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What Can Comparative Legal Studies Learn from Feminist Legal Theories in the Era of Globalization

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WHAT CAN COMPARATIVE LEGAL STUDIES LEARN FROM FEMINIST LEGAL THEORIES IN THE ERA OF GLOBALIZATION

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This article re-examines the field of comparative law and comparative legal studies through the lens of feminist legal theories/studies (FLT). It suggests that lessons learned from the development of FLT and insights from shared epistemology and methodology within FLT can inform the ongoing controversies within comparative legal studies and provide comparative legal scholars and practitioners with the tools to maximize the benefits of comparative legal studies in the era of increasing global interdependence.

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I. INTRODUCTION

Over the past few years of planning and teaching Comparative Law Seminar (renamed Comparative Legal Studies Seminar), I often struggle to explain to myself and to the students what the course is about and what our learning objectives are. It is similarly difficult to find reading materials that successfully answer those questions.¹ Much of both classical and contemporary comparative legal scholarship side-steps those issues altogether or addresses them briefly at best. Additionally, amongst the contemporary comparative law scholars that have raised key existential questions on the nature of the discipline few have been able to provide satisfactory answers. While scholars have tried to offer critical perspectives on comparative practice, that scholarship has mostly been invisible among mainstream comparativists, and not too many critical “new voices” have emerged since the two symposia issues published in 1997 and 1998 by the *Utah Law Review* and the *American Journal of Comparative Law* respectively.²

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1. At least amongst U.S. scholarship or other English based scholarship. See *COMPARATIVE LAW: A HANDBOOK* (Esin Örtücü & David Nelken, eds., 2007).
 2. In October 1996, the University of Utah College of Law sponsored the *Utah Law Review* Symposium entitled “New Approaches to Comparative Law.” Symposium, *New Approaches to Comparative Law*, 1997 UTAH L. REV. 255, 255 (1997) [hereinafter Symposium, *New Approaches to Comparative Law*]. Also in 1996 and 1997, two conferences at the University of Michigan in Ann Arbor and a year later at the Hastings College of Law resulted in a symposium issue on “New Directions in Comparative Law” published by the *American Journal of Comparative Law*. See Symposium, *New Directions in Comparative Law*, 46 AM. J. COMP. L. 597, 598–99 (1998) [hereinafter Symposium, *New Directions in Comparative Law*]. A 2009 symposium issue published by *Brigham Young University Law Review* on “Evaluating Legal Origins Theory” continues the strand of mainstream comparative legal scholarship focused on comparative economics developed within law and economics scholarship. See Symposium, *Evaluating Legal Origin Theory*, 2009 BYU L. REV. 1413 (2009). Two other recent symposia organized by the American Society of Comparative Law offer some better approaches in problematizing key issues within comparative law discourse: Euro-centrism and methodology. The 2008 Annual Meeting of the American Society of Comparative Law, held at the University of California, Hastings College of the Law, focused on “The West and the Rest in Comparative Law.” Several of the conference papers were later published in Volume 32 of the *Hastings International and Comparative Law Review*. See 32 HASTINGS INT’L & COMP. L. REV. 379, 765 (2009). The 2009 American Society of Comparative Law’s Annual Conference, held at the Roger Williams University School of Law, similarly examined issues facing new and young comparativists, especially on methodological concerns. Proceedings from that conference were published in Volume 16 of the *Roger Williams University Law Review*. See 16 ROGER WILLIAMS U. L. REV. 1, 86 (2011). Neither issue, however, offers significant new lines of inquiry to address these issues. Lastly, a 2007 comparative law textbook, including

At the same time, and maybe partially due to the lack of satisfactory answers to these key questions, numerous comparative law projects today all around the world proceed with a very pragmatic practical stance and with very little theorizing about the meaning of engaging in a comparative endeavor. While this article does not suggest that we cannot engage in comparative inquiry without understanding the broader theoretical implications, it does suggest that developing such theory can both problematize the uses of comparative law, as well as better facilitate its various uses.

In thinking anew about comparative law and comparative legal studies, I found myself drawing comparisons between the state of comparative law discourse and practice and the ongoing debates and controversies amongst feminist legal scholars with whom I have aligned in prior scholarship. Issues of substance versus method, similarities and differences, essentialism and imperialism, the production of knowledge and political dimensions are core to both areas. Yet, while these issues have either been marginalized in comparative law discourse or have simply bogged down further development of comparative law theory, feminist legal scholars have not only tackled these issues head on but have also developed promising new approaches to move us forward. Consequently, this article looks at comparative legal studies expressly³ through the lens of feminist legal theories/studies (FLT).⁴ It attempts to look fresh at some of the key questions posed by comparative scholars and answer

contributions from mostly European contributors, attempts to offer nuanced analysis of contemporary problems in comparative legal studies. *COMPARATIVE LAW: A HANDBOOK*, *supra* note 1.

3. Several of the then “new voices” represented in the 1997 Utah Symposium have no doubt brought the tools of feminist, critical, and post-colonial theories into the work of comparative law, and their ideas are utilized significantly in this article. See Symposium, *New Approaches to Comparative Law*, *supra* note 2. At the same time, fifteen years later, this work is yet to inform and transform contemporary comparative law work. With the state of comparative law in even more need of urgent care nowadays, this paper seeks to re-energize critical comparative law by tying their concepts together and broadening them through a concerted effort to link with current feminist legal theories. See discussion *infra* Parts II–VI.
4. See discussion *infra* Parts II–VI. While this field of inquiry is widely known as feminist legal theories (FLT), the term “feminist legal studies” more accurately reflect the feminist insight that theory and practice inform and constitute each other. FLT in particular is informed by the real lived experiences of women, and challenges the epistemology of abstract theoretical knowing.

them by learning from the experience of FLT scholarship and practice.⁵

Part II begins by briefly reviewing key controversies and critiques within comparative legal studies. It highlights the debate on whether comparative law encompasses a substantive area of law or is merely a method of inquiry, to suggest that FLT's efforts to move beyond similar dichotomies can help comparative legal studies regain relevance both in theory and in practice. It raises the question of whether comparativists should focus on similarities or differences amongst legal systems and the problems presented by comparative law's struggle with the relationship between relativism/multi-culturalism and universalism, especially in light of tensions between the "West" and the "Rest" and despite efforts to infuse comparative legal studies with attention to historical, social, and political contexts. Similarly, Part II highlights an area of more recent critique among comparativists regarding comparative law's traditional focus on private law areas. The article will argue in later parts that FLT deconstruction of binary dualisms such as similarity versus difference and private versus public can bring important insights to these concerns within comparative legal studies.

Part III offers a critical examination of comparative law's treatment of similarities and differences and brings to the forefront a discourse of the "Other." It relies on feminist and critical race theories' challenges to the social and legal construction of sameness and difference—challenges to the dichotomization of self and other—in order to assist comparative law in unpacking otherness. It calls on comparativists to recognize that similarities and differences are not mere observable facts but are to a large extent socially construed and, more importantly, in the service of certain ideologies and political agenda. Part IV complements Part III by examining the essentialist and ethnocentric stance from which most comparativists have construed similarities and differences. It suggests that comparativists can negotiate both essentialism and relativism by adopting feminist approaches calling for consciousness-shifting and fluid positioning that intentionally sees the world from multiple points of view.

Part V consequently offers a broader critique of the stance of universal objectivity that comparative law often presupposes and perpetuates, and builds on feminist jurisprudence about the

5. Cf. Adrien Katherine Wing, *Conceptualizing Global Substantive Justice in the Age of Obama*, 13 J. GENDER RACE & JUST. 705, 711 (2010) (arguing that comparative law, among other subfields of public international law, stands to benefit from critical race theories).

production of knowledge and objectivity as epistemology. It challenges the dichotomy between knowledge (substance) and how we come to know (methodology/epistemology) and exposes its connection to oppressive male power and ideology. It suggests that comparative work can benefit greatly from a critical attitude towards alleged universal categories and claims to authenticity by questioning the neutrality of the comparison and by taking account of the impact of the self and the observer's perspective and experience on our comparisons.

Finally, Part VI calls for acknowledging comparative law as political practice, whether in the ways in which it "finds" similarities and differences and uses them to legitimize certain legal frameworks, or in the ways in which it construes and perpetuates private law, the distinction between private and public, and law in general as a-political, non-ideological, and divorced from power structures within society. It uses FLT's explicit discourse of law as political practice, as an ideology of power, to call on those engaged in comparative legal studies and in comparative projects to be self-critical and recognize the power relations involved, whether we engage in harmonization and rule of law projects or in the seemingly mere intellectual projects of understanding and migration of ideas and legal concepts.

II. COMPARATIVE LAW IN CRISIS

"Comparative law has often been criticized for lacking in theory, Euro-centric, and black-letter-law and private law oriented," states the preface of a current handbook on comparative law.⁶ Others observe that "comparative law is in need of an overhaul."⁷ Yet, as evident from numerous academic courses, scholarly articles, and field projects, "[i]n our increasingly globally linked world, comparative law needs to take on an ever more important role."⁸

Critics of the current state of comparative law abound, both from outside and from within the discipline. Many scholars find the continued focus of mainstream comparative law on "function, efficiency, or linear history" to be unsatisfactory.⁹ Others observe that comparative law is "a mainly ethnocentric enterprise without

6. COMPARATIVE LAW: A HANDBOOK, *supra* note 1, at v.

7. Edward J. Eberle, *The Methodology of Comparative Law*, 16 ROGER WILLIAMS U. L. REV. 51, 72 (2011).

8. *Id.* at 51.

9. Igor Stramignoni, *The King's One Too Many Eyes: Language, Thought, and Comparative Law*, 2002 UTAH L. REV. 739, 739.

self-critical discipline that usually generated boredom rather than excitement.”¹⁰ And as David Snyder put it: “Over the years, and particularly in the last decade, comparative law has been criticized for excessive doctrinalism, shuttered attitudes to interdisciplinary inquiry, timidity in approaching broad-gauge study, as well as tendencies to superficiality, triviality, obscurantism, and exoticization—not to mention claims of ultimate irrelevance.”¹¹

While the nature of comparative law has been changing¹² in response to some of these critiques, these changes have only highlighted the existential angst of comparative law scholars, teachers, and users. The big questions vexing the discipline are at the forefront these days more than ever. Reflecting on comparative law in the age of globalization, William Twining criticizes comparative law for lacking adequate analytical concepts and tools to account for and “comprehend the transnationalisation of law and legal relations.”¹³ In addition to criticizing comparative law’s narrow focus on state-based European private law, Twining calls for moving to a broader agenda of comparative legal studies in light of other research traditions.¹⁴

A. The Need to Move Beyond the Subject Matter v. Method Debate

A threshold issue which itself occupies and shapes much of the debate amongst comparativists has to do with the question of subject matter versus method: “Does [comparative law] have a proper subject-matter, or is it no more than a method?”¹⁵ Esin Örüçü suggests that the identity of comparative law is pulled between these two alternatives.¹⁶ Some view comparative law as “an autonomous branch of social science or science of legal knowledge,” as “a high level analytical subject” and “an end in itself.”¹⁷ Those scholars engage in comparative law in order to learn about legal rules and institutions in other jurisdictions, in order to understand other

10. Günter Frankenberg, *Stranger than Paradise: Identity & Politics in Comparative Law*, 1997 UTAH L. REV. 259, 260.

11. David V. Snyder, *Comparative Law: Problems and Prospects*, 26 AM. U. INT’L L. REV. 935, 936 (2011).

12. Esin Örüçü, *Developing Comparative Law*, in COMPARATIVE LAW: A HANDBOOK, *supra* note 1, at 43.

13. William Twining, *Globalization and Comparative Law*, in COMPARATIVE LAW: A HANDBOOK, *supra* note 1, at 69, 75–77.

14. *Id.* at 84–85.

