between supranational human rights tribunals, the conceptual limitations of the various denotations of the concept evoked earlier are readily apparent. One is often faced with significant difficulties when trying to determine the defined goal, purpose, or problem framed by a human rights judicial norm. The alternate approach would involve a flat substitution of these with some form of extraneous standard such as whether it redresses human rights abuses or safeguards the common goal of human dignity.²⁷² But this also arouses concern as to its ultimate legitimacy.

An analytical focus in transjudicialism scholarship and rational choice theory on compliance as an objective fact to be recorded is misplaced and sociologically counterproductive when considering disciplinary reform strategies. Fundamentally, it exhibits an alarming degree of indifference toward questions of distribution and social and cultural legitimacy and the substance (and perceived exigencies) of law, which will often call for a creative act of interpretation. Benedict Kingsbury notes that recent studies of environmental and human rights norms show “checkered patterns of conformity and non-conformity with rules, and highlight the differences between conduct prescribed by rules and the actual conduct and long-term policies necessary to meet the underlying objectives of the particular international regime and other important policy goals.”²⁷³ “These and other studies conclusively show that the assumption that conformity and non-conformity are binary is not an adequate reflection of international practice, in which degrees of conformity or non-conformity and the circumstances of particular behavior

269. Raustiala, *supra* note 264, at 394 (“When the legal standard mimics or falls below the baseline—whether intentionally or coincidentally—compliance is high but effectiveness low.”); *see also* Kingsbury, *supra* note 241, at 355.

270. Raustiala, *supra* note 264, at 391.

271. *Id.*

272. *See, e.g.*, MYRES S. McDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 367–448 (1980).

273. Kingsbury, *supra* note 241, at 347–48. Andrew Hurrell, moreover, describes “differing patterns of compliance between different types of states.” Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, in REGIME THEORY AND INTERNATIONAL RELATIONS 49, 71 (Volker Rittberger ed., 1993).

often seem more important to the participants.²⁷⁴ If we are serious in seeking to understand how and why judges of human rights courts engage in dialogue and when such discursive exercises and the resulting norms and decisions are effective, we must analyze the political objectives of compliance and the underlying sources of state behavior. These sources include the substantive legitimacy of the norm or decision (such as its relationship to notions of fairness²⁷⁵ or morality²⁷⁶); the perceived legitimacy of the process of judicial interaction leading to its creation; domestic political and popular pressure; reputational costs;²⁷⁷ or simply a state's perceived immediate best interest. A much more fruitful analytic focus would be the causal impact of human rights norms and decisions on behavior and the linkages between these sophisticated causal pathways, compliance, and the role of cultural identities and relationships produced in the process. An account of a court's ability to compel and cajole compliance with its judgments following such judicial interactions that does not engage other social and normative factors is largely insufficient.²⁷⁸

Human rights commitments and judicial decisions interpreting and applying them are "onerous" for states and will usually impose substantial constraints on domestic political structure and social forms. The resulting decisions would therefore not be fully complied with.²⁷⁹ If we agree that such a tribunal is not necessarily ineffective as a result, there is no reason to contend that the tribunal's participation in judicial interactions was not effective merely as a result of low rates of compliance with its resulting judgments. Similarly, a tribunal's insulation from the jurisprudential output of its brethren is not necessarily a bad thing and will not always result in its judgments yielding lower compliance rates

274. Kingsbury, *supra* note 241, at 348.

275. See THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 40 (1995); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 183–94 (1990).

276. See Brunnée & Toope, *supra* note 151, at 274–75, 292.

277. ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 25–70 (2008). See generally Guzman, *supra* note 232 (discussing the role of reputation in promoting state compliance).

278. See Kingsbury, *supra* note 241, at 356 (arguing that "an approach to compliance that focuses only on objectively observable patterns of behavior implicitly takes these patterns as proxies for internal attitudes and other relevant normative effects [and] there frequently a risk that policy based on the circumscribed view of norms employed in rationalist instrumental theories will be sub-optimal or dysfunctional").

279. See Helfer & Slaughter, *Response*, *supra* note 49, at 919; see also Goodman & Jinks, *Measuring the Effects of Human Rights Treaties*, *supra* note 22, at 173–78 (dealing with the virtues of "incomplete internalization"); Ryan Goodman & Derek Jinks, *Incomplete Internalization and Compliance with Human Rights Law*, 19 EUR. J. INT'L L. 725, 727 (2008) (defining "incomplete internalization" as "persistent decoupling") [hereinafter Goodman & Jinks, *Incomplete Internalization*].

and rendering the tribunal ineffective under transjudicialism theorists' rationalistic account of judicial dialogue.

