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Orientalism, Occidentalism, and the Control of Law: The Dark Side of Comparative Law

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Comparative lawyers have traditionally felt compelled to assert the utility of their craft for improving legal scholarship and innovation. Yet, these humanistic and functional arguments often forget the deleterious effects that legal comparisons can have when appropriated by various actors who are uninterested in legal self-reflection or improvement but instead seek to suppress domestic critiques. Such suppression is enacted by delegitimizing domestic critiques through contrasting negative aspects of foreign legal practice with idealizations of domestic law. This dynamic was classically highlighted in legal anthropologist Laura Nader's work on the use of cross-cultural legal comparison to attack feminist critiques in both Euro-American and Islamic societies.

This potential "dark side" of comparative law is increasingly at play in the rise of global authoritarianism and democratic backsliding. The pervasiveness of this "dark side" has in part been obscured by the continued use of old geographical proxies such as "the West" or "Orientalism" to stand-in for the dangers of legal comparison in cross-cultural contexts. The Sino-American relationship, in particular, highlights how the use of these geographical shorthands blunts proper focus on the evolving global power dynamics in which cross-cultural representations are made by authoritarian interests. A focus on power over geography, moving beyond asserting new geographical proxies such as "the Global South" or "Occidentalism," is both analytically necessary and ethically demanded to help circumvent such authoritarian abuse.

While rigorous comparative legal methods may in fact be salutary for understanding and improving modern law, it is incumbent on comparative lawyers to remain cognizant of how this potential "dark side" acts to repress domestic critiques even as they may conceive of their work as transcending traditional critiques of ethnocentrism.

I. INTRODUCTION

Most 19th-century Western representations of Chinese society emphasized some variation of China's perceived alegality, or, at best, a draconian form of law anathema to asserted "rule-of-law" values held in the West.[1] Such representations justified any number of other claims about how modern Western nations should relate to China, or were used to imagine salutary foreign influence on Chinese law.[2] At the same time, representations of Western law in China became intertwined in judgments of Sino-Western relations,[3] and endemic to debates over China's own legal reforms.[4] In particular, the rise of the Chinese Communist Party was accompanied by a particular discourse about the depravity of Western, specifically American, law which it used to justify its own revolutionary agenda.[5] In the late 20th-century, notably after China's post-1978 reform period, this pattern of mutual representation would complexify to include such critical cross-cultural claims but also, for at least a few decades, more optimistic representations predicated on some form of potential convergence and admiration.

Aspects of this Sino-Western history of cross-cultural representation map onto the basic conceptual structure of "Orientalism" as popularized by Edward Said to describe historical European representations of Middle Eastern societies.[6] Said demonstrated the link between negative characterizations of the Middle East and any number of colonial and other aggressive actions taken by European nations as seminally, and inextricably, grounded in power dynamics even when produced by well-intentioned foreign scholars. The cogency of Said's analysis led "Orientalism" to be applied to other geographies of cross-cultural representation, and in social arenas beyond Said's own literary focus.[7] Orientalism as an analytical frame has thus been directly applied to legal representations by numerous scholars,[8] as well as to Sino-Western affairs.[9]

Yet, the great academic success of Orientalism has often left its core emphasis on power and represen-

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1 Two classic texts are: *Teemu Ruskola*, China, the United States, and Modern Law (2013) and *Chen Li*, Chinese Law in Imperial Eyes: Sovereignty, Justice, and Transcultural Politics (2016).

2 For the Sino-American aspects of this history: *Jedidiah Kroncke*, The Futility of Law and Development: China and the Dangers of Exporting American Law (2016).

3 In recent decades there has been a fluorescence in late imperial and early modern Chinese legal history, much of which grapples with the nature of Chinese legal reform before and after the collapse of the dynastic system in 1911. For one overview of the tenor of these debates: *Xu Xiaoqun*, Judicial Reform in Early Twentieth-Century China, 1901–1937 (2008).

4 Struggles over Chinese legal reform often involved idealizations of past Chinese legal practices as well as very particular understandings of foreign legal practice. For one example in the highly expressive arena of criminal law: *Jerome Bourgon*, Abolishing 'Cruel Punishment,' Modern Asian Studies 37 (2003) 851–862.

5 The post-1920s competition between the Guomingdang (GMD) and Chinese Communist Party often highlighted the affiliation of the GMD with American law. While the truth of this in a material sense is highly suspect, it nevertheless led to clashes over the nature of U.S. legal actions both in China and the U.S., especially in regards to civil rights. See, representatively: *Robert Shaffer*, A Rape in Beijing, December 1946: GIs, National Protests, and U.S. Foreign Policy, Pacific Historical Review 69 (2000) 31–64; *Yunxiang Gao*, W.E.B. and Shirley Graham Du Bois in Maoist China, Du Bois Review 10 (2013) 59–85.

6 *Edward Said*, Orientalism (1978).

7 For a modern extrapolation of Said's original argument to a broader indictment of modern law: *Wael Hallaq*, Restating Orientalism: A Critique of Modern Knowledge (2018).

8 For a complementary analysis and review of the larger field: *Thomas Coendet*, Critical Legal Orientalism: Rethinking the Comparative Discourse on Chinese Law, The American Journal of Comparative Law 67 (2019) 775–824.

9 For an overview, and critique, of the application of Said's work to China: *Arif Dirlik*, Chinese History and the Question of Orientalism, History and Theory 35 (1996) 96–118.

tation side-lined for a set of static geographic shorthands that stultify analysis of more complex patterns of representation, and handicaps adapting analysis to shifting inter- and intra-national power dynamics. For example, the scope and scale of power asymmetries between China and Western nations, and in particular within Sino-American relations, has often diverged from those found in the formal colonial relationships which inspired much of Orientalism's academic progeny – a fact itself noted by some scholars of China discomfited by the concept's too-easy migration. Moreover, Chinese representations of Western societies, again in particular with regard to law, have been robust and systemic since the 19th-century. The result of which is a fully analogical practice of what often is called "Occidentalism."[10] Clearly understanding the dual channels of Sino-American legal representations thus necessitates tracing the specific and shifting material context of the underlying relationship to avoid the trap of portraying China as solely a passive victim of Western misrepresentations.[11]

As such, in the post-1978 Sino-American relationship there has been both a re-emergence of old denigrating "Orientalist" tropes about Chinese law, and a massive material entanglement of the United States and China which inspired new Occidentalist discourses and debates within China.[12] Also present, though ever in the minority, has been some optimistic American views of Chinese law[13] and its future potential – if largely in mimicking American legal values.[14] Howbeit, in the last decade there has been yet another reversal in this discourse, with the CCP taking a more aggressively critical view of American law[15] akin to its pre-1949 rhetoric,[16] and many in the United States falling back to a more Cold War-like discourse on Chinese law.[17] The consequences of this, especially again as the two countries have become so materially intertwined, has yet to play out. And, however one may view earlier eras of Sino-American relations, such mutual representations are now traded by two countries that are both preeminent global super-powers.

The impact of this broader geo-political shift has thrown Sino-American legal studies into disarray as scholars reconsider how to handle not simply these geo-political realities but also the audience for their work. While this larger question is now center stage for legal scholars in and outside of China, the very nature of this changing landscape provides a critical aperture to consider whether the conceptual terminology and reductive shorthands often at play in modern claims of "Orientalism" are effective in illuminating Sino-American legal relations – and in any of the other contexts in which geographical labels derived from the 19th and 20th centuries are re-applied uncritically to a multipolar and post-colonial world.

What the 21st century has made obvious in Sino-American relations is that which will be called the "dark side" of comparative law. This dark side has become a recurrent tool by authoritarian interests across the globe. Sharing much with past Orientalist practices, it goes beyond older tactics of denigrating foreign law to justify military or other interventions across some conceptually clear East/West, North/South, or colonial/post-colonial set of geographical divides. Instead, an increasingly prominent representational strategy by authoritarian interests is to use negative representations of foreign law as a method of domestic, internal control. Resilient authoritarian and backsliding democratic regimes alike now frequently seek to suppress dissent and social critique by contrastive comparison with other legal traditions. Much like Said's Orientalist European scholars, much of this

10 Like Orientalism, Occidentalism has emerged as a concept that encompasses a wide range of representational practices in different nations: *Chen Xiaomei*, Occidentalism: A Theory of Counter-Discourse in Post-Mao China (1995) and Wang Ning, Orientalism versus Occidentalism?, New Literary History 28 (1997) 57–67.

11 The misfit of concepts such as "Orientalism" or "legal imperialism" to Sino-American legal affairs has been addressed many times. For one take: *Donald Clarke*, Anti Anti-Orientalism, or Is Chinese Law Different? The American Journal of Comparative Law 68 (2020) 55–94. The major limitation of this article is that it focuses on the consequences of such conceptual limits for understanding the material reality of the modern Chinese legal system, but resists addressing Said's original and fundamental concern with power as corrupting any such accurate understanding in international relations.

12 *Samuli Seppänen*, Ideological Conflict and the Rule of Law in Contemporary China: Useful Paradoxes (2016).

13 As in any cross-cultural context, some of these positive visions have been produced to serve pre-existing agendas rather than as the result of any serious academic inequity. A representative, and now classic, critique is contained in the chapter entitled "Burning Forest" in Simon Leys, Chinese Shadows (1977). A more contemporary critique in the context of dispute resolutions is found in: Fu Hualing, Understanding People's Mediation in Post-Mao China, Journal of Chinese Law 6 (1992) 211–246. Especially in ADR, such examples were, until recently, recurrent: Kevin Clark, The Philosophical Underpinning and General Workings of Chinese Mediation Systems: What Lessons Can American Mediators Learn?, Pepperdine Dispute Resolution Law Journal 2 (2001) 117–139.