15. David Nelken, *Comparative Law and Comparative Legal Studies*, in COMPARATIVE LAW: A HANDBOOK, *supra* note 1, at 3, 12.

16. *Id.*

17. *Id.*

societies (and one's own society) through law, in order to search for commonalities or in order to show differences and the difficulty of understanding and experiencing other people's law, regardless of any practical goals or uses of such knowledge.¹⁸ In contrast, much current comparative law scholarship and practice utilizes comparative law as a method of obtaining knowledge for specific practical aims such as for harmonization projects and convergence of legal rules, for legislative and judicial transplantation of foreign legal rules and models, and for large scale development and law reform agendas.¹⁹

The explicit debate viewing substance and method as in direct competition with each other has somewhat subsided,²⁰ since most contemporary comparativists have embraced a pragmatic pluralistic approach towards both the multiple purposes of comparative law and practice and the various comparative methods that can be employed in pursuing those goals.²¹ That pluralism, I would argue, merely represents a pragmatic compromise. By not exploring and fully embracing how comparative method and substance mutually constitute each other and further each other, comparativists have given up on the truly radical and transformative potential of comparative law. We can learn from the experience of feminist jurisprudence. Rather than viewing substance and method or theory and practice in a binary fashion, it has successfully employed theoretical investigations with real life concerns and advocacy to advance its political agendas.²² As we shall see,²³ FLT is most relevant and most transformative when it challenges the dichotomy between knowledge (substance) and how we come to know (methodology/epistemology).

B. What to Compare: Debates on Similarities and Differences and Criticism of Comparative Law's Focus on Private Law Areas

Broadly speaking, the two core questions occupying comparative law scholars are: What to compare? and How to compare?²⁴ As we shall see, each of these questions needs to be unpacked and critically examined for its methodological, epistemological, and substantive

18. *Id.*

19. *Id.* at 43.

20. Nelken, *supra* note 15, at 12–13 (“It is over this terrain that a territorial war between comparative law and comparative legal studies is being fought.”).

21. See Örüçü, *supra* note 12, at 53.

22. See *infra* Part V.

23. See *infra* Part V.

24. Örüçü, *supra* note 12, at 62.

implications. For example, a key issue within comparative law revolves around looking for similarities and differences between laws and legal systems.²⁵ Harmonization and convergence projects seek to highlight similarities and advance seemingly universal principles in law.²⁶ On the other hand, many comparativists express concern with overlooking local values, traditions and cultural approaches that “differently colour the definition of those functions” of legal rules and institutions, “the importance attached to them and the test of their successful fulfillment.”²⁷

The concern for differences in comparative law resonates with broader debates about multi-culturalism, essentialism (Western, white, male), and assimilation. Comparative law continues to struggle with the relationship between relativism/multi-culturalism and universalism.²⁸ Nowhere has this tension been more evident as in comparative law approaches to rule of law and development projects,²⁹ or with regard to human rights.³⁰ Asian, African, and other non-Western comparative legal scholars and practitioners are acutely conscious of how the traditional legal system classifications, such as the prevalent civil-law/common-law classification, focus heavily on private law, on law as rules, and are “too Euro-centric.”³¹ In contrast, their experience points to legal pluralism and to understanding legal systems as dynamic and manipulatable in nature.³²

Similarly, feminist legal scholars and advocates build on their lived experiences as women, as women of color, and as women at the intersection of gender, race, class, sexual orientation, and the like. These lived experiences challenge the objective universal façade of law and legal rules and deconstruct traditional dichotomies of private and public spheres, of objectivity and subjectivity, and of similarities

25. Roger Cotterrell, *Is it so Bad to be Different? Comparative Law and the Appreciation of Diversity*, in *COMPARATIVE LAW: A HANDBOOK*, *supra* note 1, at 133, 134.

26. *Id.* at 134–35.

27. *Id.* at 136.

28. *Id.* at 137.

29. See, e.g., Frankenberg, *supra* note 10, at 270–74 (describing the conflicted Professor Y, a Western European scholar serving as a legal consultant to a codification project in post-soviet Eastern Europe).

30. See, e.g., Christopher McCrudden, *Judicial Comparativism and Human Rights*, in *COMPARATIVE LAW: A HANDBOOK*, *supra* note 1, at 371, 371–74 (examining the tensions in the relationship between comparative law and human rights law).

31. Nelken, *supra* note 15, at 7; see Esin Örücü, *A General View of ‘Legal Families’ and of ‘Mixing Systems’*, in *COMPARATIVE LAW: A HANDBOOK*, *supra* note 1, at 169, 170–71, 181.

32. Nelken, *supra* note 15, at 8.

and differences.³³ These insights can, and should, assist comparative law address the similar issues facing it.³⁴

Another area of more recent concern among comparativists has been comparative law's traditional focus on private law areas, which meant that areas such as family law were not considered proper subject to comparative investigation. While subjects such as contract law and property law are viewed as inherently a-cultural or a-historical, where perceived differences can be overcome as there is a common core amongst all legal systems that can be harmonized, areas such as family law or other matters of personal status are viewed as tied to historical and cultural specificities that are not suitable for harmonization or transplantation between legal systems.³⁵ Recent scholarship is beginning to challenge that assumption,³⁶ as well as the universalist culture-neutral pretense of so called "private" law, such as commercial law.³⁷ Nicholas Foster, for example, stresses the importance of legal culture and history in understanding the differences in the operation of and attitudes towards commercial law even amongst countries otherwise viewed as belonging to the same legal family.³⁸ Here as well, comparative law can benefit greatly from feminist critique of the family, the market, the private sphere, and the public sphere.³⁹ Post-modern feminist deconstruction of the private-public dualism and its connection to power relation and social domination is particularly poignant as we begin to investigate the relations between comparative law, knowledge, and the politics of power.⁴⁰

33. See *infra* Parts III–IV.

34. See *infra* Parts III–IV.

35. See Örüçü, *A General View of 'Legal Families' and of 'Mixing Systems'*, *supra* note 31, at 170–72, 181. Thus, most migration of legal rules and institutions, whether through involuntary adoption of a certain legal system during a period of colonization or through voluntary borrowing, often left in place pre-existing legal regimes of matters of personal status, especially when based in historical customs or religion.

36. See, e.g., Masha Antokolskaia, *Comparative Family Law: Moving with the Times?*, in *COMPARATIVE LAW: A HANDBOOK*, *supra* note 1, at 241, 241–58 (acknowledging that differences remain, but nonetheless offers a vision of family law that builds on transnational notions of human rights and women's rights).

37. See, e.g., Nicholas HD Foster, *Comparative Commercial Law: Rules or Context?*, in *COMPARATIVE LAW: A HANDBOOK*, *supra* note 1, at 263, 263–80 (discussing the significance of incorporating commercial law into comparative legal studies and providing specific accounts of the way history and culture shapes commercial law of differing countries).

38. See *id.* at 277–79.

39. See *infra* Part VI.

40. See *infra* Part V.

C. What and How to Compare: Putting Law in Context

Deciding which aspects of a legal system are similar enough and hence comparable to another legal system depends on how we view law more broadly. In asking “What and how to compare?,” mainstream contemporary comparativists have followed the legal realists’ insights into law and call for the expansion of the scope of comparative inquiry from a formalistic approach, limited to law on the books only, to a contextual approach examining how law operates within society. Classical comparative law has focused not only on private law but also on a very narrow concept of law: law as formal positive legal rules, such as black-letter law on the books.⁴¹ Much has been said about the need to move beyond legal rules and for looking at law in context.⁴² A contextual approach examines the interpretation and application of law in practice—law in action—and facilitates a “better understanding of law and lawyers from other jurisdictions.”⁴³ Even more so, looking to context takes into account the experience of those using the law and those to whom the law is addressed, and allows us “to reach the realities of all forms of law as social practices.”⁴⁴

Current comparative scholarship is rich with examples of “putting law in context,” for example, understanding law within a wider social, political, and economic context.⁴⁵ As a matter of fact, it can be said that such contextual approach is at the core of comparative law’s functional approach.⁴⁶ A functionalist comparative investigation assumes that law has a social purpose; consequently, a functionalist comparative approach seeks to discover “how different legal systems deal with similar types of [problems] in the context of their own societies” and to compare institutions that perform

41. Örüçü, *Developing Comparative Law*, *supra* note 12, at 45.

42. *See, e.g.*, Eberle, *supra* note 7, 51–64 (arguing that “law . . . cannot be understood without understanding the culture on which it sits”).

43. Foster, *supra* note 37, 279–80; *see* Eberle, *supra* note 7, at 52.

44. Twining, *supra* note 13, at 77; *see* William Ewald, *The Jurisprudential Approach to Comparative Law: A Field Guide to “Rats,”* 46 AM. J. COMP. L. 701, 704–05 (1998); William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1973–74 (1995) (advancing the argument that in order to see how lawyers think in their own legal systems we need to compare law from the insider’s point of view).

45. Nelken, *supra* note 15, at 21.

46. *Id.* at 22.

equivalent functions, whether or not similarly structured and whether legal or non-legal solutions.⁴⁷

It is safe to say that all comparativists are now “realists” in that it is widely accepted that any comparative endeavor, whether for intellectual or for practical purposes, should examine law in its broader operational social context. For the most part, however, mainstream comparativists do not challenge the meaning of “context” itself.⁴⁸ One challenge of examining law in action, law in context, is “how to justify the choice of any given context.”⁴⁹ “Any choice to base our contextual explanations on one time or space rather than another carries implications and is rarely ‘innocent.’”⁵⁰ Rarely do comparative scholars take the time to explain such choices. For some, this may be ideologically driven and for others the result of their own blindness to the fact that what they view as the neutral state of things is in fact informed by their own experiences and place in society.⁵¹

More importantly, however, even those who put law in context often ignore the other way of relating law and context—that of finding the context in law.⁵² This second approach takes a critical view of the relations between law and society and seeks to demonstrate how law helps construct society and it is not only society that constructs law.⁵³ Functionalist comparativists and those calling to put law in context ignore the extent to which the social problems that law “solves” are themselves “culturally constructed rather than given.”⁵⁴ As David Nelken observes:

We should not assume that societies being compared will necessarily face the same ‘problems’ and use law in some way to respond to them. We need to realise the extent to

47. Nelken, *supra* note 15, at 22; Örüçü, *Developing Comparative Law*, *supra* note 12, at 51; see Stramignoni, *supra* note 9, at 749–50.

48. See, e.g., Foster, *supra* note 37, at 279–80; Nelken, *supra* note 15, at 19–20.

49. Nelken, *supra* note 15, at 25.

50. *Id.* at 24.

51. See *infra* Parts IV–V.

52. Nelken, *supra* note 15, at 21.

53. *Id.*; see also Nora V. Demleitner, *Challenge, Opportunity and Risk: An Era of Change in Comparative Law*, 46 AM. J. COMP. L. 647, 647 (1998) (discussing how law can challenge society’s status quo and bring about change).

54. See Nelken, *supra* note 15, at 22.

which cultures 'socially construct' what they treat as problems, or the need to deal with them by using the law.⁵⁵

Günter Frankenberg is amongst the few comparative scholars calling on comparativists to "recognise . . . law [as] a way of seeing" and amongst the few to engage in a critical examination of finding the context in law.⁵⁶ He calls on comparativists to "discard the . . . law-in-the-books/law-in-action distinctions" and acknowledge how we treat the "legal representations of local conflicts, contexts, and visions."⁵⁷ Comparative law, particularly, Frankenberg argues, operates both to construe social norms and values and to reflect them.⁵⁸

Similarly, feminist legal scholars and other schools of critical legal thought have long argued that law constructs society as much as society constructs law.⁵⁹ Thus, for example, feminist scholars have demonstrated how differences that have been viewed as fixed and natural, such as gender related differences, are in fact socially construed and perpetuated in law.⁶⁰ Moreover, it is the proclaimed neutrality, objectivity, and universality of law that helps perpetuate certain social structure and institutions that are oppressive to women and other disempowered members of society and reify the dominance of others in society.⁶¹ As we shall see, feminist scholars argue that law is a way of seeing which often serves as an oppressive force against subordinated communities in that it elevates particular views of the world and representation of events from the perspective of those who possess the power to have their version of reality accepted and treats them as objective and universal truth.⁶²

D. The West v. The Rest

Acknowledging the dual role of comparative law to both construe and reflect social norms and values can be a strength of comparative law, positioning it to truly facilitate a "more nuanced understanding

55. *Id.* at 22–23.