The problem of conflating effectiveness and compliance even when asserting the distinction is further compounded by the fact that legal scholars rarely seek to develop theories about the conditions under which human rights norms and decisions lead to the associated regime's effectiveness that are rooted in empirically testable hypotheses.²⁸⁰ This is a startling fact for many who, like Helfer and Slaughter, attempt to make descriptive and normative claims about disciplinary and institutional renewal while blithely ignoring existing data produced on the social impact of human rights regimes (at least the data existing outside certain highly publicized contexts like the European Union).²⁸¹ "Managerialists" like the Chayeses have pointed out that non-compliance is often non-volitional or inadvertent: the result of a lack of technical, administrative, or financial capacity, ambiguity in treaty (and a judgment's) terms,²⁸² unavoidable time lags associated with implementation, unforeseen changes in conditions, or "role strain."²⁸³ Non-compliance could also be rooted in second-order conditions such as defects in social sanctioning or global "acculturation," that is, in "the general process of adopting the beliefs and behavioral patterns of the surrounding culture."²⁸⁴ Setting aside the parochialism and self-serving bias of the European experiment

280. For a recent and significant exception, see Hathaway, *supra* note 22, at 1963–68 (discussing the challenges of measuring effectiveness of human rights treaties through quantitative analysis, but stressing the importance of compliance-based arguments). See also Douglas Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121, 122, 131 (2001); Kingsbury, *supra* note 241, at 347, 355.

281. See *infra* note 287 for important empirical work by Okafor and studies on social movement advocacy cited by Goodman and Jinks in this direction.

282. Attempts to discover whether states comply with their commitments presume, of course, that states have firm knowledge about what there is to comply with. For political scientists, this is a given, which arguably also explains the scientists' enthusiasm for compliance studies. For lawyers, however, a "compliance problem" is likely to arise as to what is perceived to be required on the part of states who are the addressees of the relevant obligations. Such riddles are unfailingly bound to make a non-lawyer despair. See IAN HACKING, *THE SOCIAL CONSTRUCTION OF WHAT?* (1999). I am grateful to Craig Scott for drawing my attention to this point.

283. CHAYES & CHAYES, *supra* note 184, at 9–17, 26–27. "Role strain" is defined in the literature as the membership by a state in various identity groups in which different norms prevail, and self-perception as an "outgroup" vis-à-vis the "ingroup" that has shaped the norm in question. See Moshe Hirsch, *Compliance with International Norms in the Age of Globalization: Two Theoretical Perspectives*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES*, *supra* note 226, at 166, 182–83.

284. Goodman & Jinks, *How to Influence States*, *supra* note 22, at 638. For a critique, which this Article shares, that the latter's acculturation theory assumes a highly homogenized global social environment, a "global culture," or a global social structure that affects pathways of diffusion in which norms operate, that it is not defended normatively, and it remains empirically parochial, see Asher Alkoby, *Theories of Compliance with International Law and the Challenge of Cultural Difference*, 4 J. INT'L L. & INT'L REL. 151, 177–78 (2008).

as a measure of effectiveness, a supranational court “whose decisions receive moderate or even low compliance rates” when it engages in judicial dialogue may, in fact, be “highly effective in changing state behavior”²⁸⁵ *over time* and may help diffuse culturally sensitive “counterhegemonic norms.”²⁸⁶ This will be the case through increased domestic and international pressure by transnational human rights advocacy networks and militant action of local popular forces (such as labor unions) in the Third World,²⁸⁷ and “legal mediation” by indigenous communities appropriating and redeploying international human rights norms locally.²⁸⁸ Some scholars have buttressed this point with important empirical research that needs to be supplemented.²⁸⁹

Constructivist accounts of law as constitutive rather than reflective of social relations treat norms and shared ideas and beliefs as fundamental not only to behavior but, as this Article has suggested, to actor *identities* underlying behavior as well as relationships fostered between them. Culture enters the fray of constructivist analysis, although its role with rights discourse as constitutive of norms, relationships, and identities remains to be explored fully in critical socio-legal scholarship. State action in the human rights realm may be seen as variously motivated by a desire to comply (or not) with norms, in order to maintain a sense of identity as law-abiding (evincing a belief in human rights as internal culturally appropriate standards of behavior) or law-violating. Herbert Kelman, a leading scholar of social behavioralism, distinguishes compliance and social internalization from “identification,” which he describes as an entity adopting induced behavior in order to be like the influencer, or because it is associated with a desired relationship with the latter.²⁹⁰

285. Helfer & Slaughter, *Response*, *supra* note 49, at 919.

286. Goodman & Jinks, *How to Influence States*, *supra* note 22, at 653; *see also* Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L.J. 983, 998 (2005).

287. *See* Obiora Okafor, *Do International Human Rights Institutions Matter? The African System on Human and Peoples' Rights, Quasi-Constructivism, and the Possibility of Peacebuilding Within African States*, 8 INT'L J. HUM. RTS. 413 (2004). *See generally* OKAFOR, *supra* note 78, ch. 7; Goodman & Jinks, *Incomplete Internalization*, *supra* note 279, at 734–35, 741–43 (arguing that the adoption of a human rights norm supranationally can induce changes in “domestic political opportunity structure,” thus opening up vistas for social movement mobilization toward greater domestic policy reforms).