14 *Jacques de Lisle*, Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond, University of Pennsylvania Journal of International Economic Law 20 (1999) 179–308; *William Alford*, Exporting the 'Pursuit of Happiness,' Harvard Law Review 113 (2000) 1677–1697.

15 While internal study of foreign legal models is still common within the Chinese government, the CCP is unbridled in their public disdain for the reality of American legal practice. Every year, a report to this effect is published in China – a twin to a parallel report put out by the U.S. State Department on human rights in China. Most recently: The Report on Human Rights Violations in the United States in 2020 (24 March 2021). Available at: http://www.xinhuanet.com/english/2021–03/24/c_139832301.htm.

16 Often forgotten today, the CCP's opposing party during the Chinese Civil War, the Guomindang, did largely lean into, at least in international forums, their affiliation with American law especially after the 1920s. However, their growing confidence led in the 1940s to more active assertions of the novelty and worth of a particularly Chinese take on modern legal reform and critiques of Western law. For example, *Ju-Ao Mei*, China and the Rule of Law, Pacific Affairs 5 (1932) 863–872 and *Chu Cheng*, On the Reconstruction of the Chinese System of Law (1947).

17 For the mutual concern with cross-cultural legal critique obscuring mutual authoritarianism in the modern Sino-American context: *Jedidiah Kroncke*, Moving Beyond the Future Now Past of U.S.-China Legal Studies: Re-Opening the American Legal Mind? Virginia Journal of International Law 61 (2020) 116–158.

contrast is made using the academic production of well-intentioned academics who either do not anticipate, or simply disavow, such use of their work. Massive proportions of the human population now reside in countries where legal comparisons in this mold drown out any of the reflective comparison which comparative lawyers have often held up as their ideal impact.

This pattern of domestic control is not without its own long-standing precedents, and here the pioneering work of legal anthropologist Laura Nader on such "controlling comparisons" is instructive. Nader identified decades ago how countries across the traditional Orientalist geographical divide (specifically in the United States and in various Islamic regimes) used negative representations of the legal status and condition of women in other societies to dampen and suppress women's domestic claims for political and social equality. Here such domestic claims were cast by patriarchical interests as working to undermine women's genuine equality by reference to women's inferior legal status abroad as either constituting a false promise of emancipation or a threat to current empowerment. Nader demonstrated how a more complex and shifting understanding of power within and between societies required understanding both the phenomena traditionally grouped under Orientalism and Occidentalism, but also such representations as applied across power asymmetries within any country.

Nader's emphasis on power and identity construction as enabling comparison to act as a form of domestic social control is highly evocative for an era where not only Sino-American relations have between transformed and disrupted but also the entire post-World War II international order has been upended. With often great populist fervor, national political dynamics are driven by attempts to rearticulate national identities among such destabilization.[18] Whether it be the policing of protest, the brutal treatment of minoritized populations, or any other genuine issue of legal critique, academic work is increasingly used against the particular intent of its producers by those who have greater access and resources to redeploy critiques of foreign legal practices to drown out domestic critiques on the very same subjects.

For comparative lawyers, this means that ignoring the dark side of legal comparison is both analytically and ethically deficient. While the progressive teleology of modern knowledge production may still be possible – advancing concrete empirical and theoretical understanding of law through comparative methods – there are increasingly many contexts where comparative lawyers may, at best, be disruptors of the dark side of legal comparison at home rather than protagonists of advancing any concrete advancements in global legal understanding.

Implicit in this duty, with much purchase outside legal studies as well, is putting aside some of the critical geographical shorthand of the past to more clearly see that this disruptive action has to be centered domestically, to undermine the controlling potential of comparison intra-nationally, as much as it was presumed to be needed inter-nationally in the past. Certainly, many Chinese comparative law scholars have been forced to reckon with this issue domestically in the last decade, and such awareness is spreading to scholars in post-colonial and other societies where critiques of "the West" or "the North," on their own, are insufficient for confronting authoritarian movements within their own countries. Among Western nations, the United States forefront among them, the uglier tides of authoritarian populism are often driven by denigrating reference to foreign nations which again obscures their own parallel authoritarian threats.

II. LEGAL COMPARISON: ACADEMIC UTOPIA OR SOCIAL CONTROL?

1. The Comparativist's Corrupted Utopia

Most comparative lawyers spend some portion of their career writing in defense of their methodological enterprise.[19] This defense is rarely reactive – provoked in response to an external critique – but proactive in asserting the merits and benefits of critical comparative legal analysis. For some, this is a more nebulous defense that focuses on the humanistic possibilities of improving cross-cultural understanding and empathy.[20] Others emphasize more social scientifically-oriented grounds where comparative analysis can stimulate legal innovation by advancing empirical and theoretical

18 After a few years of emphasis on the rise of global populism, its source and nature have become a full academic cottage industry. For an early summery in this wave: *Benjamin Moffitt*, The Global Rise of Populism, (2016). For a representative critique of early accounts: *David Art*, The Myth of Global Populism, Perspectives on Politics 18 (2020) 1–13.

19 Almost all modern journals devoted to "comparative law" now have a long history of periodic review articles on the field's lack of penetration in legal studies more broadly. Notable classics include: *Otto Kahn-Freund*, The Use and Misuses of Comparative Law, Modern Law Review 37 (1974) 1–27; *Eric Stein*, Uses, Misues – And Nonuses of Comparative Law, Northwestern University Law Review 72 (1978) 198–216.

20 *Hugh Scogin*, 'Civil Law' in Traditional China, in: Bernhardt and Huang (eds.) Civil Law in Qing and Republican China (1994) 13–41; *Tom Ginsburg*, Studying Japanese Law Because It's There, American Journal of Comparative Law 51 (2010): 15–25.

legal knowledge.[21] The unprovoked nature of this defense speaks to what many comparative scholars felt, or feel, is their marginality in legal debates or law-making process, and their under-appreciation in their domestic legal academies. *In nuce*, what the world has always needed was more comparative law.

The traditional response to this type of pro-comparative law argument was routinely made again not by outsiders but by other still-cosmopolitan scholars who nevertheless claimed that legal comparison was rarely productive. This rejoinder took two general forms: (1) legal comparison was impractical because law is so socially embedded in a particular national tradition, or (2) comparative law failed on more epistemological grounds of cultural comparability.[22] Out of this internal debate emerged another set of assertions and rejoinders on whether comparative law was itself best conceptualized as a coherent field of inquiry or simply a set of particular methodologies.[23]

The historical backdrop of these debates included emphasizing local and global legal histories where legal influence and borrowing was a constant. It is now trite to note that legal interconnection and transplantation were the historical norm, rather than the exception, even if particular legal traditions did not openly acknowledged such engagements.[24] Yet, these processes were rarely the product of any form of disciplined and studied academic inquiry, and tended in the main to reflect exigencies of trade or cultural diffusion.[25] Even when such borrowing was inspired by foreign examples, the intellectual and empirical coherence of these reform agendas were commonly more the products of international status and perception than critical legal analysis.[26]

Today, this primarily internal back-and-forth among comparative lawyers has given way to a world where academic legal comparison is anything but rare. It is rampant. No longer is cross-national legal comparison the sole purview of specialized legal scholars; law as a variable of analysis is used in the whole gamut of modern social sciences.[27] Moreover, the routinization of such comparison in academic and international institutions has exploded exponentially in recent decades.[28] The transnationalization of legal regulation and the global circulation of legal ideas and practices would seem to offer up a dream world for the comparative lawyers of the past.

Instead, the laments of comparative lawyers have shifted. The traditional epistemological critique of the impossibility of legal comparison, while perhaps still coherent at some level of generality, has been sidelined by the practical reality of the sheer volume of legal comparison now produced globally. Yet, for those who long championed the benefits of comparative methods, their marginality remains as they are now compelled to decry the poor, if not wholly misleading, quality of the academic comparisons being made.[29] It is a bitter irony that generous funding and eager audiences have emerged for legal comparison – but just not the type envisioned and practiced by critical comparative lawyers.

Part of this perverse irony is that much of this legal comparison appears to have had the opposite effect than argued for by comparative lawyers: instead of promoting self-critique it has rationalized ideological priors. Now, comparative lawyers find themselves in a different defensive crouch – showing how other professional academics use legal comparison not to destabilize their presumptions in

21 The caution this article raises is advanced even though the author has long been a proponent of the functional value of comparative legal methods. For an account of a view which contemplates the dangers of solely focusing comparative analysis on foreign nations: *Jedidiah Kroncke*, Legal Innovation as a Global Public Good: Remaking Comparative Law as Indigenization, in: Dann et al. (eds.), The Global South and Comparative Constitutional Law (2020) 110–140.

22 Again, almost all modern journals devoted to "comparative law" now have a long history of periodic articles claim that legal comparison is essentially impossible or impractical. Perhaps the most well known representative of this position, even though his own position has evolved over time, is Pierre Legrand. The energy of Legrand's critiques, and responses to them, led to a full issue of the American Journal of Comparative Law devoted to the impact of his work. For an overview: *Russell Miller*, On Hostility and Hospitality, The American Journal of Comparative Law 65 (2017) 91–206.

23 For a qualified defense of the "comparative law as field" position, with careful presentation of the "comparative law as method" position: *Catherine Valcke*, Comparing Law: Comparative Law as Reconstruction of Collective Commitments (2018).

24 The classic modern study is: *Alan Watson*, Legal Transplants (1974). For an overview of the general idea of legal transplantation inspired by Watson: *John Cairns*, Watson, Walton and the History of Legal Transplants, Georgia Journal of International and Comparative 41 (2013) 637–696.

25 There are notable historical exceptions, especially in the modern era, but whether any comparative legal analysis can be, or should be, truly acultural is ever debatable. As the legal reforms of Meiji Japan are often held up as an example of self-reconstructive use of comparative law, a critical view of Japanese engagement with Western law is provided in: *Douglas Howland*, International Law and Japanese Sovereignty: The Emerging Global Order in the 19th Century (2016).