56. *Id.* at 23.

57. Günter Frankenberg, *Comparing Constitutions: Ideas, Ideals, and Ideology—Toward a Layered Narrative*, 4 INT'L J. CONST. L. 439, 442–43 (2006).

58. Demleitner, *supra* note 53, at 647.

59. *See, e.g., id.* ("Law reflects and constructs societal norms and values."); Christina G. Ramirez, Book Note, 21 WOMEN'S RTS. L. REP. 57, 57–58 (1999) (reviewing NANCY LEVIT, *THE GENDER LINE: MEN, WOMEN, AND THE LAW* (1998)).

60. *See infra* Part III.

61. *See infra* Part V.

62. *See infra* Part V.

of ourselves and others.”⁶³ At the same time, if we do not examine our own implicit cultural value judgments, comparative law can be misused and perpetuate entrenched social and legal power structures.⁶⁴ Nowhere has this tendency been more evident as in the relations between the West and the Rest in comparative legal studies.⁶⁵

Whether viewed as a separate discipline or more of a method to expand our knowledge base, one stated goal of comparative law is to facilitate better understating of, and to shed new light on, one’s own legal system.⁶⁶ In their seminal 1968 work classifying legal systems, René David and John Brierley stated that “[c]omparative law—and for many this is its principal interest—constitutes an indispensable instrument for a renewed study of our own legal science; it helps us to know, understand and penetrate our own law.”⁶⁷ Armed with comparative observations on the operations of law and culture in the foreign legal system, the comparativist can ask, “Is there something in the foreign culture that can benefit or lead to improvement of our own system?”⁶⁸

And yet, such mutual learning has tended to be quite limited in reach. More often than not, developed western countries have only been willing to learn from other westernized developed systems (both common law and civil law countries) which are viewed as similar enough.⁶⁹ Comparisons with developing legal systems or the global south more often result in reinforcement of the advantages of one’s own familiar legal system.

In the developed western world, both those who see comparative law as an end in itself and those who advocate its use as a tool for various practical purposes have tended to engage in one way learning. On many occasions, the study of other legal systems results in reinforcement of one’s own familiar legal system. Even on those occasions when the comparative knowledge points towards certain disadvantages in one’s own legal solution and to possible available

63. Demleitner, *supra* note 53, at 647.

64. *Id.*

65. *Id.* at 653–54.

66. *See, e.g.,* RENÉ DAVID & JOHN E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 8 (The Free Press, Collier-Macmillan 1968) (1964); Eberle, *supra* note 7, at 66.

67. DAVID & BRIERLEY, *supra* note 66, at 8; *see also* Eberle, *supra* note 7, at 66 (“Just as importantly, a look at foreign culture is just as likely to shed light on our own legal culture. In effect, we are holding ourselves up to a mirror.”).

68. Eberle, *supra* note 7, at 66.

69. *See id.* at 53–55.

models in other places, the tendency is often to explain away the suitability of such models based on social cultural differences or, in exceptional cases, to import such transplants but only from other similarly developed western legal regimes.⁷⁰ This is most evident in comparative inquiries pursued for specific practical purposes such as harmonization efforts in the field of commercial law or rule of law development projects.⁷¹ In most cases, the learning focuses on exporting western models to countries of the developing world rather than in the opposite direction.⁷² It is not often that we see projects, theoretical or otherwise, that set out to learn from the global south.

Even if it can be expected that practically oriented comparative endeavors may be more one-directional in their primary outcome, at least comparativists should be open to the idea of mutual learning, open to be changed by the encounter, and open to connect and learn from the "other." In the same way that the foreign place and the other will never be fully accessible to the comparativist, Igor Stramignoni argues that comparativists cannot escape being changed by the comparative experience.⁷³ While comparativists can never fully leave their prior self behind on their "travels,"⁷⁴ having traveled they will no longer be the same as they used to be before.⁷⁵ What is needed is for comparativists to openly embrace the possibility of being changed by the experience.

Why is it then that most contemporary comparative scholars and practitioners continue to marginalize the impact of the comparative encounter on both subject and object? A critical examination of comparative law as political practice may help shed light. In doing so, this article specifically problematizes how comparativists approach similarities and differences. This article examines the underlying dynamics of norming and othering and specifically the concerns regarding essentialism and cultural relativism.⁷⁶ At a more fundamental level, this article suggests that comparative legal studies need to explicitly address the relations between knowledge, power, and ideology.

70. See Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 741-42 (1999).

71. See *id.* at 742-44.

72. See *id.*

73. See Stramignoni, *supra* note 9, at 766.

74. See *infra* Part IV.

75. See Stramignoni, *supra* note 9, at 766.

76. See *infra* Parts III-IV.

III. DECONSTRUCTING SIMILARITIES AND DIFFERENCES

Engaging in critical examination of finding the context in law and exposing the ways in which comparative law (and law generally) constructs social norms and values is particularly important with regards to the question of similarities and differences which occupies most comparativists and which has been said to be at the core of comparative legal studies.⁷⁷ Such critical examination of similarities and differences brings to the forefront the discourse of othering. By definition, comparative law “deals with and analyzes the *other*, [i.e.] the different.”⁷⁸ Feminist and critical race theories share with comparative law a focus on the different, the *other*, and have challenged the social and legal construction of sameness and difference—the dichotomization of self and other.⁷⁹ They therefore assist comparative law in unpacking *otherness* and moving beyond comparative law’s obsession with differences and similarities.

The study of similarities and differences is at the heart of comparative legal studies. Often, comparative work has focused on finding similarities and differences in legally-oriented practices when comparing societies that are otherwise perceived as similar.⁸⁰ It is also valuable to find similarities in law in societies which are in other respects perceived as very different.⁸¹ While comparativists are quite aware of the ever-present difficulties of knowing exactly what is “similar” and what is “different,” much of the discourse has focused on whether we should focus on similar genealogical roots based, for example, on the legal families taxonomy, focus on similarities in culture, as with the cultural families taxonomy, or focus on other political, economic, and developmental formants.⁸² Not much of the discourse has focused on how we perceive similarities and differences.

Comparative law’s unstated normative methodology of us/here against which them/there are measured and judged is ripe for feminist critique, which has extensively engaged in deconstructing these

77. See Demleitner, *Combating Legal Ethnocentrism*, *supra* note 70, at 740–41.

78. Vivian Grosswald Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657, 657 (1998).

79. *Id.*

80. See, e.g., *id.*

81. See Cotterrell, *supra* note 25, at 134–35.

82. See, e.g., Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 6–8, 10 (1997) (proposing to classify legal systems based on the primary pattern of law amongst three competing patterns: rule of professional law, rule of political law, and rule of traditional law).

dichotomies, especially in the context of the legal relevance of gender differences. The impetus of most comparativists has been to focus on sameness.⁸³ What has been missing from the discussion is the notion that “identifying similarity is possible only in the context of non-similarity or difference.”⁸⁴ Comparison inherently involves differentiation. But, FLT posit, we perceive otherness through our contingent cultural lens.⁸⁵ In comparing, we invariably rely on our own unstated norms and values.⁸⁶ Within comparative law, for example, the geopolitical identity of the comparativists has served as “the unstated norm against which the exotic other is viewed.”⁸⁷

Otherness, suggests FLT, is socially construed, contextual and dynamic.⁸⁸ FLT teaches us that how we perceive difference depends on who is engaged in observing and their own perspective.⁸⁹ Women’s experiences are living proof of this. Women experience their lives both as victims of oppression and as agents resisting it—as both subordinated by privacy and empowered by it—as both rational and emotional. One lesson from feminist jurisprudence lies in the rejection of simple dichotomies and the abandonment of the either/or that characterize our current jurisprudence.⁹⁰

Initially, much of the feminist discourse has focused on not only identifying differences along gender lines as socially construed but also on whether such differences should be celebrated nonetheless.⁹¹

83. Curran, *supra* note 78, at 666.

84. *Id.*

85. *Id.* at 667.

86. Brenda Cossman, *Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project*, 1997 UTAH L. REV. 525, 526 (1997); accord. Antoinette Sedillo López, *A Comparative Analysis of Women’s Issues: Towards a Contextualized Methodology*, 10 HASTINGS WOMEN’S L.J. 347, 351 (1999) (“It is important that a feminist who chooses to engage in comparative analysis learns to suspend judgment in analyzing differences. Differences should be viewed in their context and from a cultural perspective.”).

87. Cossman, *supra* note 86, at 526. See generally Nathaniel Berman, *Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion*, 1997 UTAH L. REV. 281, 282 (1997) (explaining that comparativists combat inherent exoticization when examining otherness).

88. Curran, *supra* note 78, 666–67.

89. Nelken, *supra* note 15, at 31.

90. See Cossman, *supra* note 86, at 543.

91. The strand of feminism referred to as cultural feminism “emphasized relationships, the value of intimacy, the importance of mothering and caretaking, and other feminine activities.” Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157, 162 (2010). They called for re-valuing of women’s work, women’s contributions to our culture, and for acknowledging the different voice of women. See *id.* at 158, 162, 165 (locating the three strands of “newer” feminist

Much controversy amongst feminist legal scholars surrounded on whether those differences associated with womanhood and femininity, which, the argument goes, have been denigrated and marginalized by the patriarchal hegemony to maintain the social domination of men over women, should instead be celebrated, normatively elevated, and used as a tool of empowerment. This line of discourse resonates with calls for cultural plurality and for recognition of the contributions that other cultures and traditions can make to comparative law.

Rather than focus on the merit of valuing differences as much as we value similarities, contemporary FLT have begun to deconstruct the very terms on which the understanding of differences has been based, for example, the juxtaposition of similarities and differences as diametrically opposed to each other, as absolute opposites.⁹² Instead, they argue that we acknowledge that similarities and differences are mutually constitutive; there is no self without differentiation from the other.⁹³ For example, Martha Minow views differences as relational and “reveal[s] the unstated norms against which difference has been judged.”⁹⁴

This feminist epistemology and methodology of deconstructing difference and recognizing its relational nature can be applied within comparative law as a way to begin to challenge its unstated norms and displace its ethnocentrism.⁹⁵ For the comparativist, therefore, the goal should be:

scholarship—partial agency feminism, intersectional/anti-essentialist feminism, and postmodern/poststructural feminisms—as a response to the older “Big Three” strands of feminism – liberal, cultural, and dominance feminism).

92. Compare Curran, *supra* note 78, at 666 (arguing the merits of valuing differences as much as similarities), with Cossman, *supra* note 86, at 543 (deconstructing the juxtaposition of similarities and differences).
93. Cossman, *supra* note 86, at 543; cf. Deseriee A. Kennedy, *Transversal Feminism and Transcendence*, 15 S. CAL. REV. L. & WOMEN’S STUD. 65, 89 (2005) (quoting Filomina Chioma Steady, *African Feminism: A Worldwide Perspective*, in *WOMEN IN AFRICA AND THE AFRICAN DIASPORA* (Rosalyn Terborg-Penn et al. eds., 1987)) (“For women, the male is not ‘the other’ but part of the human same. Each gender constitutes the critical half that makes the human whole. Neither sex is totally complete in itself to constitute a unit by itself. Each has and needs complement, despite the possession of unique features of its own.”).
94. Cossman, *supra* note 86, at 527 n.2; see MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 80 (1990); Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 112, 122 n.41, 175 n.212 (1987) [hereinafter *When Difference Has Its Home*].
95. Cossman, *supra* note 86, at 527 n.2.

to establish one's own identity by seeing the others as not so much like us, but rather us as very similar to them . . . [i]nstead of taking ourselves as the yardstick, as the norm, we have to situate ourselves in the world in equivalent distance from the 'others' whoever they might be.⁹⁶

The realization that similarities and differences are not mere observable facts but are to a large extent socially construed, and even more importantly, that the significance that we assign certain similarities or differences is not only socially construed but is in fact in the service of certain ideologies, is a critical lesson for comparative legal studies. Particularly in an era of globalization, when demonstrating similarity is often used to provide justification for harmonization and convergence of legal regimes, or when those who resist reform or relevant comparisons point out to unbridgeable differences, it is critical that we further examine these similarities and differences and question the political agenda behind them. First, however, we need to further examine the essentialist and ethnocentric stance from which most comparativists have construed similarities and differences.