288. *See e.g.*, Galit A. Sarfaty, *International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation*, 48 HARV. INT'L L.J. 441 (2007).

289. *See* Obiora Chinedu Okafor, *Evaluating UN Human Rights Treaty Bodies: Toward a Paradigmatic Transition*, in *THE MEASURE OF INTERNATIONAL LAW: EFFECTIVENESS, FAIRNESS AND VALIDITY* 155, 165 (2003).

290. Herbert C. Kelman, *Compliance, Identification, and Internalization: Three Processes of Attitude Change*, 2 J. CONFLICT RESOL. 51, 53 (1958); *see also* Charles O'Reilly III & Jennifer Chatman, *Organizational Commitment and Psychological Attachment: The Effects of Compliance, Identification, and Internalization on Prosocial Behavior*, 71 J. APPLIED PSY-

Identification actually precedes Koh's phase of norm-internalization in transnational legal process. It is a function of a state tapping into the judicial repository of rights discourse in which a court engages through dialogue such that the addressees of its decisions accept them in the terms the court sets for them, but in appropriating and re-signifying them according to their own ways and culturally rooted traditions and desires, even though they ultimately fail to comply or compliance is less than perfect. At stake is what Goodman and Jinks call "state socialization" through "acculturation-based judicial borrowing"²⁹¹ as the internalization of norms constitutive of identity formation. They describe this process as one by which the collective expectations of members of an identity group come to feel taken for granted and mimicked by new members.²⁹²

CHOL. 492 (1986) (applying Kelman's three-dimensional influence analysis to empirical research regarding organizational commitment and psychological attachment among university staff and students), *referenced in Koh, Why Do Nations Obey, supra* note 150, at 2601 n.3. Koh treats norm-internalization and identification as two different aspects of a single phenomenon he calls "obedience." *Id.* at 2656–57. I read his understanding of identification as coming much closer to his description of "social" (the public legitimacy of a norm results in widespread obedience) and "political" (elites accepting an international norm and adopting it as government policy), rather than "legal" internalization (incorporation of the norm into the domestic legal system). *See id.; cf.* Galit A. Sarfaty, *The World Bank and the Internalization of Indigenous Rights Norms*, 114 *YALE L.J.* 1791, 1810–13 (2005). Sarfaty's "more nuanced version of transnational legal process theory" emphasizes relations internal and external to an international organization, taking the World Bank as its model. *Id.* at 1811. It claims that at the interaction stage, "external actors can exploit tensions within an international institution and play the institution against itself," while at the internalization stage, "governments both influence and are influenced by the World Bank." *Id.* at 1810. Her point, however, is less about how identities of domestic, local, and supranational actors are shaped through their interaction and the relationships constructed through their encounter, than about how norms are internalized in the culture of an international institution such as the World Bank as an aspect of its identity. *See generally id.* at 1810–14. Norm internalization, then, means internalization in both the organization and the countries where organizational policies are sought to be implemented. As far as the former is concerned, it becomes a matter of "fit with the organizational culture," *see* Galit A. Sarfaty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 *AM. J. INT'L L.* 647, 654 (2009), which can sometimes mean neglect or even violation by the institution of its own norms when facing domestic political and legal constraints. Sarfaty, *supra*, at 1809.

291. RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (forthcoming 2010) (manuscript excerpt, at 25), *excerpts available at* <http://iilj.org/courses/documents/2008Colloquium.Session10.Goodman.pdf> (last visited Mar. 10, 2010). References to this text below are to the manuscript consolidating excerpts from the book.

292. *Id.* Goodman and Jinks do not expound a robust normative theory to describe the fluctuating content of cultural identities and the constitutive effects of a diverse range of cultural norms at work in acculturation in the intersection between global institutional developments and local forces so much as they theorize state behavior within a highly specified governance frame of cognition and social pressurization—"global culture"—following a linear script of progress through global norm diffusion enacted from patterns of Western liberal state practices. *Compare id.* at 28 (stating that "[a]cculturation, however, expects that in certain circumstances judges will adopt global models despite divergent national needs and