26 The relative marginality of "comparative law" as a field compared to applied efforts to reshape colonial and post-colonial countries has been a recurrent modern dilemma of more cosmopolitan-minded comparative lawyers. In the U.S. context: *Jedidiah Kroncke*, Law and Development as Anti-Comparative Law, Vanderbilt Journal of Transnational Law 40 (2012) 477–555. For a critical review of the more active use of comparative law in modern Chinese reform, subject to its own quite stark limitations: *Taisu Zhang*, The Development of Comparative Law in Modern China, in: Reiman/Zimmerman (eds.), Oxford Handbook of Comparative Law (2018), 228–253.

27 The most comprehensive and systematic treatment of modern debates in comparative law and their relationship to large trends in the interdisciplinary study of law: *Mathias Siems*, Comparative Law (2018).

28 The explosive growth of large-N quantitative studies comparing legal systems has been one of the recurrent objects of criticism by comparative lawyers on methodological grounds. Their attractiveness to global institutions has remained, still, quite secure: *Kevin Davis*, Legal Indicators: The Power of Quantitative Measures of Law, Annual Review of Law and Social Science 10 (2014) 37–52.

29 The World Bank's "Doing Business Report" has been the poster-child for claims of the abuse of comparative legal analysis by global reforms agendas: *Ralf Michaels*, Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law, American Journal of Comparative Law 57 (2009) 765–795; *Gerard McCormack*, Why 'Doing Business' with the World Bank May Be Bad for You, European Business Organization Law Review 19 (2018) 649–676.

order to reformulate superior understandings and prescripts, but to produce methodologically-dubious studies which only reinforce their normative and descriptive presumptions.[30]

Perhaps more critically, legal comparison has gone mainstream in popular culture. Direct observation and representations of foreign legal practices is now a regular part of global commerce, and the products of legal processes in other countries has become a normal part of journalistic production at a scale well beyond any earlier historical moment. While traditional representations of foreign legal cultures leaned heavily on their exoticism, today the ability to make personal claims about foreign law faces few of the logistical barriers of past eras. Yet, in popular context, especially for non-professionals, the desire and function of judging foreign law is rarely practical in orientation – instead like in much of human history it is suffused with self-affirming normative judgment and contrast. Thus, in many political arenas there is less an appetite for even the "bad" comparative law decried by comparative lawyers than there is for the use of cross-cultural legal comparison to shore-up or redefine social or national identity. As a result, instead of promoting cross-cultural awareness legal comparison fuels cross-cultural stigmatization. Here again, comparative lawyers are taken aback by the apparent need to re-fight very old battles to combat the type of tribalistic reasoning which openly marked the 19th and 20th centuries.[31]

This shift necessitates a very real consideration by proponents of comparative law of what might now be justifiably called its "dark side." Even those who still hold to the promise of "good" comparative law must face the realty that "bad" comparative law is not simply feckless but also dangerous. And more so when produced and deployed in the public sphere than by other academics whatever their methods. It may even require re-assessing well-justified positions on who their own audiences are, and why they study foreign law in the first place. There may, in some instances, be no clear line between public and academic production of legal representations, but it is clear that "dark" uses of comparative law are the most concerning in the current global environment. Let us now consider Nader's thesis of controlling comparisons to specify the idea of comparative law's dark side.

2. Nader's Controlling Comparisons

Legal anthropology has long struggled with the nature of legal comparison and comparability, a struggle that many point to as cratering the sub-discipline's once quite prominent place in interdisciplinary legal studies.[32] Part and parcel of this implosion was the impact of post-structuralist critiques of legal comparison which drew on particular takes on the aforementioned ideas of Edward Said's "Orientalism."[33] This critique noted that portrayals of other cultures' legal systems were commonly used by powerful Western nations to denigrate such systems and rationalize various forms of imperial conquest and rule.[34] Certainly, there is no shortage of studies that trace such Orientalist dynamics in various corners of the world over the past few centuries. And scholars have rightfully pointed out how such dynamics continue to shape and inform contemporary global relations.[35]

At the same time, the trends of modern globalization have destabilized and complicated the direct application of the Orientalist frame to many contemporary contexts. Early in the 20th century, Norbert Elias had already noted how contrastive comparison first worked intra-nationally in the "West" to describe varied social classes as uncivilized or unbound by proper reason.[36] Others tried to expand and diversify Said's work by using the term "Occidentalism" to describe "non-Western" views of the "West."[37] Moreover, key elements of Said's own critique – namely, the often vast power imbalances between those drawing comparison and those subject to them – no longer neatly fit current international relations when formerly colonized powers drive regional and global politics. Are negative Brazilian perceptions of Uruguay "Orientalist?" Are negative South African writings on India "Occiden-

30 For perhaps the most systematically and thoroughly damning account of the self-reproducing and empirically misleading nature of the Doing Business-genre of indications: *Dan Puchniak/Umakanth Varottil*, Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm, Berkeley Business Law Journal 17 (2020) 1–43.

31 The popularity of law within modern schemes of social evolution, and their self-congratulatory content for proponents, has been enduring: *Peter Stein*, Legal Evolution (1980); *Laura Nader*, Law and the Theory of Lack, Hastings International and Comparative Law Review 28 (2005) 191–204.

32 The difficulties of fully nuanced cross-cultural comparisons of law have long marked legal anthropology. The representative debate has always been set as between Max Gluckman and Paul Bohannan. See their contributions in: *Laura Nader* (ed.), Law in Culture and Society (1969). For a short-summary of the allied challenges that led to the subsequent submission of the sub-field of legal anthropology: *Simon Roberts*, Do We Need an Anthropology of Law? RAIN No. 25 (1978) 4–7.

33 For an overview of the idea in and beyond Sino-Western relations: *Teemu Ruskola*, Legal Orientalism, Michigan Law Review 101 (2002) 179–234. For parallels between such dynamics in the Islamic and Chinese contexts: *Jedidiah Kroncke*, The Flexible Orientalism of Islamic Law, UCLA Journal of Islamic and Near Eastern Law 4 (2005) 41–73.

34 Legal comparison has been central to the "international turn" in histories of international law. The now-classic pioneer in this shift is: *Martti Koskenniemi*, The Gentle Civilizer of Nations (2001). For a more recent, and expansive, take on this theme: *Jennifer Pitts*, A Turn to Empire: The Rise of Imperial Liberalism in Britain and France (2015).

35 For a comprehensive take on the useful scope of the "legal imperialism" frame: *Laura Nader/Ugo Mattei*, Plunder: When the Rule of Law is Illegal (2008).

36 For one of the original, and still incisive, theoretical takes on the relationship between internal and external modes of social control: *Norbert Elias*, The Civilizing Process (1939).

37 A recent, and intentionally provocative, take on how this impacts modern geopolitics; *Avishai Margalit/Ian Buruma*, Occidentalism: The West in the Eyes of Its Enemies (2004).

talist?" In this potential mismatch of past and current empirical contexts, the centrality of power to Said's critique – rather than simple geography – has often been lost.

A better frame for understanding this evolution, and its relationship to the dark side of comparative law, was proposed by Laura Nader in her 1989 article "Orientalism, Occidentalism and the Control of Women." In this article, Nader herself acknowledges the positive potential of legal comparison to unsettle unexamined notions of the normative good – itself a traditional tenet of anthropological study.[38] Yet, for Nader's particular subject in the article, the perpetuation of patriarchical forms of social control, she notes how portrayals of Western women in Islamic societies paralleled many of the stigmatizing tropes of Orientalism redolent during and after colonialism.[39] The legitimacy of dominant domestic narratives about women's rights in countries both colonial and post-colonial was mutually sustained by assertions of native cultural superiority undergirded by a dual-channel comparison. When Western women made arguments for reform to achieve greater political or social equality, negative representations of the legal status of Islamic women were used to either claim that they were already free or that they should direct their energies elsewhere. In parallel, when women in Islamic societies argued for reforms to achieve greater political or social equality, negative representations of the legal status of Western women were used to claim that such claims risked undermining their extant empowerment.[40] Nader does not claim that any particular critique of women's status in Western or Islamic societies is necessarily descriptively inaccurate, or even that the particular claims made by Western or Islamic feminist movements are good or the same. Instead, she centers that resistance to authoritarian interests in both countries makes use of cross-cultural representations to suppress the legitimacy of domestic feminist critiques. While Nader's normative commitment to a robust form of feminist equality is apparent, her argument is structural in nature. Representations of the other are not motivated by genuine concern for women's equality, but as a reactionary tactic to suppress their legitimacy.

Thus, where Nader's penchant for integrative analysis intervenes in more established "Orientalist" critiques is in emphasizing how studies critical of the legal status and rights of women in other societies are used to control women within their own societies. Rather than promoting enlightenment through deconstructing unexamined assumptions, here comparison is used to reinforce the very domestic normative systems in which internal asymmetries of power predominate. She concisely states her analytic move:

> My aim here is to identify how images of women in other societies can be prejudicial to women in *one's* own society … misleading cultural comparisons support contentions of positional superiority which divert attention from the processes which are controlling women in both worlds … Images of women in other societies reinforce norms of subordination of women in one's own society.[41]

Nader then exemplifies her insight by noting extant work by feminist scholars who map the operation of this intra-national pattern of social control. In non-Islamic societies, Islamic women are portrayed as centrally oppressed by religion, denied social agency and legal equality, and whose repression retards modern economic development. At the same time, within Islamic societies non-Islamic women are portrayed as exploited, induced to libertine performance and dress by a sexualized market economy, and denied any true sense of moral independence. Such representations are then deployed against women within their own societies to downplay their critiques of patriarchal control. Thus, claims are advanced that domestic feminist critiques are at best misguided, drawing on false notions of equality, or at worst destructive, and as such are undermining the extant grounds of women's status and threatening to actually worsen their social position.