IV. AVOIDING THE TRAP OF BOTH ESSENTIALISM AND RELATIVISM

Much of the critique and current angst of comparative law's treatment of similarities and differences, of self and other, focuses on the essentialist perspectives comparative law exhibits in both finding similarities and differences and in devaluing and disempowering the "different other." Comparative law and practice has been heavily criticized as imperialistic, as taking the place of physical conquest and colonization.⁹⁷ Many have rightfully criticized comparative law as western-centric and ethno-centric. Even those who call for comparative law to focus more intently on non-western cultures and on indigenous people,⁹⁸ often take an essential view of the other (benevolent as it may seem) and its culture.⁹⁹

96. Demleitner, *supra* note 53, at 652–53.

97. See, e.g., Frankenberg, *Stranger than Paradise*, *supra* note 10, at 262 (“[T]he current rush toward codifications appears rather like a postmodern form of conquest executed through legal transplants and harmonization strategies.”).

98. See, e.g., Eberle, *supra* note 7, at 54–55.

99. See, e.g., *id.* at 57 (“Law in action is quite important, *even*, to western culture. . . . Law in action is *even more critical* for nonwestern cultures, as here the law may be *more a result of tradition, custom, or orality*.”). *Id.* at 57 (emphasis added). But western law is as much the result of tradition and custom as in the nonwestern world.

In contrast to the mainstream comparativist that is unaware of its own perspectivity, its own subjectivity, the post-modern comparativist may be too keenly aware of its inability to, on the one hand, fully know the other, and, on the other hand, to fully escape the biases of its self.¹⁰⁰ Such a comparativist agonizes over his or her identity, over the authenticity of his or her comparative observations, to the effect that any comparative insights offered are always couched in language of relativism and contingent knowledge at best.

In his article *Stranger than Paradise: Identity & Politics in Comparative Law*, Günter Frankenberg aptly juxtaposes these types of comparative lawyers: the “mainstream hegemonic self” and the “tragic self.”¹⁰¹ The mainstream comparativist is typically represented in “the three major schools of comparative thought”—classical comparative law, focused on classifying legal systems; better-solution/convergence comparativism; and comparative law and economics.¹⁰² All share universalist humanist aspirations and a belief in ideal transcultural law and are untroubled by the empirical and historical plurality of normative frameworks and cultures.¹⁰³ For the mainstreamers, the ability to compare and to know other systems’ legal norms is relatively uncomplicated and unproblematic, not surprisingly so, as they share a strong bias about the superiority of their home western Anglo/European law.¹⁰⁴ At the same time, the mainstreamer rejects critiques of ethnocentrism because for the mainstreamer, law as he knows it is universal.¹⁰⁵ Hence, the mainstreamer “does not even need to export or transplant” the superior (hence universal) law of his home country, because “wherever he goes and looks, it is always already there, if only in a similar or dissimilar, derivative or rudimentary form.”¹⁰⁶ Epistemologically, the mainstreamer uses objective discourse to try and suppress his subjectivity and hide his paternalistic view-point.¹⁰⁷

100. See, e.g., Eberle, *supra* note 7, at 60 n.17; Frankenberg, *Stranger than Paradise*, *supra* note 10, at 266.

101. Frankenberg, *Stranger than Paradise*, *supra* note 10, at 266.

102. *Id.* at 263.

103. *Id.* at 263–264.

104. *Id.*

105. *Id.* at 264.

106. *Id.* at 264–65.

107. *Id.* at 263. A more detailed discussion of subjectivity versus objectivity and the epistemology of knowledge will follow in the next section. See *infra* Part V.

In contrast to the mainstreamer, the tragic comparativist is all too well aware of cultural, moral, and epistemic differences.¹⁰⁸ He recognizes the limitation and imperfections of his own legal system as well as his intellectual situated-ness, and therefore agonizes over not being able to genuinely know the other, let alone compare different legal cultures.¹⁰⁹ Acutely sensitive to ethnocentrism and legal pluralism and to the need to contextualize knowledge and values in light of power relations, history and culture, such comparativist is left with no way to make actual critical judgments and is tragically paralyzed.¹¹⁰ Instead, the tragic comparativist engages in metaphoric rhetoric, cautions against the problems of comparability, and rejects all-encompassing explanations for fear of ethnocentric imperialistic impositions disguised as supposedly “value-free or objectively universal” standards.¹¹¹

How then is the comparativist to avoid the pitfalls of both the mainstreamer and the tragic comparativist? How can the comparativist negotiate both essentialism and relativism?

One approach, offered by Nathaniel Berman, calls on comparativists to revisit the traditional epistemology, couched in terms of merely trying to understand the other and often resorting to simplistic understanding of “culture” and “legal culture.”¹¹² Instead, he challenges comparativists to engage in critical comparative inquiry by radically flipping familiar comparative techniques on their head: “[I]n those contexts where the tradition would exoticize, normalize; in those contexts where it would normalize, exoticize; in those contexts where it finds infinite depths of meaning, formalize and fragment.”¹¹³ By resisting essentializing tradition and showing how both our own and others’ cultures are not homogenized but rather “split, hybrid, and embedded in contexts of power” comparative law can become transformative.¹¹⁴

In imagining the Other, western comparativists often deal with seemingly unbridgeable and unknowable differences by exoticizing the Other, i.e. “view[ing] the Other as wholly different.”¹¹⁵ In dealing with such exotic differences, some have advocated respect, i.e.

108. Paolo G. Carozza, *Continuity and Rapture in “New Approaches to Comparative Law”*, 1997 UTAH L. REV. 657, 660 (1997).

109. Frankenberg, *Stranger than Paradise*, *supra* note 10, at 266–67.

110. *Id.* at 266–69.

111. *Id.* at 269.

112. Berman, *supra* note 87, at 281.

113. *Id.*

114. *Id.*

115. *Id.* at 282.

leaving the Other alone to its own (un-comprehensible but non-threatening) practices and culture.¹¹⁶ In contrast, too often have such exotic differences been demonized as primitive and barbaric, to justify conquest in the name of civilizing the Other.¹¹⁷

A parallel response on the other end of the spectrum has been to “normalize” the Other, again both in “respectful” ways and in “dismissive” ways.¹¹⁸ Respectful normalization values the contribution of the other cultures and traditions, and incorporates them (though often in a marginal way) into mainstream social structures and legal regimes.¹¹⁹ Dismissive normalization highlights the similarity of such practices to “our” (normal) tradition, so that they do not pose a challenge to mainstream concepts and can be easily assimilated.¹²⁰

Lastly, those who are weary of too quickly categorizing the Other as normal or as exotic, nonetheless view the Other as something that needs to be studied and interpreted in depth. Driven by this “hermeneutic compulsion,” such scholars engage in an infinite comprehensive study of the Other, necessitated, according to this view, by the deep complexity of the Other.¹²¹

All three techniques essentialize the Other by treating its identity and its culture as a unified coherent entity (either exotically different from us or similarly normal), which we could only truly understand if we continue to pursue a deeper and deeper level of interpretation. To resist such essentialism, argues Berman, the comparativist should engage in splitting, hybridization, and politicization of both the Self and the Other.¹²²

Hence, the exoticizer should normalize by recognizing that the non-western Other is as split (by gender, race, class, and religion) as the comparativist’s own society; by recognizing that the Other is not “purely” other but rather a hybrid identity inflected by the West, as is most often the case with legal systems of previously colonized societies; and by recognizing that the colonizer’s own society is similarly inflected by that legacy, including the re-importation of mutated colonial legal exports.¹²³ Recognizing that both the Self and

116. *Id.*

117. *Id.*

118. *Id.* at 283.

119. *Id.*

120. *Id.*

121. *Id.* at 284–85.

122. *Id.* at 284.

123. *Id.* at 282.

the Other are similarly internally split and mutually constitutive of each other's legal system thus forces the comparativist to abandon the role of the outside observer and the pretense of "point-of-viewlessness."¹²⁴ The comparativist is not neutral. "Any description of the Other will always involve taking a position within the conflicts that structure the Other's system."¹²⁵ The comparativist must, therefore, acknowledge the "political" in the "comparative."¹²⁶

Similarly, using splitting, hybridization, and politicization, the normalizer should re-exoticize. But, rather than trying to re-establish and differentiate previously normalized (and assimilated) cultures by simply asserting their radical difference, we should at the same time emphasize their internal splits, for example, along gender lines; their inevitable hybridization over time, thus exposing claims for authenticity as ideological; and the power structures within that culture.¹²⁷ These techniques will also allow the hermeneutic to recognize that the infinite study of the Other may only lead to deeper error; the split, hybrid, and politicized Other may simply resist a totalizing meaning.¹²⁸

Berman's approach demonstrates the important contribution feminist theories and other critical schools of thought can make to comparative law.¹²⁹ Feminist epistemology, as well as substantive commitment, is particularly well suited to tackle the comparativist's existential angst head on. Feminism offers a critical epistemology that challenges traditional modes of production of knowledge, challenges a dichotomized discourse pitting similarities against differences, the West versus the Rest, the normal versus the exotic, and law versus culture.¹³⁰

Feminism has itself faced criticism of ethnocentrism early on. Women, and particularly women of color, whose diverse lived experience did not resonate with the unstated white-upper class-heterosexual norm of mainstream feminist theory and practice, have exposed feminism's own partiality, its own essentialist perspective of

124. *Id.*

125. *Id.*

126. *See infra* Part VI for an in depth discussion of theorizing comparative law as political practice.

127. Berman, *supra* note 87, at 283–84.

128. *Id.* at 285–86.

129. Carozza, *supra* note 108, at 657, 661–62.

130. *See* Elizabeth Anderson, *Feminist Epistemology and Philosophy of Science*, STAN. ENCYCLOPEDIA OF PHIL., <http://plato.stanford.edu/entries/feminism-epistemology/> (last modified Mar. 16, 2011).

women and women's issues.¹³¹ Feminism has faced similar criticism of its a-cultural stance as being inherently Western.¹³² Third world feminists criticize the international feminist movement "for [both] excluding [and] essentializing the perspectives and needs of women of color and third world women" in particular.¹³³

Feminist scholars are increasingly aware of the dangers of either extremes—the un-self-critical ethnocentric (akin to Frankenberg's mainstream hegemonic-self) or the hyper-self-critical cultural relativist (akin to Frankenberg's tragic self)—and have attempted to pave new paths,¹³⁴ calling on us to view the world from more than a single, reflexive position. Patricia Williams described this practice as the "ambi-valent, multivalent way of seeing that is . . . at the heart of what is called critical theory, feminist theory, and the so-called minority critique."¹³⁵ It is the "fluid positioning that sees back and forth across boundary,"¹³⁶ and which has been the "daily experience of people of color and of women."¹³⁷

Mari Matsuda, for example, suggests that we can avoid essentialism by adopting "multiple consciousness" and employing strategies of "consciousness-shifting" to pursue justice.¹³⁸ In consciousness-shifting, Matsuda refers to the ability to see that the law reflects a particular viewpoint, the ability to operate within that view, and at the same time the ability to critically extract one-self out

131. See, e.g., Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 843–45 (1990); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 155–57 (analyzing the ways in which feminist theory and anti-discrimination principles obscured the "multidimensionality of Black women's lives" and introducing the concept of intersectionality); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (criticizing feminist theories for obscuring the voice of black women by failing to recognize the differences in experiences and reality for black women and for essentializing gender over race and class). For example, minority and poor women who have faced the challenges of working outside the home or have had the state intervene in their reproductive and child-rearing preferences experience their lives very differently from middle-class white women. See Cain, *supra* at 844–45.