To speak of a human rights norm's effectiveness, on such an account, is to claim that it has led a state to maintain or construct its cultural identity relationally as law-abiding over time through reflexive identification or socialization with local social movements as well as with the adjudicator and his or her reasons for rules (and interactions), rather than with the actual norms or decisions adopted. This is a stance which may or may not immediately translate into meeting the *legal* standard of compliance sought through persuasion, but which significantly shapes social relationships between various actors involved in the process. The key role of the overseer of the judicial process, the "social influence situation," in Kelman's terms,²⁹³ is to manage an interactive dialectical process of justificatory discourse and rhetorical knowledge-formation among various transnational actors. In such a process, human rights norms, institutions, and discourse are not only invoked, harnessed in local cultural contestations and struggles, interpreted and redeployed, but also identified with—as a function of cultural identity construction—in such a way as to ultimately lead to their seeping-into or "vernacularization" in domestic social and political structures.²⁹⁴ Self-identification and self-definition of a wide range of social actors engaging in interactions in relation to each other rather than state compliance are therefore at the heart of the effectiveness of a court's judicial interactions. Yet because of their inherent inter-subjectivity and psycho-linguistic dimension, they are much more difficult to control and disentangle from mere behavioral changes. The last part of this Article illustrates through a case study that their utility will ultimately depend on the rhetorical force of these actors' appropria-

conditions"), *with id.* at 30 (claiming that "whether liberal democratic states participate in the adoption of a rights practice may be crucial to its institutionalization and diffusion [by means of acculturation]" and that "[t]he source for illiberal change in the diffusion of a norm may have to arise from or pass through these states"). Goodman and Jinks elsewhere define global culture as being "reflected in universally applicable models that define the legitimate actors in world society, the legitimate goals of these actors, and the most appropriate means of pursuing these goals." Goodman & Jinks, *Toward an Institutional Theory of Sovereignty*, *supra* note 236, at 1758. Similarly, they assume that the adoption of a "global human rights script" is a potential focal point for studying the extent to which social processes of acculturation explain patterns of decoupling or deviation from the global model with an aim to fashioning interventions in institutional design to bridge the gap between normative commitment and local practices. *See* Goodman & Jinks, *Incomplete Internalization*, *supra* note 279, at 734–37. Rarely, if ever, are there any allusions to the cultural legitimacy and "content" of the global script or norm, how these norms came about in the first place, where boundaries are drawn for the purposes of assessing "decoupling," and how the "gap" is posited. *See id.* As Alkoby points out, "a legitimate reference group is a condition for this form of social influence," and such an approach "fails to ask where international norms come from and the extent to which relations of domination are implicated in their global diffusion." Alkoby, *supra* note 284, at 177; *see also* Özsu, *supra* note 151, at 31–34.

293. Kelman, *supra* note 290, at 54.

294. SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER JUSTICE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 103–217, 219–22 (2006).

tion of rights discourse, the amenability of self-definition and self-identification processes to concrete observation, and the relationships developed and sustained through these social interactions.²⁹⁵

III. "JUDICIAL GLOBALIZATION" AND THIRD WORLD RESISTANCE: A CASE STUDY AND CRITIQUE

Evaluating human rights regime effectiveness necessarily requires data about state behavior plus a sound theory and analysis of the causality of behavior and effectiveness coupled with a counterfactual analysis.²⁹⁶ The following case study deals with the "death row" phenomenon, an issue that has attracted the attention of transjudicialism theorists. Thus, it allows for a close and critical engagement with transjudicialism scholarship on its own methodological terrain through counterfactual analysis to test its assumptions. The normative content of this social phenomenon has, indeed, been shaped by judicial dialogue against which it would be interesting to test the soundness of the theory of relational self-identification expounded in this Article as an aspect of interactional, judicial socio-discursive cultural identity-formation and transformation processes.

In a string of cases originating with *Pratt & Morgan v. Jamaica*,²⁹⁷ the Human Rights Committee has repeatedly rejected the claim that detention on death row, no matter how prolonged, and its associated physical and psychological distress amounts to cruel, inhuman, or degrading treatment or punishment prohibited under Article 7 of the International Convention on Civil and Political Rights. In *Pratt & Morgan*, two condemned prisoners argued that their detention on death

295. In the field of human rights protection, where problems are commonly affected by a range of distributional factors (political, economic, cultural, and social), particularly in relation to economic, social and cultural rights, and reliable data on the impact of rules on social engineering is not readily available, it is not surprising that existing research on the effectiveness on human rights norms has focused on issues of compliance and behavioral change through reliance of indicators and best practices.

296. Counterfactual analysis has been defined as "a comparison of the observed outcome and the analyst's best guess about the likely course of events if the treaty or commitment or particular institution had not existed." Raustiala, *supra* note 264, at 398. Evaluating the effectiveness of a human rights tribunal engaging in judicial dialogue inevitably requires such an analysis. See James D. Fearon, *Counterfactuals and Hypothesis Testing in Political Science*, 43 *WORLD POL.* 169, 169 (1991). Of course, generalizations based on case studies may also involve pitfalls. See Gregory Mitchell, *Case Studies, Counterfactuals, and Causal Explanations*, 152 *U. PA. L. REV.* 1517, 1546-61 (2004). The framework proposed in this Article is offered as one possible explanation of the impact of norms and identity-building on the effectiveness of international human rights law.