Again, Nader's aim is not to make a claim about how far any particular generalization ranges from empirical reality, but to note that such images lead to highly deterministic understandings of culture which end up as tools to suppress locally-driven calls for female social emancipation.[42] In other words, her structural argument aims to show how controlling legal comparisons close down discussion, and her argument thus does not necessarily suggest a particular normative commitment. Most critically, however, the very nature of this form of static cultural comparison obscures the actual common patterns of patriarchy which afflict women in Islamic and non-Islamic societies

38 *Laura Nader*, Orientalism, Occidentalism and the Control of Women, Cultural Dynamics 2 (1989) 323–355.

39 "In the West positions of superiority are translated into development programs for transforming the lives of those technologically underdeveloped and the mechanisms used are related to programs of economic development." Ibid., 328.

40 "Critique of the other may be an instrument of control when the comparison asserts a positional superiority." Ibid., 324.

41 Ibid., 347.

42 "Cultural analysis of gender at times produces static images which are no less deterministic than biological explanations of male/female roles in society." Ibid., 347.

alike.[43] Here comparison becomes control, not in the direct carceral sense, but in what is seen as desirable and possible.[44] This type of comparison is not the genre of reflective comparison that comparative lawyers hope for, but instead quells dissent and dampens the possibility for ethical imagination and legal innovation. Moreover, Nader's analytical move shows that in the realm of legal representations the danger of legitimating or justifying an intervention against the other, which she understands still runs on power asymmetries not in Islamic women's favor, cannot be the sole concern. And in many instances – which in a material sense are only growing in consequence – women around the world find themselves facing increasingly authoritarian domestic trends which are openly hostile to their particular views of gender equality.[45]

III. THE AMPLIFIED LIABILITIES OF LEGAL COMPARISON IN AN INTERCONNECTED WORLD

1. Comparison in an Age of Identity Crises

It is generally now well-understood that much of what would become modern social science was driven by the need to explain the rapidly changing nature of industrializing societies in the 19th-century.[46] Corollary to this was the increasing interaction between cultures, often carried out through conflict and colonialism. As contrastive comparison is an inherent part of human cognition, there have been accounts of cultural and legal differences for as long as we have evidence of interaction between discrete human populations.[47] But the rapidity by which industrialization first reshaped societies in Europe prompted explanations of how this happened as well as its larger normative meaning.[48] And as there were many societies not yet industrialized, often self-soothing explanations were generated for why this was also the case.[49]

Said's original Orientalist analysis was focused on a specific geography of this genre of explanation driven by contrast – the European world's historical interactions with Middle Eastern countries and ultimate imperialisms. Said traced how broad culturalist explanations and narratives were developed as peoples between those geographies came into ever increasing contact and competition, and often direct conflict. And it was not sheer ignorance that generated such contrasts, they were part and parcel of the most educated and informed within particular European countries. As noted earlier, the flexibility of this frame has been shown to capture dynamics well beyond this original geography.[50] Nader's work touches on the ways in which this can happen in diverse contexts whenever there is social upheaval or competition, ranging from post-Soviet republics to revolutionary Libya, and then active-debates in the United States.

Yet, this flexibility has given way to studies of Orientalism's limitations given the complexities of late 20th-century interactions. While less emphasized today, the place of Soviet conquest and ideology within the Orientalist frame, long replicated in argument over Russia's place with "the West," was particularly pressing for many Middle Eastern scholars for whom the practical import of European colonialism had been usurped by Soviet expansionism.[51] A long-standing debate still endures on the use of Said's work in Asia and among other non-Euro-American cultures.[52]

Thus, as Nader advanced her argument about controlling comparisons, she raised the idea of Occidentalism. At the time of her original article, she admits that as an academic field of inquiry understandings of Occidentalism were then more limited in the international academic world.[53] It is not

43 "Yet, in both cultures the manner of gender construction whereby the inside culture is idealized in comparison to the outside culture allows members of both East and West to feel superior to the other, while ignoring common traits." Ibid., 334.

44 Addressing the particular place and context of Nader's critique within modern feminist legal theory is beyond the scope of this paper. Yet, there is little controversy in stating that the illusory nature of the public/private divide in the context of gender relations, much less law more broadly, is a traditionally shared tenet: *Ruth Gavison*, Feminism and the Public/Private Distinction, Stanford Law Review 45 (1992) 1–45.

45 Modern authoritarianism recurrently makes revanchist use of "defending" traditional gender norms: *Anna Gwiazda*, Right-Wing Populism and Feminist Politics: The Case of Law and Justice in Poland, International Political Science Review 41 (2020) 1–16.

46 This is now a well-worn point for the 19th-century rise of modern social science. But new work continues to review and revisit its continued relevance: *Chloe Campbell*, Race and Empire: Eugenics in Colonial Kenya (2007).

47 In the Sino-Western context, travelogues were hugely popular in Europe going back centuries. As travel became more frequent and convenient, images of foreign nations could be reshaped in the matter of a few decades by sustain production of such travelogues: *Susan Thurin*, Victorian Travelers and the Opening of China, 1842–1907 (1999).

48 It is often forgotten that Weber and Durkheim, still inspirational for many modern social scientists, were deeply skeptical of the desirability of modernity for human happiness: *Peter Baehr*, The "Iron Cage" and the "Shell as Hard as Steel": Parsons, Weber, and the Stahlhartes Gehäuse Metaphor in the Protestant Ethic and the Spirit of Capitalism, History and Theory 40 (2001) 153–169; *Steven Seidman*, Modernity and the Problem of Meaning: The Durkheimian Tradition, Sociological Analysis 46 (1985) 109–130.

49 For a classic take in the American context of this self-reifying aspect: *Richard Hofstadter*, Social Darwinism in American Thought (1944).

50 *Ali Mazrui*, The Re-Invention of Africa: Edward Said, V. Y. Mudimbe, and Beyond, Research in African Literatures 36 (2005) 68–82.

51 *Alfrid Bustanov*, Soviet Orientalism and the Creation of Central Asian Nations (2015); *David Schimmelpenninck*, The Curious Fate of Edward Said in Russia, Etudes de Lettres 2 (2014) 81–94.

52 Warren *Cohen* (ed.), Reflections on Orientalism: Edward Said (1983).

53 "Orientalism and Occidentalism both impact women, the two represent quite different processes. For Orientalism is a construction that we can deconstruct. Occidentalism is not a historical or ideological category that we know a lot about. Notions about the Occident are not coalesced in a large body of scholarship. There are very few books and articles written by contemporary Arab scholars about the West. A comparable literature to Orientalism is nonexistent." *Nader* (fn. 34) 326.

coincidental that in later years Nader would go on to publish and highlight exactly such accounts of non-Western representations of Western Law.[54] Nonetheless, she noted what would come to concern many scholars in the following decades – the use of essentialized notions of "Eastern" or others cultures in an oppositional discourse that emphasized their normative superiority.[55] If these essentializations were understandable at one point to defend against claims that greater Western material wealth conclusively established Western cultural superiority, they remained essentializations that help sustain an oppositional discourse that would come in time to haunt constructive analysis much like Orientalism's reductionism.

What we have seen in recent decades is that the volume and pace of cross-cultural/national interaction have only intensified, and inspired much of the legal comparison that comparative lawyers now lament. The international system has shifted from directly abetting colonialism to entrenching facially neutral forms of legal analysis which privilege particular capitalist economic reforms and allied agendas.[56] While in the technical discourse of universal "best practices" legal comparison has became far more statistical in nature, arguments asserting the legal inferiority of different countries and cultures remains active in popular culture.[57]

Though such transformations in the language of the international legal discourse now has inspired many comprehensive critical studies, it remains the case that the turn to more technical legal comparison by elites has coincided with perhaps a far more intensive daily practice of cross-cultural comparison in national politics and discourse. The intensified cultural interaction that moved many 19th-century thinkers to produce accounts of legal difference has today become routine as technology has shrunk the material and discursive distance between cultures. It is indisputable that more information about foreign cultures is consumed by everyday citizens across the globe today than ever before.

At one point in time, many heralded that this ability of modern technology to shrink spaces between people would help increase understanding and deaden old forms of cultural chauvinism.[58] Similar claims were made about interconnection, free information and social and political democratization.[59] While there does seem to be some evidence that for a time international economic integration suppressed major global conflict,[60] the liberating potential of information and access is now severely in doubt.[61] Even with new translation tools and greater internet connectivity, information framing appears vastly more important and determinative than just access to information itself. In cross-cultural contexts, this means that "good" knowledge about other cultures is as easily accessed as "bad," and perspectives derived from deep experiential knowledge are often placed on equal ground with those derived from the most amateur and facile reactions. A condition of cognitive and informational overload within still shifting social conditions seemingly now prevails rather than one of growing sophistication and empathy.[62] As such, the type of studied and serious reflective comparison championed by traditional comparative lawyers to challenge and improve law has given way to ready access to quick and easy comparisons of the contrastive and self-affirming nature. It takes little exposure to modern social media to see that these distinctions are not so clear cut, as academic production – even by disciplined comparativists – is easily misappropriated.

Here we can recall a core insight of another anthropologist, Fredrik Barth, who recurrently noted that interaction between cultures more often than not provokes the human need for contrastive comparison.[63] Human identities need to be reinforced when confronted with other identities – illustrated for Barth by the common cultural neo-conservativism of diasporic communities or those within multicultural urban settings.[64] Nader picks up on Barth's insight by showing that images of women in other societies demand explanation when they diverge

54 *Laura Nader*, What the Rest Think of the West Since 600 AD (2015).