132. Cossman, *supra* note 86, at 526–27.

133. López, *supra* note 86, at 348–49.

134. See Cossman, *supra* note 86, at 525, 527.

135. Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2151 (1989).

136. *Id.*

137. Pat Williams, *Response to Mari Matsuda*, 11 WOMEN'S RTS. L. REP. 11, 11 (1989).

138. See Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 9 (1989).

of that view.¹³⁹ The key point is not to simply see multiple points of view, but to make a genuine effort to see excluded and oppressed viewpoints and know the concrete lived details of others.¹⁴⁰

A similar approach offered by Deseriee Kennedy conceptualizes “transversal feminism” as a way to create diverse and inclusive feminist theory. “By emphasizing the importance and relevance of individual experience and perspectives, it reinforces the importance of anti-essentialism and intersectionality in developing effective feminist legal theory.”¹⁴¹ Building on the work of Nira Yuval Davis on transversal politics,¹⁴² Kennedy offers a methodology of “rooting” and “shifting.”¹⁴³ Rooting means that participants in a dialogue (political, cultural, or legal, for that matter) understand their own position in the world, and hence the unique (and incomplete) positionality of their perspective.¹⁴⁴ At the same time, they also try to shift by listening and putting themselves in the situation of others in the dialogue who are positioned differently.¹⁴⁵ Such shifting requires empathy.¹⁴⁶ It may not be easy to understand those whose experiences and values are very different from our own, but we can make a good faith effort to learn to identify with others and to allow ourselves to be moved by others.¹⁴⁷

Of course, claiming to put ourselves in the exact shoes of the other, risks becoming as essentialist and unattainable as the current

139. *Id.*

140. *Id.*

141. Kennedy, *supra* note 93, at 92.

142. *Id.* at 75–78 (citing the works of Nira Yuval-Davis including: Nira Yuval-Davis, *Human/Women's Rights and Feminist Transversal Politics*, in GLOBAL FEMINISM: TRANSNATIONAL WOMEN'S ACTIVISM, ORGANIZING AND HUMAN RIGHTS 275, 280–83, 290 (Myra Marx Ferree & Aili Mari Tripp eds., 2006); NIRA YUVAL-DAVIS, GENDER AND NATION 88, 130 (1997); Nira Yuval-Davis, The Cairo Conference, Women and Transversal Politics, 6 Women Against Nation 88, 130 (1997); Nira Yuval-Davis, *The Cairo Conference, Women and Transversal Politics*, 6 WOMEN AGAINST FUNDAMENTALISM 19, 21 (1995)).

143. Kennedy, *supra* note 93, at 76.

144. *Id.* (quoting Yuval-Davis, *Human/Women's Rights and Feminist Transversal Politics*, *supra* note 142, at 275, 282).

145. *Id.* (quoting Yuval-Davis, *Human/Women's Rights and Feminist Transversal Politics*, *supra* note 142, at 275, 282).

146. *Id.* (citing Yuval-Davis, *Human/Women's Rights and Feminist Transversal Politics*, *supra* note 142, at 275, 283).

147. See Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 815 (1994) (quoting Kim L. Scheppelle, *The Reasonable Woman*, 1 THE RESPONSIVE COMMUNITY 36, 36 (1991)).

(objective) standards.¹⁴⁸ At the same time, by trying to take the perspective of another, we acknowledge the partiality of our own perspective.¹⁴⁹ This forces us to question our own categories and assumptions and expose other power webs that may have not affected us as much as they have others.¹⁵⁰ At the very least, the impossibility of fully knowing the perspective of another invites a certain amount of humility and self-doubt when we try to gain knowledge. Acquiring this knowledge may, in turn, allow us to “glimpse” a point of view other than our own, or at least acknowledge that our own point of view is not the only truth and to open our minds to accept more than one, two, or even three truths in any given situation.¹⁵¹

Brenda Cossman’s article, *Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project*,¹⁵² provides a direct example of the immense potential of feminist theories to comparative law. Cultural relativism arguments accept that we cannot escape comparative law’s inherent ethnocentrism, and therefore suggest that we abandon the comparative project altogether.¹⁵³ Cossman, on the other hand, argues that feminist insights can mitigate the essentialism-relativism debate within comparative law and offer a way out of the

148. As Mari Matsuda points out: “I cannot pretend that I, as a Japanese American, truly know the pain of, say, my Native American sister. But I can pledge to educate myself so that I do not receive her pain in ignorance.” Matsuda, *supra* note 138, at 10.

149. Martha Minow, *The Supreme Court 1986 Term — Forward: Justice Engendered*, 101 HARV. L. REV. 10, 60 (1987) [hereinafter *Justice Engendered*].

150. Martha Minow explains:

[I]f you try to break out of unstated assumptions and take the perspective of [the “other”] . . . You may see an injury that you had not noticed, or take more seriously a harm that you had otherwise discounted . . . [Y]ou will then get the chance to examine the reference point you usually take for granted. Maybe you will conclude that the reference point itself should change . . . You may find you had so much ignored the point of view of others that you did not realize that you were mistaking your point of view for reality. Perhaps you will find that the way things are is not the only way things could be . . .

Id. at 72.

151. See *When Difference Has Its Home*, *supra* note 94, at 129–30.

152. Cossman, *supra* note 86.

153. *Id.* at 526.

ethnocentric gaze by strategically turning the (ethnocentric) “gaze back on itself.”¹⁵⁴

Cossmán builds on her collaborative study with Ratna Kapur on law and feminism in India,¹⁵⁵ examining, amongst other things, how the legal regulation of women in India is informed by and perpetuates “familial ideology.”¹⁵⁶ The concept of familial ideology, however, is not as naturalized and universalized as it may first seem.¹⁵⁷ “Familial ideology looks very different in the Indian context than in the Anglo-American context.”¹⁵⁸ By interrogating, reframing, and recasting this concept we begin to transform the concept itself and open the door to turning the gaze of comparison back on ourselves.¹⁵⁹ We can begin to displace the hegemonic discourse of the West by insisting on multidirectional flow of the comparative analysis.¹⁶⁰ Thus, for example, instead of asking “what is culturally specific about familial ideology in India” (which retains the West as the unstated norm), we should turn our gaze and ask “what is culturally specific about familial ideology in Anglo-American legal system[,]” (allowing the non-Anglo-American context to become a stated norm).¹⁶¹ Consequently, what is being compared starts to shift, and unstated monolithic norms are replaced with multiple stated norms.¹⁶² This “in-between space” that “recognize[s] and nurture[s] cultural hybridity” may eventually allow us to differently inhabit our world and transform our gaze.¹⁶³

To be clear, in turning the gaze back on ourselves we do not escape its specificity. By explicitly stating our previously unstated norms as well as opening the door to embrace other norms we still face the challenges entailed in having to choose between possibly

154. *Id.* at 527.

155. *Id.* at 527 (referencing RATNA KAPUR & BRENDA COSSMAN, *SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA* (1996)).

156. Cossmán, *supra* note 86, at 531–32.

157. *See id.* at 531.

158. *Id.* at 536. In the Anglo-American context, as well as other industrialized, capitalist societies, the nuclear, heterosexual, patriarchal family—with entrenched roles for women as wives, mothers, and economic dependents—is the dominant household arrangement. *Id.* at 531–32. In India, on the other hand, the joint family is believed to be the dominant household structure. *Id.* at 534. The joint family concept itself was historically mainstreamed in by the British colonizers in India, and therefore itself represents the cultural hybridity of India rather than a “pure” authentic Indian culture. *Id.* at 534–35.

159. *Id.* at 536.

160. *Id.*

161. *Id.*

162. *Id.* at 536–37.

163. *Id.* at 537.

incompatible normative regimes, social arrangements, and legal frameworks. We will still have to make normative hard choices. To do that, I argue, we will need to turn our gaze to comparative law as a political practice.¹⁶⁴

In sum, the broader strategic deployment of proposals such as Berman's and Cossman's within comparative law, and a way out of the essentialism-relativism quandary, lies not only in acknowledging our "subjectivity" and unsuccessfully (and impossibly) trying to escape it, but in deconstructing the subjective-objective dichotomy all together.¹⁶⁵ It requires us, therefore, to deconstruct our own "hegemonic grid" about the production of knowledge.¹⁶⁶

V. COMPARATIVE LEGAL STUDIES, THE PRODUCTION OF KNOWLEDGE AND POWER: A CRITIQUE OF OBJECTIVITY

"To compare things," observes Paolo G. Carozza, "we must be able to *know* what they are."¹⁶⁷ Hence, we approach the problem of comparability differently depending on our approach to how we know and whether we can even know.

As we have seen, a key critique leveled against mainstream comparativists has to do with the stance of universal objectivity they advance in their comparisons. Typically, for a mainstream comparativist, the (western) home law is the natural (superior) standard.¹⁶⁸ Measured against this yardstick, similarities and dissimilarities "observed" through the comparative study mirror concepts in the comparativist's home legal system—the only relevant system.¹⁶⁹

Unlike classical comparativists, who have been criticized for their cultural blinders, most contemporary comparativists caution against ignoring our own cultural biases when proceeding with the comparative endeavor. However, many proceed on the assumption that, once acknowledged, we can free ourselves from our subjective

164. See *infra* Part VI.

165. Cf. Cossman, *supra* note 86, at 539 ("Not only does it require that the Anglo-American feminist legal scholar recognize the partiality of her perspective, but it also directs her attention to the way in which that partial perspective shapes how the comparative knowledge is received and interpreted.").

166. Carozza, *supra* note 108, at 661; Frankenberg, *Stranger than Paradise*, *supra* note 10, at 270.

167. Carozza, *supra* note 108, at 660.

168. Frankenberg, *Stranger than Paradise*, *supra* note 10, at 265–66.

169. *Id.*

cultural biases, immerse ourselves in the foreign culture and study it with an open heart, and eventually step back outside of that culture and objectively assess the data obtained.¹⁷⁰ Feminist insights, in turn, question the ability to divorce ourselves from our so-called subjectivity and, more fundamentally, question the subjectivity-objectivity divide and the notion of an attainable universal, neutral and objective knowledge.¹⁷¹

Comparativists, like travelers, try to learn new things about the people and places they investigate and consequently to “shorten[] the distance” between the comparativists and the subject of investigation.¹⁷² However, asks Igor Stramignoni, “[C]an travelers ever hope to meet whatever lies ahead of them on its own terms? Or do travelers risk, instead, remaining forever foreign—both distant from their own past and never quite close enough to whatever else lies ahead?”¹⁷³ In reality, traveling is as much about encountering one’s own past, as it is about discovering one’s own foreignness.¹⁷⁴ Comparative law is as much, if not more so, about learning the self anew as it is about learning the other. The risk is, of course, that our gaze of the unfamiliar other may “find” exactly that which we set out to find. Rather than ask whether comparativists can ever fully understand unfamiliar laws, institutions, or cultures, we need to ask whether comparativists can ever access the otherness of their own familiar past. “Can they ever go past certain differences that, upon closer inspection, might turn out to be not much more than a celebration of sameness?”¹⁷⁵

Instead of proceeding with the assumption that law or culture are constant realities that can be classified systematically,¹⁷⁶ we should recognize our own learning experience where old knowledge and new knowledge, knowledge of the self and knowledge of the other, interact and mutually construct each other.¹⁷⁷ More importantly, such

170. See, e.g., Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 44 (1998); Eberle, *supra* note 7, at 52–53.

171. See, e.g., Leti Volpp, *(Mis)Identifying Culture: Asian Women and the “Cultural Defense”*, 17 HARV. WOMEN’S L.J. 57, 78–80 (1994) (noting feminist scholars’ discussions of how subjectivity and objectivity are opposed within the law and whether a universal rule of law exists).