297. *Pratt & Morgan v. Jamaica*, Comm'n Nos. 210/1986 & 225/1987, U.N. GAOR, Hum. Rts. Comm., 44th Sess., Supp. No. 40, at 222, U.N. Doc. A/44/40 (1989).

row for nearly ten years violated Article 7, whose language is essentially identical to that used in the European Convention on Human Rights. The Committee, which did not reference *Soering v. United Kingdom*,²⁹⁸ a case pending at the time before the Strasbourg court that produced a highly fact-specific ruling in favor of the complainants, adopted a somewhat more conservative approach than the latter. Rejecting the petitioners' claim on the facts presented, it held that "[i]n principle prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners"²⁹⁹ It stressed, however, that "an assessment of the circumstances of each case would be necessary."³⁰⁰ In the subsequent case of *Barrett & Sutcliffe v. Jamaica*,³⁰¹ the Committee refused to find a violation in a fourteen-year stay on death row, making no reference to *Soering*.³⁰² But in *Kindler v. Canada*,³⁰³ while reaffirming its position that death row detention does not *per se* violate the ICCPR, the HRC gave "careful regard to" the Strasbourg Court's approach, adopting much of the reasoning of *Soering* while distinguishing its unique facts.³⁰⁴ In cases following *Kindler*, the HRC's promise to conduct a fact-specific review of each case has rarely been realized. The "controversy" that the Committee's jurisprudence had sparked culminated in *Johnson v. Jamaica*, in which an eleven-member majority stated that it would continue to apply a facts-and-circumstances approach to death row petitions.³⁰⁵ They cautioned, however, that a treaty violation would be found only if a petitioner could demonstrate "compelling circumstances of the detention" other than its length,³⁰⁶ which were not present in the case before them. This effectively meant that it would be highly unlikely that the Committee would find a violation of the ICCPR. This approach effectively prompted a retreat from the purportedly objective, fact-specific methodology paralleling that of *Soering* to a "smell test" where an unfavorable ruling against a state would be made only in exceptional

298. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (Ser. A) at 42–44 (1989).

299. *Pratt & Morgan*, U.N. Doc. A/44/40, ¶ 13.6.

300. *Id.*

301. *Barrett & Sutcliffe v. Jamaica*, Comm'n Nos. 270/1988 & 271/1988, U.N. GAOR, Hum. Rts. Comm., 47th Sess., Supp. No. 40, Annex IX, at 254, U.N. Doc. A/47/40 (1992).

302. Committee member Chanet did, however, cite to the *Soering* case in support of her rather terse conclusion that "[a] very long period on death row . . . cannot exonerate a State party from its obligations under article 7 of the Covenant." *Id.* app. (separate opinion of Chanet).

303. *Kindler v. Canada*, Comm'n No. 470/1981, U.N. GAOR, Hum. Rts. Comm., 48th Sess., U.N. Doc. CCPR/C/48/D/470/1991 (1993).

304. *Id.* ¶ 15.3.

305. *Johnson v. Jamaica*, Comm'n No. 588/1994, U.N. GAOR, Hum. Rts. Comm., 56th Sess., U.N. Doc. CCPR/C/56/D/588/1994 (1996).

306. *Id.* ¶¶ 8.5–8.6.

circumstances, following the adjudicators' sentimentality, ideology, or "hunch."³⁰⁷

What lessons can be drawn from this development? Can one speak of the *Johnson* decision as being "effective"? Using compliance here as a variable would be meaningless as there is, strictly speaking, nothing for Jamaica to comply with. Although the Committee did not explain the shift away from European jurisprudence upon which its earlier ruling in *Kindler* firmly rested, one might suspect it was gravely concerned about the palatability of its decision in a Third World state where the political climate was different from the one existing in European nations—an anxiety voiced earlier by then-Committee member Rosalyn Higgins although hardly shared by all Western members³⁰⁸—and more-so given that petitioners had repeatedly asked the HRC to follow a widely diverse range of national and international case law adopting a more petitioner approach. As Helfer explains, "[w]ere the Committee to adopt the ECHR's more rigorous approach, it would be setting a standard of protection so far out of touch with domestic law that many States might be unwilling to follow it,"³⁰⁹ which might have the effect of leading states to speed up appeals and carry out death sentences expeditiously in order to avoid a detailed factual review of each case.

Put differently, Jamaica would not have perceived favorably or identified with the Committee's discursive exercise, which in these circumstances would have had no constructive or transformative effect shifting (even incrementally) Jamaica's cultural identity from a law-violating to a law-abiding nation according to *localized* standards of