55 "In the East evoking positional superiority as a method of control takes a quite different shape, in rhetoric claiming to be more philosophical and less materialist." *Nader* (fn. 34), 328.

56 For a foundational work and recent exemplar in this project: *Gerrit Gong,* The Standard of "Civilization" in International Society (1984); *Ntina Tzouvala*, Capitalism as Civilisation: A History of International Law (2020).

57 As mentioned earlier, quantitative work has taken comparative law by storm in recent decades: *Holger Spamann*, Large Sample, Quantitative Research Designs for Comparative Law?, American Journal of Comparative Law 57 (2009) 765–796. The homogenizing nature of large-N studies has a recurrent, if in some ways not inescapably ontological, relationship to assertions of legal practices that work best in all cultural contexts.

58 *Dana Fisher/Larry Wright*, On Utopias and Dystopias: Toward an Understanding of the Discourse Surrounding the Internet, Journal of Computer-Mediated Communication 6 (2001) 1–13

59 *Matthew Hindman*, The Myth of Digital Democracy (2009).

60 Another academic cottage industry exists in trying to prove or disprove the impact of trade and economic integration on conflict. For a summary example: *Quan Li/Rafael Reuveny*, Does Trade Prevent or Promote Interstate Conflict Initiation?, Journal of Peace Research 48 (2011) 437–453.

61 *Dirk Helbing et al.,* Will Democracy Survive Big Data and Artificial Intelligence?, Scientific American (25 February, 2017).

62 The human need for schemas that reduce informational complexity is, naturally, directly related to the volume and information any particular human needs to process in their daily life: *Andrei Boutyline/Laura Soter*, Cultural Schemas: What They Are, How to Find Them, and What to Do Once You've Caught One, American Sociological Review 86 (2021) 728–758.

63 Much of the inspiration for the underlying assumptions in this article about how cross-cultural interaction impacts ethnic identity can be found in: *Fredrik Barth*, Ethnic Groups and Boundaries (1969).

64 The stress of shifting cultural settings makes this conservatism understandable, and the impact of such stress can be traced to very material psychological effects: *Dinesh Bhugra/Matthew Becker*, Migration, Cultural Bereavement and Cultural Identity, World Psychiatry 4 (2005) 18–24.

from extant social norms to stave off exactly the type of deconstructive inquiry they could inspire and new reforms they could legitimate.[65] This point co-exists with the general reality that identity can be legitimately contrastive by some normatively coherent standard – you see in others or in other societies values which you legitimately do not hold. However, the concern here again is when crude representation of the other only serves to stave off self-examination, especially when a society's asserted values hardly match its current practices. This leads to the danger that when confronted with social challenges or deficiencies, the tendency will be to become solely reactionary in emphasizing *other* culture's defects and not actually confronting less than sanguine material realities at home.

Summarily, the modern world is beset by multiple drivers of the need to reinforce identity and understanding through contrastive comparison. This need to reinforce extant identities is also amplified by recent developments in social precarity induced by the further penetration of calculative productive logics into national economies.[66] Many national regimes, formally liberal and authoritarian alike, have discerned that symbolic cultural affirmation is far more easy to provide than material security and self-criticism. And it is a problem that transcends any clean geographical divide. In this context, the dark side of comparative law emerges, even if unintended by comparative lawyers themselves.

2. Comparative Law and the Renewed Allure of Cultural Reification

If modern conditions militate so fiercely for identity affirmation and contrastive cultural comparison, this raises significant concerns for many of comparative law's traditional reflective aspirations. For beyond advancing defenses of the enterprise itself, most comparative lawyers also spend some portion of their writing grappling with its particular methodological challenges. What actually constitutes proper comparative law, even basic conceptualizations of what "comparative law" is, fills a substantial portion of traditional writing on comparative law.[67]

Herein, most comparative lawyers exerted their efforts battling the traditional critique of the impossibility of legal comparison.[68] Out of this battle, "good" comparative law emerges as that which can successfully extricate legal rules, institutions, and practices from any particular local context for productive comparison elsewhere.[69] Older forms of legal comparison are routinely criticized for their formalism – the translations and juxtaposition of legal texts such as statutes or cases.[70] Similarly, interrogating the gap between formal law and actual legal practice – at the heart of modern socio-legal approaches – pushes the modern comparativist to more empirical understandings of law's operation and, hopefully, resistant to the lazy catch-all explanatory force of broad cultural generalization.[71] More sophisticated studies increasingly have to juggle the fact that even the most utilitarian study of the outputs of legal processes – from jury trials to taxation – need to be evaluated in the context of contested social values regarding notions of fairness or mechanisms of social redistribution. Even here, the expressive function of law itself, often purely symbolic in nature, makes coherent comparison challenging.[72]

Traditionally, much of this debate played out on a level of generality amenable to the terms of Orientalist critiques. Nations compared themselves to other nations, and the proper subject of comparison was national, commonly appellate, courts. Contextual studies recurrently emerged to complicate such accounts, but as laws circulated or were impressed through intensifying globalization it became increasingly hard to use the nation-state as the sole rubric for comparison[73] – even given pre-existing issues of ongoing legal pluralism within nations.[74] Herein, the comparativist had to acknowledge the import of legal culture while rising above it at some point to make a point of general comparison,[75] or simply to describe transnationalized regulation. Thus, the comparative lawyer was, perhaps sometimes still is,[76] most comfortable in

65 "To understand dogmas of female subordination in a dynamic perspective, we must examine gender ideologies in the larger framework of attempts of nations and societies to maintain separate identities within the context of increasing interaction." *Nader* (fn. 34) 346.

66 *Lisa Rodgers*, Labour Law, Vulnerability and the Regulation of Precarious Work (2016).

67 One consistent reviewer and contributor in this field: *Edward Eberle*, The Method and Role of Comparative Law, Washington University Global Studies Law Review 8 (2009) 451–486.

68 As discussed later, the modern classic in this regard: *Pierre Legrand*, The Impossibility of 'Legal Transplants,' Maastricht Journal of European and Comparative Law 4 (1997) 111–124.

69 *Jaakko Husa*, Functional Method in Comparative Law–Much Ado About Nothing? European Property Law Journal 2 (2013) 4–21.

70 The move from textual formalism to a more social scientifically-informed version of comparative law is a recurrent theme of: *Annelise Riles* (ed.), Rethinking the Masters of Comparative Law (2001).

71 *Arif Jamal*, Comparative Law, Anti-Essentialism and Intersectionality: Reflections from Southeast Asia in Search of an Elusive Balance, Asian Journal of Comparative Law 9 (2014) 197–211.

72 *Richard McAdams*, The Expressive Powers of Law (2015); *Janice Nadler*, Expressive Law, Social Norms, and Social Groups, Law & Social Inquiry 42 (2017) 60–75.

73 For an early summary and analysis of the frame of "transnational law": *Michael Likosky* (ed.), Transnational Legal Processes (2002).

74 *Keebet von Benda-Beckmann/Bertram Turner*, Legal Pluralism, Social Theory, and The State, The Journal of Legal Pluralism and Unofficial Law 50 (2018) 255–274.

75 *Reza Banakar*, Power, Culture and Method in Comparative Law, International Journal of Law in Context 5 (2009) 69–85.

76 *Marta Infantino*, Quantitative Legal Comparisons: Narratives, Self-Representations and Sunset Boulevards, Journal of International and Comparative Law 6 (2019) 287–306.

binary analyses that sought to compare say German or American law, or Japanese and Korean law – with one nation the home country of the comparative lawyer in question.

Yet, as often as many comparative lawyers argued that this process could produce functionally useful legal knowledge for national and international reforms, they could not have predicted the way in which legal comparison become so central to the global pace of legal reform at the end of the 20th-century. And a flurry of far-reaching reforms worldwide they were often not a part of. Of course, the very nature of the Cold War led to a whole cottage industry contrasting Soviet and Euro-American law even if some notable exemplars tried to discern comparative insights from that context.[77] But with great fury after the fall of the Soviet Union in 1989, various "end of history" conceptualizations of largely American-dominated views of legal regulations spread throughout the world under the continued aegis of "modernization" and "best practices."[78]

Formal comparative legal analysis gained energetic audiences looking for solutions to largely economic growth objectives, and economists began to look to law as an explanatory variable in their analyses.[79] Epitomized by the "law and finance" literature emergent in the 1990, explanations were again sought for relative national wealth.[80] In this context, there was little need seen for using comparison to improve Western, particularly American, law but to somehow show others how to replicate its successes.[81] Even larger supranational harmonization projects like the European Union or various multilateral trade regimes seemed ever-prone to promoting implicit assumptions about who had "good law" rather than investigate critically what should be common among quite diverse nations.[82] In the immediate decades of the post-Soviet era, study after study reaffirmed priors about the desirability of various regulatory patterns largely drawn from the Anglo-American post-feudal common law system, and even after a reactive wave of empirical studies arose that challenged the predictive utility of these models.[83] In this mad rush, the traditional methodological concerns of comparative lawyers were (by and large) run over roughshod – and so made poststructuralist concerns with legal comparability a seemingly irrelevant enemy.

Even in the midst of greater global interactivity, the ultimate result of this surge in legal "comparison" were variations of Nader's dual-channel control. Fights over property rights and "allocative efficiency"[84] or antitrust law and "consumer welfare"[85] were cast in academic terms as products of technical expertise even as they were wielded on terrains of significant power asymmetries marked by destabilized and insecure identities.[86] Again, while comparative lawyers would produce numerous critiques of this new genre of academic comparison, such representations in popular contexts – often in their crudest forms – were fervently desired by overwhelmed citizens looking to stabilize their own identities and hold onto clear normative evaluations of an increasingly complex world. Rather than corporate law, issues of family law became central to domestic authoritarian politics, and old Cold War tropes of "free markets" and "socialism" took on new life, even with quite different meaning, in countries as diverse as Brazil, China, and India.[87]

Here then there is some validation of post-structural theories about the impossibility of legal comparability. Law and legal performance have deeply symbolic purchase within society. The very force of Nader's view of the controlling function of legal

77 The exemplar of critical scholarship in this era of super-heated cross-cultural conflict: *Harold Berman*, Justice in Russia: An Interpretation of Soviet Law (1952).