172. Stramignoni, *supra* note 9, at 740.

173. *Id.* at 741 (emphasis omitted).

174. *Id.* at 742.

175. *Id.* at 743.

176. Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L L.J. 411, 415–16 (1985).

177. *Id.* at 416.

a learning process challenges any claims for universal truths and complete and objective knowledge.¹⁷⁸

Objectivity is a fundamental precept of Anglo-American jurisprudence.¹⁷⁹ Patricia Williams observes how the opposition of objectivity to subjectivity constructs our theoretical legal understanding.¹⁸⁰ Our legal thought and rhetoric are characterized by the existence of “transcendent, acontextual, universal legal truths” that are conveyed through objective discourse.”¹⁸¹ “The more serious side of this essentialized world view is a worrisome tendency to disparage anything that is nontranscendent (temporal, historical), or contextual (socially constructed), or non-universal (specific) as ‘emotional,’ ‘literary,’ ‘personal,’ or just ‘[n]ot [t]rue.’”¹⁸² The result is, as Letti Volpp points out, that our jurisprudence “fails to recognize the inherent subjectivity of legal standards and masks the oppressive force of the law against subordinated communities.”¹⁸³

Williams and Volpp are not alone in pointing out the subjectivity of objectivity. As part of a persistent feminist investigation of the relationship between power and knowledge, many feminist scholars have demonstrated how particular views of the world dominate our discourse and production of knowledge.¹⁸⁴ These critiques question claims of “objectivity” and “neutrality” or statements with “universal” applicability.¹⁸⁵ The point is that “frequently what passes for the whole truth is instead a representation of events from the perspective of those who possess the power to have their version of reality accepted.”¹⁸⁶

Martha Minow, for example, problematizes knowledge because it embodies certain social and political positions.¹⁸⁷ She joins other feminists in arguing that the unspoken assumption of objectivity masks the fact that knowledge is construed from the vintage point of the observer.¹⁸⁸ Reality is constructed from the unstated and biased

178. *Id.* at 413.

179. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 8–9 (1991).

180. *Id.* at 8–9, 11.

181. *Id.* at 8–9.

182. *Id.* at 9.

183. Volpp, *supra* note 171, at 80.

184. Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 *TEX. J. OF WOMEN & L.* 95, 95 (1992).

185. *Id.*

186. *Id.*

187. *When Difference Has Its Home*, *supra* note 94, at 174.

188. *Id.* at 175.

standpoint of the observer,¹⁸⁹ for we cannot see the world unclouded by preconceptions. As Minow writes: "Inevitably seeing entails a form of subjectivity, an act of imagination, a way of looking that is necessarily in part determined by some private perspective. Its results are never simple 'facts,' amenable to 'objective' judgments, but facts or pictures that are dependent on the internal visions that generate them."¹⁹⁰

This argument is not uniquely feminist. Feminists, however, have also exposed how our discourse of neutrality hides the lack of objectivity as well as the oppressive impact of the hegemonic view.¹⁹¹ The observer's perspective is also oppressive because knowledge is inextricably intertwined with social power.¹⁹² Thus, social understandings based on "prevailing views" or "consensus approaches" express the perspectives of those socially positioned to enforce their points of view in society.¹⁹³

The focus on the relation between knowledge and power allows Minow to question the categorizing of people based on purportedly objective and inevitable differences. She argues that the claim to knowledge manifested by the "labeling of any group as different . . . disguises the act of power by which the namers simultaneously assign names and deny their relationships with, and power over, the named."¹⁹⁴ Instead of being objective, any perspective presented as "the truth" excludes competing perspectives by the sheer power of its holder.¹⁹⁵ Because power relations are imbalanced and often oppressive, the namers can simply ignore less powerful perspectives.¹⁹⁶ Hence, "[t]he assignment of difference then marks the relationship between those who have the power to claim that theirs is the true perspective and those who have no such power."¹⁹⁷

In sum, what initially seems an objective stance may appear partial from another point of view. Moreover, what initially seems as an objective difference may in fact be an act of exclusion and subordination.¹⁹⁸ In any event, the possibility of multiple

189. *Id.* at 176.

190. *Justice Engendered*, *supra* note 149, at 45 (quoting EVELYN FOX KELLER, *A FEELING FOR THE ORGANISM* 150 (1983)).

191. *Id.* at 45-46.

192. *When Difference Has Its Home*, *supra* note 94, at 128.

193. *Id.*

194. *Id.*

195. *Justice Engendered*, *supra* note 149, at 33.

196. *When Difference Has Its Home*, *supra* note 94, at 128.

197. *Id.* at 175.

198. *Justice Engendered*, *supra* note 149, at 14.

perspectives undermines the notion of objectivity and “shows how claims to knowledge bear the imprint of those making the claims.”¹⁹⁹

Catharine MacKinnon also uses seemingly natural and real differences—the differences between men and women based on sex—to question objectivity.²⁰⁰ According to MacKinnon, objectivity assumes we all see the same thing,²⁰¹ that only one reality exists, and that this reality is not contingent on the observer’s positioning.²⁰² But if sex-discriminatory conditions exist for women, there are (at least) two realms of social meaning.²⁰³ Consequently, if women inhabit a sex-discriminatory reality, their point of view is no more subjective than men’s.²⁰⁴ The point of this observation is that “social circumstances, to which gender is central, produce distinctive interests, hence perceptions, hence meanings, hence definitions of rationality.”²⁰⁵ It follows, for example, that neutral so-called objective legal standards are inadequate to describe “the nonneutral objectified social reality that women experience.”²⁰⁶

The core issue, however, is not the plain inadequacy of the stance of objectivity to address socially constructed realities, but the oppressive domination of male power that is objective epistemology. MacKinnon writes: “[T]he male standpoint dominates civil society in the form of the objective standard—that standpoint which, because it dominates in the world, does not appear to function as a standpoint at all.”²⁰⁷

Objectivity as epistemology defines both the process of observation or acquiring knowledge and the content of that knowledge and the world observed.²⁰⁸ As the traditionally superior methodology for acquiring knowledge, we have seen that the epistemology of objectivity erects distance and a-perspectivity as its

199. *Id.*

200. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 229–30 (1989) [hereinafter FEMINIST THEORY OF THE STATE]. The implications of MacKinnon’s insights are not limited to the inadequacy of gender-blind standards in addressing sex inequality. Moreover, although MacKinnon focuses on the role of gender in forming perceptions and women’s reality, her observations are applicable to race and class as well.

201. *Id.* at 231.

202. *Id.* at 232.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 237.

208. *Id.* at 97.

methodological criteria.²⁰⁹ While the criteria of distance and a-perspectivity appear to be general ways of getting at reality, rather than constructing it, they are in fact socially determined and devalue “perspective[s] from the bottom of the social order.”²¹⁰

Moreover, the objectivist epistemology controls the content of and what will be viewed as knowledge.²¹¹ Objectivity “defines the relevant world as that which can be objectively known.”²¹² It assumes the existence of an objective “knowable” reality which is not dependent on how or who gains that knowledge.²¹³

In light of our current gendered social hierarchies, the world which can be objectively known corresponds with men’s reality.²¹⁴ Since men control the world, they “create the world from their own point of view, which then becomes the [reality] to be described.”²¹⁵ The male epistemological stance, objectivity, does not comprehend its own perspectivity or that it presupposes the way things are.²¹⁶ “What is objectively known corresponds to the world [as men live it, and can thus] be verified by being pointed to . . . because the world itself is controlled from the same male point of view.”²¹⁷

After exposing objectivity for its maleness, feminists exposed the divide between objectivity and subjectivity, as well as other dichotomies, as a product of male power. On the one hand, women have been sexually objectified; on the other hand, they have been devalued as creatures of emotion and subjectivity. Consequently, feminists reject the objective-subjective distinction.²¹⁸ The goal is not to affirm feminine particularity and reject masculine universality, nor to reclaim female passion in place of male rationality.²¹⁹ We should reject the division between objectivity and subjectivity, between reason and emotion, and between abstract and concrete, as well as the

209. “To perceive reality accurately, one must be distant from what one is looking at and view it from no place and at no time in particular, hence from all places and times at once.” *Id.*

210. *Id.* at 99.

211. *Id.* at 97.

212. *Id.*

213. *Id.*

214. *Id.* at 121–22.

215. *Id.* at 121.

216. *Id.* at 121–22.

217. *Id.*

218. “Disaffected from objectivity, having been its prey, but excluded from its world through relegation to subjective inwardness, women’s interest lies in overthrowing *the distinction itself*,” argues MacKinnon. *Id.* at 120–21.

219. *See id.*

discourse of opposites itself, because they are invented from a position of power to maintain gender hierarchy.²²⁰

We came to view the world in dualisms.²²¹ These binary pairs came to be viewed as natural and neutral; they are mere tools describing a pre-existing reality rather than having been constructed by men to serve men's interests.²²² Feminists exposed these dichotomies as ideological social constructs driven by male power that are far from being natural or inevitable.²²³ For example, if what we consider universal is in fact a particular perspective of dominant male power, then the distinction between universal and particular collapses.²²⁴ The subjective/objective dichotomy is similarly false, because the so-called objective truth embodies a specific subjective view from the social position of dominance that is occupied by men.²²⁵ Therefore, as long as men continue to control women and male preferences continue to shape our world and discourse, such dichotomies will continue to look "general, empty of content, universally available to all, valid, mere tools, against which all else fell short."²²⁶

Accordingly, law will continue to value objectivity and neutrality, and to marginalize particular perspectives as subjective and culturally biased. Similarly, comparativists continue to maintain the fiction

220. We came to view the world generally as "a series of complex dualisms," such as reason and passion, rational and irrational, power and sensitivity, thought and feeling, and objective and subjective. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1575 (1983) [hereinafter *The Family and the Market*].

Men, who . . . created our dominant consciousness [and discourse], have organized these dualisms into a system in which each dualism has a strong . . . positive side and a weak . . . negative side. Men associate themselves with the strong sides of the dualisms and project the weak sides upon women.

Id. "Socially, men are considered objective, women subjective." FEMINIST THEORY OF THE STATE, *supra* note 200, at 97. Privileging reason over emotion or objectivity over subjectivity is traditionally male. The binary pairs, in turn, reflect the hierarchy of gender in our society—the privileged status and control of men over women. See *The Family and the Market*, *supra*, at 1575–76.

221. *The Family and the Market*, *supra* note 220, at 1575.

222. See Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 690 (2000).

223. See *id.*

224. *Id.*

225. *Id.*

226. *Id.*

that, in general, comparative facts can be objectively described from a neutral stance, rather than acknowledging that our experiences and identities always shape the way we perceive the world. This stance of objectivity serves to legitimize the status quo and to perpetuate the dominance of particular views from a position of power as the true representation of reality, while other constructions of reality are dismissed as untrue and undeserving of legal and social recognition.

Comparativists must rethink how we come to know what we know. Each of us is a "prisoner of his own experiences."²²⁷ Since we cannot eliminate our prejudices, we can at least recognize them.²²⁸ Similar to feminist legal scholars, Günter Frankenberg calls on comparativists to make a conscious effort to establish subjectivity.²²⁹ Comparative work can benefit greatly from a critical attitude towards alleged universal categories and claims to authenticity.²³⁰ We can nonetheless engage in meaningful comparisons by distancing ourselves, as long as we question the neutrality of the comparison, factor in the impact of our perspective and experience, and understand how subjective our comparisons can be.²³¹ This, argues Frankenberg, is "critical comparison."²³²

The question then becomes, is it possible for feminist or other outsider constructions of reality to attain the status of objectivity within a legal framework that recognizes multiple realities? Rather than trying to attain the status of objectivity within a discourse based on the division of objectivity from subjectivity, I argue that we can strive to discard the male epistemology of objectivity and the dichotomies it entails and adopt a concrete, experience-based, multi-perspectival epistemology and methodology.²³³ But the point is not that subjectivity is superior to objectivity. This alternative epistemology is not to be mistaken for replacing male objectivity with female subjectivity.