307. Joseph C. Hutcheson Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929). Four dissenters in the case strongly objected to the "compelling circumstances" formulation as demonstrating "a lack of flexibility that would not allow [the Committee] to examine . . . the circumstances of each case." *Johnson v. Jamaica*, *supra* note 305, app. B (Bhagwati, Bruni Celli, Pocar, & Vallejo, dissenting). In fact, the outcome in *Johnson* led Committee member Francisco José Aguilar Urbina to claim that "the Human Rights Committee's wish to be consistent with its previous jurisprudence has led it to rule that the length of detention on death row is not in any case contrary to article 7 of the Covenant." *Id.* app. C (Urbina, dissenting); see also *Hylton v. Jamaica*, Comm'n No. 600/1994, U.N. GAOR, Hum. Rts. Comm., 57th Sess., U.N. Doc. CCPR/C/57/D/600/1994 (1996) (Urbina, dissenting). For Judge Chanet, the matter is ultimately highly subjective, for although "each case must be judged on its merits" (referring to the standard boiler-plate list of reasons pertaining to the physical and psychological treatment of the prisoner and his age and health and the availability of domestic judicial procedure and remedies), "[t]hese are the limits to the subjectivity available to the Committee . . . excluding factors such as what is preferable from the supposed standpoint of the prisoner, death or awaiting death, or fear of a possible misinterpretation by the State of the message contained in the Committee's decisions." See the individual opinion of Committee member Chanet in *Johnson*, *supra* note 305, app. A .

308. Rosalyn Higgins, *The United Nations: Still a Force for Peace?*, 52 MODERN L. REV. 1, 8 (1989).

309. Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 329 (1999).

legality, elaborated relationally through internal cultural dialogue and contestation. The effect, rather, would have been quite the opposite. Thus, when the region's highest court, the Privy Council, used an expansionist strategy and issued a highly unpopular decision that increased the ICCPR's legalization level in the area of capital punishment, the court attracted local protests and was charged with "engaging in a form of 'judicial imperialism' by 'super-impos[ing] . . . Eurocentric notions and values' on the region."³¹⁰ Denouncing the Optional Protocol to the ICCPR (which grants petitioners a right to bring a complaint against their national government before the HRC) then became the only viable political strategy for Caribbean countries, as exiting the treaty framework would allow state authorities to proceed with executions while avoiding potentially violating Article 7.³¹¹

While a negative finding against Jamaica would undoubtedly have yielded an ever-more aggressive stance by that State against the Committee, one can only guess what the likely outcome of the factual circumstances raised in the *Johnson* case would have been in the *absence* of the Committee's decision altogether, in application of counterfactual analysis. Even so, it is not unreasonable to have expected from that state increasing or at least continuing instances of indefinite detention on death row, or even hasty executions (although Jamaica has

310. Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1888–89 (2002) [hereinafter Helfer, *Overlegalizing Human Rights*]; see also HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS 30–42 (2d ed. 2000) (discussing the fact that domestic courts take contextual factors into account in death penalty cases). Such popular uprising was also palpable in the aftermath of the 1993 Privy Council ruling in *Pratt & Morgan*, in which the Council ruled that prisoners convicted of capital crimes and not executed within five years suffered "inhuman or degrading punishment" and should have their death sentences commuted; the ruling prompted Jamaica to abolish the link to the Council, set up its own regional supreme court, and eliminate formal ties to the British legal system. See Helfer, *Overlegalizing Human Rights*, *supra*, at 1872, 1882–84, 1888. The House of Representatives and the Senate approved the retention of the death penalty in November and December 2008 and the lower house of the Parliament will consider a proposition that the constitution of Jamaica be amended to remove the five year stricture imposed by the Privy Council. Schauer explains that in countries seeking to cast off an imperialist past (as is the case for Jamaica, as a former British West Indies Crown colony), it is likely to be particularly important (as an aspect of identity building) to establish an indigenous constitution that includes a set of human rights protections, although these protections might not mirror those of international human rights law; rather resistance to foreign exchanges and ideas is equally likely to be the rule. See Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in GOVERNANCE IN A GLOBALIZING WORLD 253–54, 257 (Joseph S. Nye & J.D. Donahue eds., 2000).

311. Jamaica's denunciation became effective on January 23, 1998. For a thorough exposition of how the "overlegalization" of a government's human rights commitments can lead to a backlash against human rights institutions (even when at the initiative of domestic courts), see Helfer, *Overlegalizing Human Rights*, *supra* note 310, at 1851–58, 1886–94. On the unilateral exit from treaties, see Laurence Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

not executed anyone for twenty years), since the state would have received no authoritative guidance as to which scenario would constitute a violation.