78 *Leonard Rotman*, Debunking the "End of History" Thesis for Corporate Law, Boston College International and Comparative Law Review 33 (2010) 219–272.

79 A summary defense of this position: *Kenneth Dam*, The Law-Growth Nexus (2006). The durability of claims regarding various legal variables and economic growth, it is now safe to say, is only present in economic studies that simply ignore the last few decades of critiques by legal and other scholars: *Chantal Thomas*, Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutionalist Critique of Institutionalism, Cornell Law Review 96 (2011) 967–1024.

80 Debates over this literature and the "legal origins" thesis have become recurrent. For an early summary of the basic positions and critiques: Symposium, Evaluating Legal Origins, 2009 BYU Law Review (2009) 1413–1906. An underlying rationale for why the debate continues is because accepting many of the critiques would force proponents to develop new methodologies, mostly qualitative in nature, which they do not possess.

81 *Kroncke* (fn. 2).

82 Original enthusiasm about the European Union as a new site of comparative legal innovation, not so dissimilar from the American notion of federal states as "laboratories of democracy," has generally resolved into critiques of ham-fisted homogenization: *Martin Mendelski*, The EU's Pathological Power: The Failure of External Rule of Law Promotion in South Eastern Europe, Southeastern Europe 39 (2015) 318–346; *Angela Wigger*, The New EU Industrial Policy: Authoritarian Neoliberal Structural Adjustment and the Case for Alternatives, Globalizations 16 (2019) 353–369. Also: *Charles Taylor/Heather Gerken*, The Myth of the Laboratories of Democracy (2021). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3902092.

83 *Puchniak/Varottil* (fn. 31).

84 A general critique of the dominant international understandings of property rights reforms: *Frank Upham*, The Great Property Fallacy (2018).

85 In the United States context: *Sanjukta Paul*, Antitrust as Allocator of Coordination Rights, UCLA Law Review 67 (2020) 378–431.

86 The sociological gap between those producing global reform prescriptions and those subject to them is a theme in: *David Kennedy*, A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy (2016).

87 The attraction of modern authoritarian regimes to meritocratic notions of labor markets for justifying employment law deregulation is a remarkable contrast to early 20th-century corporatism: *Jedidiah Kroncke*, Precariousness as Growth: Meritocracy, Human Capital Formation, and Workplace Regulation in Brazil, China and India, Law and Development Review 9 (2016) 321–368.

comparison points to the fact that even a statistical material fact – such as the number of female law professors in a given country – is always run through webs of power which frame the meanings of such facts. In an interconnected world, such facts flow so readily and in such volume that soothing framings are thus more intensely sought after. So, a legal incident in one country, such as a genuinely unfair trial or simply an offensive legal statement, is instantly extrapolated and circulated as a marker of deep and irredeemable cultural difference.[88] What Nader hinted at, and which now confounds simple applications of the Orientalist frame, is that such dynamics operate across whole new geographies of power and inequality in-between and within nations. Thus Orientalism, even together with Occidentalism, is not capacious enough to capture all of these multi-faceted dynamics, as the networks of power that legal representations now travel through are fragmented and transnationalized in a world where such new geographies of power can be anchored by non-Western, even post-colonial, nations.

IV. LEGAL COMPARISON IN AN AGE OF NATIONALISM AND AUTHORITARIANISM

1. Post-Colonial and Techno-Authoritarianism: Whither Orientalism?

The challenge of Nader's insight into the controlling power of legal comparison thus presents a core aspect of this modern drama and dilemma of knowledge and identity. If humans demonstrate an even greater demand for identity affirmation under conditions of interconnectedness and insecurity, it would appear that the controlling function of comparative legal production will only continue to deepen as more comparisons are made. But there is one challenge more to consider, and that is that type of rigid essentialism that Nader's critique identified as characterizing much discussion of reactionary legal comparison. The challenge her article presented requires one to do exactly that which so many comparative lawyers have called for – center productive self-critique rather than deadening self-congratulation. And this is a challenge that even many who have been inspired by the Orientalism frame have struggled to do.

This struggle stems from the fact that Said's work, and most critical social theory in the 20th century, was itself a product of its own conditions. In a world consumed by legacies of colonialism and the Cold War, the central operative level of Said's critique – the deploying of images of the other cultures across asymmetries of power – was easy to skip over in favor of the simplifying heuristics of that era's dominant geographies. Descriptive overgeneralization of terms like "the West" or the underdevelopment of ideas like "Occidentalism" are understandable in a global context where such frames were more fully coterminous with global power asymmetries. By some social calculus, it may also be understandable that the images and comparisons produced by the "West" are emphasized when such countries had disproportionate ability to inflict both violence and economic exploitation on other countries so represented. And there are certainly many contexts where even if one nation produced denigrating images of a more powerful country it "mattered" less as a subject of normative concern.[89]

Here is where Nader's focus on internal control helps refocus the liabilities of legal comparison in an era where the conceptual short-hands of Orientalism and Occidentalism increasingly straight-jacket analysis. For while one country may not at a given point in time be able to inflict its will on another, this never precludes its elites from inflicting their will on its own population. This is the core of Nader's original insight. Every society now actively creates and consumes legal comparison internally to shape domestic social contestation. Images of women and their relative position in different societies still inhabits domestic contests over women's rights just as they circle military interventions.[90] The centrality of gender norms and identity make debates over women's rights still far more socially evocative than securities regulation, even if such can drastically impact lived economic realities for different classes of women – as well as men for that matter. And in understanding this diversity of such controlling processes, we can see that the dark side of comparative law in this manner is highly adaptive.

88 A recent example has been the re-circulation of critiques of Japanese criminal procedure: *Frank Upham*, What's Wrong with American Approach to Foreign Legal Systems, USALI East-West Studies 4 (2021) 1–4.

89 The admixture of analytical criticism and justifiable normative outrage in studies of colonialism has helped entrench a view that nations are best understood holistically as victims or victimizers. Yet, in practice the negative human effects of colonialism were always mutual, if still unequal. This dynamic was perhaps most eloquently explored in: *Frantz Fanon*, The Wretched of the Earth (1963). It is understandable in many cross-cultural contexts to emphasize the asymmetry of power between nations-as-nations, but this still should not inhibit understanding more complex geographies of power inequalities, again especially as many political regimes, unfortunately democratic and authoritarian alike, try to obscure their own complicities in reproducing global inequalities in and between nations.

90 Now replayed in the context of the withdrawal of the U.S. from its occupation of Afghanistan, the temporary concern with the rights of foreign women in justifying military incursions shows some of the worst appropriations of modern human rights discourse: *Karen Engle*, Calling in the Troops: The Uneasy Relationship Among Women's Rights, Human Rights, and Humanitarian Intervention, Harvard Human Rights Journal 20 (2007) 189–226.

For Nader, exposing this dynamic required focusing on how fundamentalist regimes in the Middle East used images of Western women to suppress the claims of their own citizens. The importance of identifying this dynamic may seem in some global sense less pressing because Middle Eastern countries to date have not invaded a Western nation on the pretense of improving the lives of its women, but it does genuinely matter for women's rights activists in those countries and for any clear-eyed view of transnational feminism.[91] While military invasions are far from absent in the modern world, internal civil conflict – or simply police violence – shows little prospect for decline. Moreover, the migration of populations, themselves an essential element of modern economic globalization, makes military crossings of national borders often less impactful than regional economic integration – again a social dynamic best captured by emphasizing common methods of social control among diverse nations than simply differences among them.

Nader's article here resonates with another seminal anthropological contribution: Martin Chanock's understanding of the uses of legal "tradition" by post-colonial authoritarian regimes.[92] Chanock emphasizes how portrayals of pre-colonial legal practices in post-colonial societies, contrasted with some version of Western or colonial law, can generate great symbolic power for new authoritarian leaders.[93] Whether for women's rights or, quite commonly, property rights, such representations replace (often racist) colonial imagery with a new system of control once formal colonialism is over (though numerous colonial legacies persist).[94] The complexity of this interaction is driven by the continued international asymmetries of power post-colonial countries still operate in, all the while post-colonial authoritarians retain or import less evocative legal forms of regulation that leave many colonial economic relationships in place.[95]

Nader's push to see the commonalities in structures of social control are thus all the more necessary as the globe shifts away from the brief unipolar moment of the post-Soviet era. Simple conflation of one specific geography with problematic legal comparison, here even the binary opposition of "Orientalism" and "Occidentalism," is ever more stultifying as all nations can increasingly have deep internal inequalities. Moreover, different national elites often have overlapping interests, which some may claim are even more thorough with other national elites than with other domestic classes. Recently, it has become popular to use the terms "Global North" and "Global South" to resurrect this binary in a new form.[96] Here, presumed ideas of geography and agency remain that, while perhaps accurate in the aggregate, often obscure the commonalities of social control that Nader's critique illuminates.

In recent decades, the authoritarian dynamics of internal control, which Chanock noted in post-colonial contexts, have only proliferated as the magical reasoning which imagined an end of history in liberal democracy has been increasingly discredited.[97] While substantial inequalities replicate many colonial and Cold War dynamics, authoritarian regimes of various stripes have shown themselves ever more resilient and adaptable.[98] Again, where Russia fits into traditional schemas is still unclear. It is a very illiberal democracy, with its own regional sense of hegemony. Its ruling regime currently plays on evocative legal comparisons – grounded in more traditional notions of the authoritarian family and repressive of social liberties.[99] The same could be said of Brazil, India, and any number of post-colonial societies whose global import now dwarfs that of their former colonizers.