We need to abandon the pretense of abstract objectivity and universal knowledge and adopt a multi-perspectival way of knowing

227. Paul P. Dumont, Comment, *Radke v. Everett: An Analysis of the Michigan Supreme Court's Rejection of the Reasonable Woman/Victim Standard: Treating Perspectives That Are Different As Though They Were Exactly Alike*, 27 GOLDEN GATE U. L. REV. 255, 255 (1997) (citing Edward R. Murrow, News Commentary, Dec. 31, 1955).

228. Frankenberg, *Critical Comparisons*, *supra* note 176, at 413.

229. *Id.* at 414.

230. *Id.* at 443.

231. *Id.* at 414.

232. *See id.* 413-16.

233. Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1402 (1986).

informed by the detailed particularities of our lives. These particularities then “become facets of the collective understanding within which differences constitute rather than undermine collectivity.”²³⁴ As Ann Scales observes, if the purpose of law is indeed to decide the moral crux of the matter in real human situations, “[i]t would seem obvious that law’s duty is to enhance, rather than to ignore, the rich diversity of life. Yet this purpose is not obvious; it is obscured by the myth of objectivity which opens up law’s destructive potential.”²³⁵

The myth of objectivity exemplifies the way in which knowledge—*itself an embodiment of power*—has been used as a mechanism of exclusion and marginalization of those who do not possess the power to have their version of reality accepted. The abstract universality of the objective point of viewlessness in comparative law, and in law in general, treats the particular perspectives of the powerful as reality and defines other perspectives out of existence.²³⁶ In contrast, aware of the inextricable connection between knowledge and power, feminists practice a positive, inclusive, and empowering vision of knowledge.²³⁷

Feminist epistemology values the multiplicity of perspectives and realities. It takes multiplicity to be constitutive of reality; it sees the relational web between dominant and subordinated perspectives; and it views different perspectives as always in flux.²³⁸ Feminist legal scholars have developed several versions of such multi-perspectival jurisprudence, but one message, captured by Martha Minow, unites them: “Only through the variety of relationships constructed by many people seeing from different perspectives can truth be known and community be created.”²³⁹

Transcending our own perspective is not an impossible challenge. We can try and minimize the impact of the situated self by approaching our inquiry from an honest critical stance.²⁴⁰ For one, we should recognize that our usage of language as a means of observation and differentiation is itself rooted in our culture and

234. FEMINIST THEORY OF THE STATE, *supra* note 200, at 86.

235. Scales, *supra* note 233, at 1387–88.

236. *See id.* at 1380.

237. *Id.* at 1388.

238. *Id.*

239. Martha Minow, *Stories in Law*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 24, 34 (Peter Brooks & Paul Gewirtz eds., 1996).

240. Stramignoni, *supra* note 9, at 758.

history.²⁴¹ Nonetheless, even if we are successful in deconstructing and transcending the hegemonic grid of self/other, of subjectivity/objectivity, and expose knowledge as a mask for the hegemonic exercise of power, how would we be able to make any normative hard judgments? What norm should guide us?²⁴²

Here as well, FLT can provide useful insights to comparative legal studies. First, rather than merely deconstructing the hegemonic discourse, FLT offers a prescriptive vision, calling on us to explicitly examine our underlying substantive commitments.²⁴³ Instead of agonizing over identity, Frances Olsen calls on the comparativist to start examining his or her politics.²⁴⁴ Second, we should view our commitment to voice multiplicity and diversity as part of an expanded commitment to the true sharing of social power. Multi-perspectivity is both an epistemology and a substantive commitment. It requires a dedication to making decisions based on genuine attempts at understanding the perspectives and social circumstances of others, to making choices with care and humility.²⁴⁵ Moreover, it requires a willingness to reach results that actually produce the sharing of power with the powerless.²⁴⁶ Comparative law, I would argue, is particularly suited to serve as a subversive practice on a global scale, marrying substance and method to re-envision national, international and transnational legal regimes.

VI. ACKNOWLEDGING COMPARATIVE LAW AS POLITICAL PRACTICE

“Who would have thought that comparative law might become an invasive political enterprise with considerable practical impact . . . [a]n ally of power . . . ?”²⁴⁷

Comparative law and legal studies present themselves as divorced from politics, “without either a political agenda or a geopolitical location.”²⁴⁸ Even Frankenberg, who is a vocal critic of traditional comparative law, suggests that the politicization of comparative law is a more recent phenomena, which is tied to efforts by postcolonial

241. *Id.*

242. Carozza, *supra* note 108, at 662.

243. *See* Scales, *supra* note 233, at 1387–88.

244. Frances Olsen, *The Drama of Comparative Law*, 1997 UTAH L. REV 275, 279 (1997).

245. Jeanne M. Dennis, *The Lesson of Comparable Worth: A Feminist Vision of Law and Economic Theory*, 4 UCLA WOMEN'S L.J. 1, 10–12 (1993).

246. *See id.* at 35.

247. Frankenberg, *Stranger than Paradise*, *supra* note 10, at 260 (internal quotation marks omitted).

248. Cossman, *supra* note 86, at 542.

colonizers, both national and supra-national forces, to transplant various aspects of their legal systems and rule of law in transitional economies seeking to participate in global markets.²⁴⁹

Comparative law, however, has always had an implicit political feature to it both abroad²⁵⁰ and at home.²⁵¹ Comparativists old and new have just “carried the card of political affiliations” quietly.²⁵² As David Kennedy points out, however, the lack of discussion amongst comparativists about comparative law as a political practice can itself be seen as a political position.²⁵³ As discussed earlier, the questions of law and context, of similarities and differences, of west and the rest, all support viewing comparative law as a political practice.²⁵⁴

Frances Olsen agrees with Frankenberg’s main critique: “Comparative law has become an invasive political enterprise and it is important for those engaged in it to be self-critical. Comparativists should recognize the power relations involved.”²⁵⁵ It is the self-

249. Frankenberg, *Stranger than Paradise*, *supra* note 10, at 260.

250. See Carozza, *supra* note 108, at 659 (citing Jorge L. Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425 (1997), who shows how Rene David’s classification of Latin American law in one way over another served to expand the liberal democratic European tradition).

251. Comparative law has often been used to effectively reinforce or challenge the social and political discourse in one’s home legal system. Amalia Kessler, for example, argues that American lawyers and scholars contrast European legal traditions and “commitment to inquisitorial modes” of justice and to bureaucratic judicial structure “in order to highlight the supposedly distinctive . . . virtues” of the American legal system as committed to the protection of the individual from the state and to values of equity and justice. In this way, she argues, American comparativists have both shielded their institutions from any threat of reform as well as elevated the status of the legal profession. See Amalia D. Kessler, *The Making and Debunking of Legal Tradition*, 16 ROGER WILLIAMS U. L. REV. 129, 130 (2011).

252. Carozza, *supra* note 108, at 659.

253. David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 626 (1999).

254. See Carozza, *supra* note 108, at 659 (citing Esquirol, *supra* note 250, at 425); Kennedy, *New Approaches to Comparative Law*, *supra* note 253, at 626.

255. Olsen, *The Drama of Comparative Law*, *supra* note 244, at 278. Olsen argues, however, that there is a limit to how much of their own political agenda comparativists serving as law reform consultants can in fact achieve. *Id.* at 279. Comparativists may be able to utilize the comparative work to influence political development in their own countries, to challenge underlying assumptions and the status quo in their own legal system; they will not likely be able to successfully push such agenda in the foreign place in which they are serving as experts. *Id.* It will take the people of that country to carry out social change. *Id.* So indeed, the comparativist has to know his or her political agenda in performing the comparative work, but also in order to serve some domestic agenda. *Id.* at 280. The hope is, suggests Olsen, that

conscious and explicit discourse of the politics of comparative law and of comparative law (and any law) as political practice, as an ideology of power, that marks the most important and promising contribution FLT can make to comparative legal studies.²⁵⁶

Critical feminist legal theories posit that the personal is political, that law's objectivity and universality is political.²⁵⁷ As Brenda Cossman observes, "[w]e make no claims to neutrality in our work, but rather begin from an explicitly and unapologetically political location."²⁵⁸ So what are the political locations of comparative law?

In his article on *Comparativism and International Governance*, David Kennedy explores the roles comparativists play in international governance.²⁵⁹ Kennedy argues for situating comparative law within the broader problems of international governance, where it plays several important roles.²⁶⁰ Far from being disinterested outside observers, we should see comparativists for what they are: "people with . . . political, professional, and personal projects of . . . [global] governance."²⁶¹

Comparative law sees itself as specifically *not* about politics or governance projects.²⁶² As such, for the comparativist, colonization and imperialism, global trade, or the migration of ideas and legal concepts are not *projects* at all, but merely facts and history serving as backdrop to his comparative understanding.²⁶³ The comparativist does not seek power or aspires to rule but rather seeks to further intellectual understanding.²⁶⁴

Take, for example, comparative law's traditional focus on private law. The most central comparative law stories told by leading comparativists, such as the difference between common law and civil law or the reception of Roman law, are perceived as private law stories, a matter of non-governmental ordering.²⁶⁵ They most often attribute the migration of particular legal rules to incidental borrowing and transplantation, to ad-hoc advancement of

"including formerly exotic countries in the western regime of law might somehow undermine the hegemonic status of the West." *Id.*

256. Carozza, *supra* note 108, at 662 ("There is no question that it can give us new ways to revisit the basic questions of comparative law and can generate important insights.").

257. *See supra* notes 66–68 and accompanying text.

258. Cossman, *supra* note 86, at 542.

259. Kennedy, *New Approaches to Comparative Law*, *supra* note 253, at 551.

260. *Id.*

261. *Id.*

262. *Id.* at 554.

263. *Id.*

264. *Id.* at 556.

265. *Id.* at 583–84.

autonomous legal expertise, or to the natural extension of broad legal and cultural families, rather than to a strategic political choice or struggle.²⁶⁶ In sum, private comparative law distances itself from governance.²⁶⁷

In contrast, Kennedy advocates seeing comparative law's concern with a-political intercultural and cross-legal understanding as comparative law's strategic (and hidden) project of governance.²⁶⁸ To further develop his argument, Kennedy draws on post-colonial feminist critique of parallel dynamics of governance within the field of international law—the insight that international law's overt disengagement with culture (rather than viewing international law as one cultural form amongst many) is itself a form of governance.²⁶⁹

In order to uncover comparative law's connections to governance, Kennedy offers a rough typology of three broad geographic subdivisions²⁷⁰ and two broad methodological styles²⁷¹ within comparative law. He demonstrates their different strategies of disengaging from governance, by either presenting their involvement as merely that of an outside independent expert facilitating someone else's project, or as purely an intellectual matter of developing knowledge (granted, often focused on reinforcing the uniqueness of western legal tradition, arguing about what is required to sustain the

266. *Id.* at 583.

267. Comparativists dealing with public law similarly distance themselves from governance. While private law comparativists maintain the fiction that private law has nothing to do with politics, public law comparativists are forced to recognize the politicization of public law, but proclaim to leave it to the politicians and the governing institutions.

268. Kennedy, *New Approaches to Comparative Law*, *supra* note 253, at 580–81.

269. *Id.* at 578–80.

270. Those focused on western traditions, i.e. first world countries; those focused on non-western exotic legal systems; and those focused on universal frameworks. *Id.* at 593–94.