From this perspective alone, the decision would appear somewhat “effective,” if by effectiveness we mean a gradual shift in a state’s perception of legitimacy of and self-identification with a supranational institution. Such a claim about the decision’s effectiveness might, however, often rest on a policy value judgment between conflicting interests and carries the risk of turning into a Trojan horse for regressive politics and closure strategies. By the most generous characterization, “compliance” here would be automatic, as the norm established by the Committee would simply “mirror” state conduct. But counterfactual reasoning does suggest that there is likely to have been a cultural change in behavior due to the decision and the relationship between Jamaica and the Committee that was structured through that encounter. Considering the twenty-eight similar complaints that have been brought against Jamaica and before the HRC since *Johnson* was decided, it would, of course, be inaccurate to claim that the decision has had any definitive, transformative effect on that state’s core identity. Jamaica has openly and repeatedly resisted the HRC’s authority over the years by failing to cooperate by frequently ignoring its recommendations and decisions.³¹² Nonetheless, this history of extensive interaction with the Committee, combined with the Privy Council precedent, would indicate that the decision did somehow alleviate—through the rhetorical practice and interaction between different actors such as the Committee members, the state, local courts, and protest movements—the country’s intransigent stance as part of its internal value set, however short-lived the effect may have been. At the same time, and perhaps more importantly, the HRC’s approach exhibited sagacity and a healthy dose of political pragmatism, as it would have enhanced opportunities for Jamaica to make common cause with the Committee and to perceive its future rulings as authoritative and legitimate, particularly in extreme death row cases of mental and physical degradation where there could be little doubt, by the state’s own account and admission, that the petitioners’ rights were violated.³¹³ The effect of the Committee’s rhetorical practice was not simply to arrive at a decision that Jamaica would accept, but also to sustain a relationship such that ongoing decisions relating to that country’s human rights record could be made collectively in the interests of those most

312. See generally Helfer, *Overlegalizing Human Rights*, *supra* note 310, at 1870–79.

313. See also Koh, *Transnational Legal Process*, *supra* note 150, at 206 (broadly predicting that a nation will come into compliance with international norms if allowed to internally develop its cultural identity while interacting in international norm-generating fora).

vulnerable and dependable on the state. Such a relationship would, in turn, foster relations between supranational tribunals such as the Committee with individuals and groups, and between individuals, groups, and local social movements and the State. There is, however, no developed normative account of a “good” relationship between the Committee and Jamaica that underwrites this argument, for a focus on identity construction through rhetorical knowledge production does not dictate *ex ante* what types of relationships are constructive or serve to promote particular values in supranational human rights adjudication.

It is not insignificant that transjudicialism theorists have cited the decision as an illustration of what they call the “discursive constraints of the global community of law” in which the Committee participated by engaging in dialogue.³¹⁴ In other words, the decision was eminently influenced by pressures of professional and personal socialization of autonomous and culturally bounded rational judges³¹⁵ within an already pre-existing, cohesive, socio-cultural environment, a global community of law or regulatory network of similarly situated subjects. This is a decidedly odd and lopsided use of precedent which increasingly finds comfort in biases and blind-spots within the vocabulary of TLPAF itself. It is one that, nonetheless, highlights the importance of emerging scholarship on global administrative law and procedure.³¹⁶ Yet how can we distinguish, on these scholars’ account, cases warranting “informed divergence” from those which do not in any principled manner and on a normatively meaningful basis? Their argument about the discursive constraints of a purportedly apolitical and ahistorical global legal community is rhetorically useful in quelling fears that such a loose community of judicial elites will capitalize on this institutional void to

314. Helfer & Slaughter, *Response*, *supra* note 49, at 953–54; *see also* Helfer et al., *supra* note 225, at 40–41 (reviewing and supplementing “principal-agent theory,” which analyzes “the legal, political, and discursive constraints that together create a ‘strategic space’ that defines the boundaries within which tribunals can be effective”).

315. *Id.* This is perhaps the only aspect of Slaughter’s theory that exhibits many of the same assumptions about networks that social norms scholarship (theories of persuasion) predicts about the characteristics among group members—the building of relationships, the exchange of information, the development of shared network standards, and the professional socialization of members—as well as about processes of social pressure, or “acculturation,” that conventional constructivists have begun to map. *See* SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 31, at 3–4, 136–37, 196–200; Goodman & Jinks, *How to Influence States*, *supra* note 22 (discussing process of acculturation). Some authors are, however, skeptical about the possibility that regulatory networks might promote convergence through social processes of networking, persuasion, and acculturation, finding the evidence to be “conjectural and pitched at a high level of generality” and calling for “much more detailed theoretical and empirical analysis by those who wish to rely on such theories to establish the effectiveness of TRNs.” *See* Verdier, *supra* note 123, at 171; *see also id.* at 165–67.

316. *See* Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15, 15–28 (2005).

usurp law-making powers of states and introduce polluting legal traditions under the mantra of global legal pluralism without any checks.³¹⁷ Yet this neither satisfactorily explains the rich and complex motives and incentives these judges have to engage in dialogue (or not) as part of their cognitive world-view mapping, nor the distributive impact of identity-based choices and decisions by states to comply (or not) with their rulings through reflexive, cultural engagement with the underlying norms. It also fails to assuage Third World concerns about a resurgence of neo-colonialist and imperial motives in transjudicialism. The theory does not account for how factors such as power asymmetries and violence (in a Bourdieusian “symbolic” sense³¹⁸), local cultural contestations, and identity-building through appropriations of rights discourse are relevant in structuring the relational process. This suggests that neither formal law nor professional socialization alone can achieve this end. State compliance with human rights norms and decisions will reflect a continuous search for maintaining a balance between judicial group and peer pressure, judicial identities and competing identities, claims and interests marshalled by social movements at home which influence how norms develop through such interactions and are ultimately implemented and enforced. Eschewing an identity-based relational theoretical framework for analyzing compliance and architectural issues relating to human rights may largely explain the frailties of decade-long reform programs at the United Nations in this area and its obliviousness, as well as that of the vocabulary of TLPAF itself, to the contributions of Third World resistance to judicial norm-enunciation and internalization.