2. Sino-American Legal Relations and Mutual Stultification

Returning to contemporary Sino-American relations serves to clarify these dynamics as well as illustrate their globally important consequences. In recent discourse, it is quite common to speak of China as not only a superpower, but potentially the strongest superpower by the mid-21st century. Thus, while perceptions of China's subordination to Western powers is still very much alive in popular and elite Chinese discourse, it is increasingly difficult to argue that even China's once semi-colonial status best frames its relationship to other nations today, especially that of its largest trading partner, the United States.

91 Whether there ever can be a sustainable transnational version of feminism is debatable: *Valentine Moghadam,* Transnational Feminist Networks: Collective Action in an Era of Globalization, International Sociology 15 (2000) 57–85.

92 *Martin Chanock*, Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia (1986).

93 A summary review of Chanock's scholarship: For Martin Chanock: Essays on Law and Society: Introduction, Law in Context: A Socio-Legal Journal 28 (2010) 1–144.

94 Many of the attempts, if not most, to replace informal property rights with formal property rights resulted in a wide range of negative, if unanticipated, effects: *Shaun Goldfinch*, Property Rights and the Mystery of Capital, Progress in Development Studies 15 (2015) 87–96.

95 *Maria Debre*, The Dark Side of Regionalism: How Regional Organizations Help Authoritarian Regimes to Boost Survival, Democratization, 28 (2021) 394–413.

96 For a critique of the newly popular concept of the "Global South" as a proxy for global power asymmetries: *Nina Schneider*, Between Promise and Skepticism: The Global South and Our Role as Engaged Intellectuals, The Global South 11 (2017) 18–38.

97 *Aziz Huq/Tom Ginsburg*, How to Lose a Constitutional Democracy, UCLA Law Review 65 (2017) 80–169.

98 *Kim Lane Scheppele*, Autocratic Legalism, University of Chicago Law Review 85 (2018) 545–583.

99 *Alexandra Orlova,* Russian Politics of Masculinity and the Decay of Feminism: The Role of Dissent in Creating New "Local Norms," William & Mary Journal of Race, Gender and Social Justice 25 (2018) 59–86; *Sarah Ashwin/Jennifer Utrata*, Restoring Masculinity: Putin and Trump, Contexts 19 (2020) 16–21

Moreover, and in large part because of its more partial relationship with Western colonialism, "Occidentalist" representations of Western law have been produced in China for centuries as part of Chinese debates over some variation of "catching up" with Western powers.[100] Again, well before 1989, the mid-20th century Chinese Civil War was rife with competing representations of foreign, most especially American, law. While some have earnestly sought to learn from foreign law in China, and in basic material terms both Soviet and Western legal influences are systemic in Chinese law today, the basic "controlling" use of images of foreign law has been equally recurrent throughout these different eras. Casting reform proposals in some essentialized notion of "Chinese" culture has always been a consistent tactic of powerful domestic Chinese actors. Also as regards women's rights in particular, Nader's analysis proves pertinent: the legal status of Chinese women has been used both in contests between and within China and the United States to dampen intra-national calls for women's equality.[101]

When China began its modern economic and legal reforms after 1978 all of these traditional representations became re-complicated by the shifting sense of power, and empowerment, between China and the rest of the world – again most notably the United States.[102] Many in the United States remained comfortable with highly charged negative representations of Chinese law,[103] and many in China pressed similarly unflattering views of American law.[104] This discourse was more unsettled in the 1980s in China as there seemed to be greater openness in how China would reformulate its legal system to spur economic development. While the United States still hewed to its traditional resistance to reflective comparison with any other country, many in China were quite active about the possibility of adapting foreign legal lessons to the Chinese context.[105]

Yet, it appears that this diversity of legal comparison with post-1978 China was short-lived – never having truly disturbed the fundamentally authoritarian power of the Chinese Communist Party. If not conclusively understood after the events of 1989, the recent authoritarian crackdown throughout Chinese society by the CCP has made it untenable to assert that its phenomenal economic growth had been leading to some preordained liberalization. This very turn disrupted the genre of American legal analysis of Chinese law which had largely operated on the assumption that China would liberalize through the influences articulated by various theories of legal and economic modernization.[106] Quite quickly, the nature of legal comparison between China and the United States has turned thoroughly oppositional in nature – both countries represent a clear specie of the global move towards both authoritarian politics and identity-affirmation through contrastive comparison. Again, following Nader's prediction, at the very same time these representations have been used to stigmatize a whole host of domestic reform ideas – superficially associating each with the other country's law to delegitimize them even when the countries face similar issues[107] and are still deeply economically interconnected.

Furthermore, while critical media studies have a long pedigree in the United States,[108] China stands out as an authoritarian regime which has developed the most sophisticated tools for managing modern information sharing and framing, again frustrating utopian predictions that global interconnection would lead to a citizenry demanding its ouster.[109] In near real-time, legal developments in the United States are given interpretation in China, and through mechanisms which transcend the crude repression traditionally associated with authoritarian regimes. In parallel, contrastive legal comparisons with China are now almost a daily occurrence in American discourse.[110] And commonly the work of thoughtful comparativists is caught up in their

100 For a review of the historical post-1978 Chinese legal reforms: *Randal Peerenboom*, China's Long March Toward the Rule of Law (2002).

101 Critiques of the legal status of Chinese women have a long external pedigree. For a modern American example: *Robert Rogers*, The Legal Position of Women in China, Green Bag 13 (1901) 13–21. Such representation continued to plague foreign studies of Chinese gender relations: *Patricia Uberoi*, Chinese Woman in the Construction of Western Feminism Alternatives: Global, Local, Political, China Report 16 (1991) 387–405; *Jinhua Emma Teng*, The Construction of the "Traditional Chinese Woman" in the Western Academy: A Critical Review, Signs 22 (1996), 115–151. As Nader's study presages, the difficulty of recognizing Chinese women's subordination in common with that of women in any patriarchical society has long been a challenge in cross-cultural feminist studies

102 *Kroncke* (fn. 2).

103 Much like Said's Orientalists, many American writers on Chinese law were both dedicated to their scholarship while being themselves deeply engaged with Chinese society. Yet, their attachment to binary juxtapositions continued many disruptive analytical patterns: *Stanley Lubman*, Bird in a Cage: Legal Reform in China After Mao (1999).

104 Such critiques are made on a now-daily basis in the various strata of Chinese media. The intellectual framings of this critique, and views of Chinese law within global society, are ever-evolving: *Louis Brang*, Carl Schmitt and the Evolution of Chinese Constitutional Theory, Global Constitutionalism 9 (2020) 117–154; *Ryan Mitchell*, Chinese Receptions of Carl Schmitt Since 1929, Penn State Journal of Law and International Affairs 8 (2020) 181–263.

105 For a recent, still optimistic view of comparative law in the Chinese context, see *Liang Zhiping*, The Vernacularization and Localization of Civil Law in China, Ancilla Iuris (2021), 189–205.

106 *Kroncke* (fn. 16).

107 By the 2020s such parallel challenges are the matter of daily journalistic fare. Debates as distinct as anti-trust regulation of technology companies, the desirability of industrial policy, and the ever more existential challenge of climate change play out in Chinese and American forums.

108 *Edward Herman/Noam Chomsky*, Manufacturing Consent: The Political Economy of the Mass Media (1988).

109 *Florian Schneider*, China's Digital Nationalism (2018).

110 The rise of "trade war" language between the U.S. and China initiated during the Trump Administration was paired with a shift from optimism about Chinese law accommodating/facilitating some form of liberalization to emphasizing its radically disjunctive qualities with American law. Again, this belies the many ways in which both countries obscure their own authoritarian aspects through unreflective contrast with the other's bad legal practices. *Kroncke* (fn. 16).

mutual recriminations. None of this is to say whether any particular comparison is accurate or misleading, and it would be facile to claim that all comparison, even reflective comparison, requires positive evaluations of foreign law. Yet, the social function of such comparison has to date replicated Nader's controlling function rather than producing genuine self-critique.

For some, it has become attractive to apply the old "Cold War" framings of the 20th century to U.S.-China relations. And such framings do serve useful functions for elites within both countries. There are even those long critical of social exploitation who continually conflate geography with settled power dynamics, such as those who cannot see the pernicious legal comparison at the heart of Chinese authoritarianism that they see at the heart of American imperialism.[111] More importantly, powerful actors within each of the two countries use representations of the other as symbolic fodder to delimit debates from industrial policy to police violence. Notably, both countries have elements seeking to defeat modern claims for legal liberty using revanchist imaginations of long-past historical eras to center conservative forms of identity affirmation over any form of self-critique.[112]

What Nader's basic insight into the nature of legal comparison compels is not some final conclusion about whose legal comparison is "better" or "worse" herein. Rather, the question is ultimately whether it matters more for contemporary reformers of any particular country that they were subject to external Orientalist imaginations or that their domestic dynamics replicate such sins to repress domestic emancipatory claims. Specifically: Is China's most pressing material concern today the negative American representations of Chinese law? Or isn't it much more significant, even in the most cynically conceived self-interest, if Chinese elites engage in emphasizing negative representations of American law to suppress domestic calls for reform?

Not that either type of representation has to be always more consequential than the other in some material sense, but neither can be understood without knowing how the other operates. Ultimately, China and the United States thus become locked in a pattern of mutual recrimination whose only material affect is to obscure their own problems. The same can be said for post-colonial nations facing resurgent ethno-nationalism, such as Brazil and India, wherein authoritarian interests co-opt critiques of colonialism not to truly rectify their legacies but to depress domestic agendas to dislodge them.[113]

But herein is the most acute question. If comparative lawyers participate in producing representations that they feel are empirically accurate about either country, at what point do they have to accept active concern for the dominant practical effects of their work even if unintended? The core of Said's and Nader's critiques suggests that there is no ethical safe harbor of academic purity in a world gripped by the dark side of comparative law. At the very minimum, even the methodologically most advanced academic comparative law has to consider its most likely impact in the world – and the fact that the only attainable salutary effect is in combating domestic rather than foreign manifestations of this dark side.