271. The “technocrats” are concerned with concrete harmonization/modernization projects, which require their comparative expertise, and the “culture vultures” view themselves as intellectuals and stress history and cultural specificity. *Id.* at 594. Consequently, the western tradition first world technocrat engages with harmonization projects, while the first world culture vulture tackles a variety of classic comparative law subjects. *Id.* Within the non-western exotic context, the technocrat focuses on development and rule of law projects, while the culture vulture pursues areas studies. *Id.* Lastly, the technocrat's project at the universal arena typically advances international economic law, while the universalist culture vulture focuses on legal families and universal private law. *Id.*

west against the rest, or observing what is universally human) and not a matter of politics or power.²⁷²

Next, Kennedy unveils three key ways in which, he argues, comparativists participate in international governance.²⁷³ All three demonstrate the broader argument, that not only are comparative law's methods and subjects of inquiry far from being fixed and objective, but that they directly serve to construe and perpetuate particular exclusionary normative frameworks and power relations on a global scale.²⁷⁴

First, the comparative practice of "finding similarities" and differences, of exoticizing and normalizing, is itself a normative political practice.²⁷⁵ Comparativists facilitate the legitimacy of international law regimes, such as universal human rights, by negotiating the tension with cultural differences (either reassuring that some cultural differences nonetheless share familiar commonalities and can be accommodated or assimilated, or that they are so exotic that they should just be left outside the reach of international law).²⁷⁶

Second, as we have seen, comparativists participate in the broader social project of constructing and perpetuating law in general as a-political, non-ideological, and separate from power structures within society.²⁷⁷ For example, study of foreign legal systems is often used to legitimize the domestic operations of law and to reinforce the social and political discourse in one's home legal system.²⁷⁸ Amalia Kessler argues that American lawyers and scholars contrast European legal traditions and commitment to inquisitorial modes of justice and to bureaucratic judicial structure in order to highlight the supposedly distinctive virtues of the American legal system as committed to the protection of the individual from the state and to values of equity and justice.²⁷⁹ Such discourse of equity, justice, and individual rights in America masks the prevailing social structures of domination and disempowerment of certain members of American society, such as women and racial and ethnic minorities, and helps deflect calls for reform to the American justice system.²⁸⁰

272. *See id.* at 595–606.

273. *Id.* at 614–15.

274. *See id.*

275. *See id.* at 614–18.

276. *See id.* at 615–21.

277. *See id.* at 629–33.

278. *See Kessler, supra* note 251, at 130.

279. *Id.*

280. *Id.*

Third, comparativists play a direct ideological and practical role in constructing and perpetuating a vision of private law as depoliticized.²⁸¹ Whether in the form of harmonization projects among developed nations or through private law transplants in the developing world, such private law constitutes a sort of seemingly a-political international regime outside the sphere of sovereignty and traditional international law.²⁸² However, developing a system of rules to be implemented by the market and commercial actors without state intervention is itself a governance project.²⁸³

As feminist critique of the private and the public has demonstrated, the allocation of certain areas to private law or to public law, the separation of the market and the family, and the distinction between intervention and non-intervention in private relations are directly tied to power relations between men and women and have been a particularly effective way in which law constructs and perpetuates power structures within society while appearing as neutral, natural, and a-political.

In light of the predominance of the public-private dichotomy and of privacy in legal and social discourse, it is not surprising that the public-private dichotomy has been central to FLT.²⁸⁴ Feminists have exposed the ideology inherently embedded in the notion of *privacy* and the public-private dichotomy. “Privacy is not a coherent concept and it does not lead to any indisputable policy choices” writes Frances Olsen.²⁸⁵ Elsewhere she explains that “[p]rivate’ is not a natural attribute nor descriptive in a factual sense, but rather is a political and contestable designation,”²⁸⁶ a normative designation of how things should be treated,²⁸⁷ fueled and informed by struggles over power.²⁸⁸ Struggles over the meaning of gender and the role of

281. Kennedy, *New Approaches to Comparative Law*, *supra* note 253, at 622–29.

282. *Id.* at 623.

283. *Id.* at 624.

284. Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 281, 281 (S.I. Benn & G.F. Gaus eds., 1983).

285. Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 862 n.73 (1985) [hereinafter *The Myth*].

286. Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 319 (1993) [hereinafter *Public/Private Distinction*].

287. *Id.* at 320 n.2; *see also* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 4 (1992) (“[T]he terms ‘private’ and ‘public’ occur in various senses, which are distinct though interrelated . . . these terms typically have both descriptive and normative meanings.”).

288. *Public/Private Distinction*, *supra* note 286, at 320.

men and women in society particularly construe and inform the public/private divide; men's sphere is the public sphere whereas women are relegated to the private sphere.²⁸⁹

Feminist theories have advanced several lines of critique of the public/private dichotomy.²⁹⁰ Of particular insight to comparativists are the challenges leveled against the public-private distinction altogether, arguing that law or the state actually determine what is public and what is private. Rather than focusing on where and how we draw the public-private line, some feminist scholars, including myself, question the public-private dichotomy altogether and reject the notion of sharp demarcation between public and private. "'Private' and 'public' exist on a continuum."²⁹¹

Frances Olsen has consistently argued that the public-private dichotomy is false and that the state is constantly implicated in the *private* sphere.²⁹² She illustrates this point by focusing on state intervention in the family, arguing that the terms *intervention* and *nonintervention*, are largely meaningless.²⁹³ Because the state is implicated in the formation, functioning, and distribution of power within the family, it is meaningless to ask whether the state does or does not intervene in the family.²⁹⁴ On the other hand, the use of the terms *intervention* and *nonintervention* masks the policy choices the state is making.²⁹⁵ According to Olsen, whichever family status quo the state chooses to support, its choice is a political choice that

289. Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN'S L.J. 47, 61 (1997).

290. Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847, 847 (2000).

291. Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 977 (1991) (observing that "[t]here is no realm of personal and family life that exists totally separate from the reach of the state. The state defines both the family, the so-called private sphere, and the market, the so-called public sphere."). Similarly, Deborah Rhode argues that empirically, "[t]he dichotomy of 'separate spheres' has always been illusory. The state determines what counts as private and what forms of intimacy deserve public recognition." Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1187 (1994). Public opportunities and policies concerning tax, welfare, and childcare shape private choices just as private family considerations constrain public participation in the workplace. *Id.*

292. See *The Family and the Market*, *supra* note 220, at 1508; *The Myth*, *supra* note 285, at 842; Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 113 (1989).

293. *The Myth*, *supra* note 285, at 842.

294. *Id.* at 837, 842.

295. See Schneider, *supra* note 291, at 985 ("Although social failure to respond to problems of battered women has been justified on grounds of privacy, this failure to respond is an affirmative political decision that has serious public consequences. The rationale of privacy masks the political nature of the decision.").

impacts the family power dynamics.²⁹⁶ Consequently, after exposing the malleability of the public-private distinction, one comes to the realization that the state should not be allowed to justify unjust actions and policies based on an imaginary public-private line.²⁹⁷

Feminist critics have similarly challenged the use of the public-private divide to dichotomize the home and the family against the marketplace.²⁹⁸ Olsen, for example, focuses on the distinction between the privateness of families (*women's sphere*) and the publicness of markets (*men's sphere*).²⁹⁹ The dichotomization of market and family pervades our discourse and our culture to the extent that we tend to forget that our family and market arrangements are human creations.³⁰⁰ Thus, we must reject the family-market dichotomy in order to resolve real conflicts.³⁰¹

If law and culture then serve to construe both family and market, serve to define the scope and the line demarcating and differentiating personal relations from commercial relations, there is nothing inherently more or less comparable between the different legal regimes of contracts or property as opposed to family law. Nothing in the so-called private areas of law that makes them more suitable for harmonization or transplantation between different legal orders as opposed to the other aspects of law that seem incomparable, resisting convergence, because they are within the public sphere of culture and tradition. Whether engaged in harmonization projects among industrialized economies or in the export of legal models to the developing world, comparativists should acknowledge that such private law is part of the global public agenda and should critically investigate the implications of forwarding such agenda.

In sum, those engaged in comparative legal studies and in comparative projects need to be self-critical and recognize the power relations involved, whether we engage in harmonization and rule of law projects or in the seemingly mere intellectual projects of understanding and migration of ideas and legal concepts. It is such

296. *The Myth*, *supra* note 285, at 843.

297. *Public/Private Distinction*, *supra* note 286, at 324–25.

298. *The Family and the Market*, *supra* note 220, at 1498.

299. *Id.*

300. *Id.* at 1566. Even more so, the division of the world into separate public and private spheres facilitates the oppression of women. Especially with regards to the embodiment of the private sphere in the home and the family, feminists have argued that privacy doctrine “shelters from state regulation a domain in which women have unequal power and are physically vulnerable.” Higgins, *supra* note 290, at 850.

301. *The Family and the Market*, *supra* note 220, at 1567–68.

self-conscious and explicit discourse of the politics of comparative law and of comparative law (and any law) as political practice, as an ideology of power, that marks the most important and promising contribution FLT can make to comparative legal studies.

VII. CONCLUSION

Over the last few decades, comparative law and comparative legal studies have been amidst an existential identity crisis. Often criticized for lacking in theory, being Euro-centric and doctrinally oriented, questions abound on whether comparative law is indeed an independent academic discipline. Furthermore, even if better viewed as a methodological framework, there is no agreement on how to engage in comparative legal studies and what methodological tool-kit is available to the comparative scholar and lawyer. While all over the world many policy and law reform projects, harmonization projects and academic research endeavors flourish under the broad umbrella of comparative legal studies, they most often proceed with very little theorizing about the nature of the comparisons or consciousness of the inherent challenges that such comparisons entail.

Similar to comparative law and comparative legal studies, feminist legal theories have been questioned both externally and from within on whether they represent a unified discipline with core values and methods of inquiry; have been challenged on the scope and goals of feminist inquiries; and have been criticized for being essentialist and ethnocentric. Rather than shying away from such challenges, feminists have embraced them as a way to move forward. Comparative legal scholars and lawyers could similarly benefit from embracing the multiple purposes of comparative legal studies and comparative law projects while recognizing shared commonalities. They could learn from FLT how to broaden the discourse and approach other legal systems with humility and a genuine interest for mutual learning of both the foreign system and one's own. They could particularly learn from FLT how to avoid the extremes of both ethnocentrism and cultural relativism, thus overcoming the fear of not being truly able to know the other legal system or to draw meaningful comparisons based on observed legal similarities and differences.

Feminist jurisprudence about the production of knowledge and objectivity as epistemology can be similarly helpful for comparativists. Whereas traditional comparative legal studies present the juxtaposition of one legal system against another legal system (often one's home legal system) as an objective neutral scientific project, feminist jurisprudence exposes such epistemological standpoint of point of viewlessness as masking implicit biases and normative standards. Moreover, insights from feminist jurisprudence

also help shed light on the inherent political dimensions of comparative legal studies rather than the purported objective universal assessment of various legal systems and legal rules so often present in comparative legal scholarship and reform work. As a matter of methodology, the diversity of feminist legal theories and the ability to embrace multiple voices and experiences can help comparative scholars break down the binary discourse of west/rest, common law/civil law, and so forth. Feminist practices of perspective-shifting and of seeing ourselves as we see the other can further allow comparativists to recognize the partiality of their perspective and acknowledge unstated norms at the base of their comparisons. Such epistemology and methodology will allow us to re-engage in comparative legal studies in a way that is better suited to the era of globalization.

Comparative law can and should move forward strategically in a transformative way. If comparative legal studies take all these insights from feminist legal theories seriously and truly build on them to dismantle entrenched categories and practices, we may be able to finally realize its ability to “challenge entrenched categorizations and fundamental assumptions in one’s own and others’ legal cultures” and fulfill its true potential for “sharpening, deepening and expanding the lenses through which one perceives law.”³⁰²

302. Curran, *supra* note 78, at 658.