From the vantage point of a political actor's behavior, agency, and self-identification with other actors and discursive judicial activity, *Johnson* suggests that it may be crucially important for a court to refuse to emulate the jurisprudence of another if its opinion is to be culturally “effective,” that is, legitimately received by those most likely in the Third World to resent a “foreign” intervention. It demonstrates the constructivist power of supranational human rights institutions, of the norms and ideas they generate, and the dynamics of their iterations of judicial interaction through the constitution of rhetorical knowledge through alliances with and resistance by local forces. Neither a technocratic

317. SLAUGHTER, A NEW WORLD ORDER, *supra* note 31, at 29–31. For a more elaborate exposé, see Anne-Marie Slaughter, *Agencies on the Loose? Holding Government Networks Accountable*, in TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS 522 (George A. Bermann et al. eds., 2000).

318. I understand violence in this context, following Bourdieu, as *symbolic* and entailing an imposition of unconscious structures and meaning that tend to perpetuate the structures of action of the dominant, thus simultaneously legitimizing the power of its producers and hiding the *rapport de force* behind the production of such meaning. See generally BOURDIEU, *supra* note 138.

compliance-orientated rationalistic approach to effectiveness, nor a liberal, even Marxist, one that stresses the prior convergence and superimposition of fixed state-society preferences with institutional interests is able to account for the inter-subjective elaboration and interpretation of human rights norms, and their complex role as the embodiment and constitution of social structures and relationships and cultural forces both domestically and supranationally.³¹⁹

CONCLUSION

This Article has sought to challenge the prevailing orthodoxy about achieving the effectiveness of supranational human rights tribunals through judicial dialogue by drawing attention to the exclusions and distributive consequences operated by a particular form of celebratory rhetorical practice—the claim to “newness” of a global community of courts—in the literature on transjudicialism. Specifically, I have argued that the narrowness in focus engendered by the ideological premises of mainstream international human rights lawyers and American transjudicialism theorists’ on-going research agenda in the post-Cold War era actually distorts an issue of immense practical concern and real-world application for understanding the sociology of violations, abetting, as it might so happen, ends which have been justified by recourse to the findings such research has supplied.³²⁰ Transjudicialism is as popular today among human rights lawyers and advocates as it was during the post Cold-War, and this tendency is likely to persist. The Article illustrated that any assessment of the impact of judicial dialogue upon the effectiveness of the international human rights legal regime requires a critical evaluation of both. But these are the very issues that transjudicialism scholarship evades.

A full-fledged theory of effectiveness which is methodologically sound, empirically defensible, normatively useful, and receptive to the cultural pluralist project animating much of human rights discourse and Third World critical scholarship today must take stock of the complex interactions among different governance forms and human rights systems, and between different types of human rights norms, normative orders, and actors and cultural identity (trans)formation processes. The

319. Kingsbury, *supra* note 241, at 363.

320. Helfer and Slaughter are, one assumes, not so much preoccupied with legitimacy concerns as with the search for conceptual and epistemological clarity and aptitude for further research, satisfied with what the Chayeses call a “first approximation surrogate for effectiveness.” See Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT’L ORG. 175, 176 (1993); Helfer & Slaughter, *Theory*, *supra* note 27, at 391.

Article introduced the methodological-theoretical sketch of “judicial socio-discursive interactionism” as such an explanatory model. It exposed, through a review of the extant scholarship on transjudicialism and a case study analyzed by transjudicialism theorists themselves, how this model could nicely complement recent sociological research in the field of international human rights with which it shares many affinities; namely by emphasizing, in addition to the insights generated by this body of work, the importance of the cultural relational constitution of rhetorical knowledge, as well as of the relationships fostered through social interactions, to identity-building at the supranational, domestic, and sub-national levels. The contours and parameters of this framework will be further refined and tested in subsequent work. The Article’s more modest ambition was to make the argument that the Herculean task of devising such a “theory,” despite misgivings we may have about grand theorizing, remains a worthwhile and much-needed counterhegemonic strategy to claims of “newness,” which reproduce exclusions of certain norm-generating cultural practices through a positivist and rationalist legal-process orientation. It is one which, in the end, appears to be as pressing today for understanding prognostics about renewing the discipline of international human rights law to account for its “effectiveness” as the related need to historicize and theorize cultural resistance in and to international law and international (and supranational) human rights institutions.³²¹

321. BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* 9–23 (2003).