Concern with the dominant power dynamics of legal comparison (rather than geography) is now all the more pressing as countries – whether in the "Global North," the "West," or any older geographical proxy for global power asymmetries – confront severe national crises while facing collective dangers such as climate change. Harkening back to Elias's original insights on the domestic antecedents of colonialism, almost every former colonial power, including the United States as the once unipolar power of the late 20th century, increasingly confronts their own democratic decay, nativist reimaginations, and frustrated solutions to immense social and economic problems. Acknowledging commonality in patterns of representation within "Northern" and "Southern" countries or any other descriptive proxy does not mean ignoring the very real and continued maldistribution of global power and wealth along which legal comparisons are still deployed. It does center, however, that the ugly operative logics of comparative law's dark side are increasingly shared globally.

V.
CONCLUSION

Moments of true comparative legal analysis – in the comparative lawyer's ideal sense – are truly rare in history. Some of the most notable are generally induced by acute moments of social anxiety and

111 China and the U.S. Left: A Dialogue Between Critical China Scholars and Spectre (3 August 2021). Available at: https://spectrejournal.com/china-and-the-u-s-left/.

112 It is notable that authoritarian discourses in both countries refer back to stylized views of their legal history for justification. As of yet, there is no direct academic study of CCP's use of "5000 years of Chinese history" as a rhetoric prop for its policies and "golden-age" inspired politics of constitutional originalism in the United States.

113 *Prerna Singh*, Populism, Nationalism, and Nationalist Populism, Studies in Comparative International Development 56 (2021) 250–269. The relationship of resurgent forms of authoritarian ethnic nationalism and deregulatory "neoliberal" economic reform policies in Brazil and India are clear examples of Chanock-styled appropriations of "tradition" by post-colonial elites.

competition.[114] This need to overcome a competitor nation has propelled a great deal of legal reform, especially in the 20th-century, and has recently played out in Chinese law reform. But even here, the type of reform that competition compels can be formalistic and unthoughtful, of which the initial post-Soviet legal reforms evidence.[115]

Even in those rare contexts where such legal reform is informed by critical and thoughtful comparative legal analysis, such moments are hard to sustain. As soon as a sense of external competition diminishes or, more frequently, when domestic actors find their interests entrenched by current legal institutions, critical comparative legal analysis diminishes. Even in countries with legacies of stronger comparative law traditions, such as the dedicated comparative legal bodies in the Japanese or Swedish legislatures, aggressive legal reform outside of current models quickly becomes rare. And in countries with weaker comparative law traditions, such as the United States, overt foreign borrowing can be seen as politically anathema even when systemic legal reform is desperately needed.[116]

What then are the genuine prospects for reflective legal comparison in a world seemingly beset by the dark side of comparative law and the reactionary identity politics it feeds? In the current multi-polar world, it is all too easy for national leaders to speak in value-laden terms even if they highly under-perform according to some objective metric.[117] The same is true for sub-national legislatures who engage in intra-national symbolic legal contrasts to reject legal reform informed by experiences within their own countries. Again, the intensity and availability of empirical legal information in these instances becomes orthogonal, if not detrimental, to reform debates in democratic and authoritarian regimes alike.[118]

Such a reality seems to do more than dampen the comparative lawyer's best hopes for a productive practice of comparative law. Even if the post-structural critique of legal comparability is practically outmoded, there remains some wisdom in resisting legal comparison if no practical good ever comes of it. Not simply the production of "bad" comparative legal analysis in the academic sense – that simply masks legal priors in more technical, statistical language – but the intractable use of images of foreign law in seemingly universal patterns of domestic social control.[119]

Such fatalism would not be out of place in a world which seems to produce disheartening evidence about the durability and sustainability of human progress.[120] The current rise of reactionary nationalist politics across the globe has, as of yet, done little to dislodge the types of legal regimes which undergird the very economic systems which produce the material outcomes that such nationalist politics purport to decry.[121] Notably, the type of repressive cultural essentialism around gender that Nader identified has notably grown to include an even more diverse range of contrastive legal judgments around sexuality and ethnicity.[122]

If we return to the seemingly most impactful global relationship between the United States and China, there are few indications that either country is committed to backing down from centering such contrastive legal comparison. Again, this is the case even while their economic integration, and aversion to democratic economics, are at historical high points.[123] It seems clear that the last thing any country wants to see are the ugly things it has in common with its competitor.

What then should the critical comparative lawyer do? One possibility is simply to operate as if in exile. Perhaps there will be a moment where systemic legal reform will be seen as desperately needing the type of knowledge that comparative lawyers can produce. Yet, it is hard to imagine today that such moments will not also be seen as opportunities by existing social interests, but at some point such interests could be discredited enough to legitimize genuine self-searching critique. It seems with this possibility not fully closed-off that the sustained production of good comparative law scholarship can have its moment with patience and continuity.

114 *Samuli Seppänen*, After Difference: A Meta-Comparative Study of Chinese Encounters with Foreign Comparative Law, The American Journal of Comparative Law 68 (2020) 186–221.

115 *Janine Wedel*, Collision and Collusion: The Strange Case of Western Aid to Eastern Europe (2001); *Jeffrey Kahn*, The Search for the Rule of Law in Russia, Georgetown Journal of International Law 37 (2005) 353–410.

116 *Kroncke* (fn. 2).

117 Here it is incumbent to note that authoritarian claims that a return to traditional heteronormative hyper-masculinity will invigorate countries have no empirical basis. In fact, the opposite is at least marginally true: *Lee Badgett et al.,* The Relationship Between LGBT Inclusion and Economic Development: Macro-Level Evidence, World Development 120 (2019) 1–14.

118 "Yet, in both cultures the manner of gender construction whereby the inside culture is idealized in comparison to the outside culture allows members of both East and West to feel superior to the other, while ignoring common traits." *Nader* (fn. 34) 334.

119 "My aim here is to identify how images of women in other societies can be prejudicial to women in one's own society…misleading cultural comparisons support contentions of positional superiority which divert attention from the processes which are controlling women in both worlds." Ibid., 323.

120 The most high-profile optimistic recent take is: *Steven Pinker,* The Better Angels of Our Nature (2011). Responses, especially which note the challenges of nuclear proliferation and climate change, are equally popular in public forums across the world.

121 *John Abromeit,* A Critical Review of Recent Literature on Populism, Politics and Governance 5 (2017) 177–186.

122 *Joshua Tschantret,* Revolutionary Homophobia: Explaining State Repression against Sexual Minorities, British Journal of Political Science 50 (2020) 1459–1480.

123 *Hunter Clark/Anna Wong*, Did the U.S. Bilateral Goods Deficit With China Increase or Decrease During the U.S.-China Trade Conflict?, https://doi.org/10.17016/2380–7172.2927, last access: 14 September 2021.

Another alternative is simply to carry on trying to delegitimize the intellectual veneer of bad comparative law scholarship now so popular – even if ever in the eye of the beholder. Such marginality will always strike comparative lawyers as unpalatable, especially as legal academics are commonly closer to the formal levers of social power, and comparative lawyers see other legal scholars have immediate impact on legal reform.[124] But even if comparative lawyers can best act as disrupters, this cannot be conflated with being irrelevant. A more realist view of human progress, not teleologically preordained but highly contingent, can make simply inhibiting the worst tendencies of legal comparison valuable enough.

Such realism would only redouble the conclusion that the way in which comparative lawyers have been fighting their internecine and external battles need to be reformulated. Arguing among the self-identified has few marginal returns outside of narrow networks of academic prestige. Grasping on to old critiques and old language in a world that seems to have passed by comparative lawyers can only be an apotheosis of self-referential academic production. This definitely requires engaging actively with "bad" comparative law rather than simply decrying it. For example, and as others have noted, if the larger academic world insists on coding large-scale legal phenomenon, comparative lawyers will have to produce better coding.[125]

But likely, the most difficult lesson from Nader's insight about comparative law's dark side is that our contribution has to be grounded in our own domestic contexts.[126] This is one issue that still very much bears the mark of historical inequalities, as the presumption of where scholars see the best potential impact for comparative legal knowledge production suffers from very path-dependent notions of empowerment – still quite evident in the idea that legal "development" happens elsewhere or that poorer countries are both more willing and reformable than wealthier nations.[127] In turn, simply critiquing colonialism has not served to create a sustainable, emancipatory politics in post-colonial countries. And solely working to supposedly "improve" other countries has done little to create a sustainable, emancipatory politics in former colonial powers. The dark side of comparative law is one that demands comparativists never lose sight of their roles in their home countries. The current converging calamities of the modern world show that in the long run there are no social accomplishments that can be taken for granted. Comparative lawyers would do well to secure those at home that they are best situated to secure.

124 The tension between access to power and legal relevance is cogently reviewed, if optimistically so, in: *David Fontana*, What Do Constitutional Law Professors Do?, Wisconsin Law Review (2020) 317–342.

125 An example in the context of labor regulation: *Zoe Adams et al.,* The Economic Significance of Laws Relating to Employment Protection and Different Forms of Employment: Analysis of a Panel of 117 Countries, 1990–2013, International Labour Review 158 (2019) 1–35.

126 *Kroncke* (fn. 21).

127 *Brian Tamanaha,* A Pragmatic Approach to Legislative Theory for Developing Countries, in: Seidman et al. (eds.), Making Development Work (1999) 145–156.

