# COMPARATIVE LAW AND DECOLONIZING CRITIQUE[1]

## O Direito comparado e a crítica decolonial

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## ABSTRACT

This essay asserts that comparative legal scholarship might overcome its current crisis of relevance by reorienting itself towards decolonizing critique. In a recent article, decrying the current state of the discipline, Pierre Legrand argued that comparative law has become mired in a solipsistic and outmoded style of positivism. Draying upon insights from critical theory, he argues that the discipline might render itself more relevant by engaging in a more contextualized analyses of the law and by encouraging active interpretation beyond descriptive reporting. This essay extends Legrand's argument to suggest that an emancipated, incorporative, and interdisciplinary comparative law might play an important role in decolonizing legal scholarship more broadly. Founded in a commitment to constrain an ethnocentric impulse in legal discourse, comparative law seems a natural site from which to challenge the varieties of Eurocentrism that continue to define legal scholarship and study and for exploring the colonial roots of globalized racial formations.

**Keywords:** Comparative Law; Decolonizing Critique; Pierre Legrand; Critical Theory.

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## Resumo

Este ensaio propõe que os estudos jurídicos comparados podem superar sua atual crise de relevância reorientando-se para a crítica decolonial. Em artigo recente, condenando o estado atual da disciplina, Pierre Legrand argumentou que o direito comparado está atolado em um estilo solipsista e ultrapassado do positivismo. Refletindo sobre os insights da teoria crítica, ele argumenta que a disciplina pode tornar-se mais relevante envolvendo-se em uma análise mais contextualizada da lei e incentivando a interpretação ativa para além de relatórios descritivos. Este ensaio amplia o argumento de Legrand para sugerir que um direito comparado emancipado, incorporativo e interdisciplinar pode desempenhar um papel importante na decolonização mais ampla da doutrina jurídica. Fundado em um compromisso de restringir um impulso etnocêntrico no discurso legal, o direito comparado parece um local natural a partir do qual é possível desafiar as variedades do Eurocentrismo que continuam a definir a doutrina e a produção acadêmica jurídica e a explorar as raízes coloniais das formações raciais globalizadas.



**Palavras-chave**: Direito Comparado; Crítica Decolonial; Pierre Legrand; Teoria Crítica.


## INTRODUCTION

While scholars of comparative law confront a crisis of relevance, law students themselves have been engaged in unusually creative acts of comparison.[2] In the spring of 2015, the University of Cape Town erupted in protest as students demanded that the administration remove a statue of Cecil Rhodes from its campus. Rhodes founded one of the most profitable and most exploitive mining companies in the world before becoming Prime Minister of the Cape Colony in 1890. As Prime Minister, Rhodes introduced a series of laws designed to dispossess native Africans of their lands and put them to work for European landowners.[3] When he died in 1902, Rhodes "donated" part of "his" estate to the University. He also bequeathed part of his vast fortune to the establishment of an international

[2] LEGRAND, 2017.

[3] Cecil Rhodes, considered one of the architects of apartheid, instituted the Glen Grey Act of 1894, which deprived native South Africans of the opportunity to own land while imposing a tax on South Africans who could not prove wage employment. In a speech announcing the Act, Rhodes acknowledged that "there is . . . a general feeling that the natives are a distinct source of trouble and loss to the country." S. AFR. HIST. ONLINE, 2016. But contrasting the native trouble in South Africa with the "labor trouble" in the United States and in England, Rhodes assured his countrymen, "I feel rather glad that the labor question here is connected with the native question." S. AFR. HIST. ONLINE, 2016. Rhodes' rhetoric should remind us that European imperialism has always proliferated comparisons—both on the part of those seeking to advance imperialism and those seeking to resist it.

exchange program to cultivate men for the service of expanding the British Empire—"the more of the world we inhabit, the better it is for the human race."[4] In an early draft of his will, Rhodes expressed his hope that a secret society would be created to bring the whole world under British rule.[5] For the students demanding its removal, Rhodes' statue represented the university's fundamental complicity in perpetuating colonial legacies of white supremacy and imperial capitalism. The statue stood as a reminder of the many ways in which decolonization remains incomplete.[6]

The *Rhodes Must Fall* campaign quickly spread to other universities in South Africa. A Nigerian law student brought the movement to Oxford, where a statue of Rhodes hovers above the entrance to one of its colleges.[7] Students at the University of the West Indies and the University of California at Berkeley issued statements of solidarity with their South African counterparts.[8] At Yale University, students renewed old demands to rename one of its residential colleges — Calhoun College — named after a statesman and committed defender of slavery.[9] At Princeton University, students stormed an administrative building and demanded that the university acknowledge the racist legacy of its former president, Woodrow Wilson, after which its School of Public and International Affairs is named.[10] At Harvard Law School, students of color, taking encouragement from their counterparts in Cape Town and elsewhere, sounded calls to retire the law school shield, which had been modeled after the family crest of an eighteenth century slaveholder, Isaac Royall Jr., who amassed a fortune as the owner of a sugar plantation in Antigua.[11] Royall devoted some of his

[4] In 1877, Rhodes reflected, "I contend that we are the first race in the world, and the more of the world we inhabit the better it is for the human race. I contend that every acre added to our territory means the birth of more of the English race who otherwise would not have been brought into existence." MEREDITH, 2018.

[5] CHAUDHURI, 2016.

[6] The statue came down on April 9, 2016. BBC NEWS, 2016.

[7] BBC NEWS, 2016.

[8] RUSSELL POLLIT, S.J., 2015.

[9] REMNICK, 2015.

[10] As President of the United States, Wilson aggressively reversed many of the gains black Americans had achieved after the end of slavery, purging them from civil service positions while transforming the government "into an instrument of white supremacy." N. Y. TIMES, 2015. Woodrow Wilson evidently "believed that black Americans were unworthy of full citizenship and admired the Ku Klux Klan for the role it had in terrorizing African Americans to restrict their political power." N. Y. TIMES, 2015.

[11] PARKER, 2016. HALLEY, 2008.

considerable wealth to establishing the first law professorship in the independent colonies.[12]

As observers note, the flames of protest that have since spread across elite universities in the United States were lit not in the college classroom but on the streets.[13] In places like Ferguson, Missouri and Baltimore, Maryland, the highly publicized police execution of black men, women, and children ignited massive protests. The killings recorded on cell phone cameras brought no news to black and other persecuted minorities in the United States — black communities have long complained of the violence and humiliation they routinely experience at the hands of police — but they have forced other Americans to confront a set of realities often obscured by an unexamined faith in legal institutions.[14] Protests against police violence in the United States have found resonance in France and Britain, which have their own, often unacknowledged, histories of racialized policing.[15]

Before universities in Texas and Kentucky quietly removed statues of slavery's defenders, citizens of South Carolina once again demanded the removal of the Confederate flag waving above the state house.[16] That was after a white young man entered a historic black church and shot nine parishioners. On his personal website, the killer posted photographs of himself holding a Confederate flag. He had sewn into his jacket—the one that he wore on the day he killed nine men and women in prayer—the flag of apartheid South Africa. He called his website *The Last Rhodesian*.[17] A few days after the killing, tired of old debates, an artist named Bree Newsome climbed up the thirty-foot pole to bring down the offending flag herself. She later explained, "I removed the flag not only in defiance of those who enslaved my ancestors, but also in defiance of the oppression that continues against black people . . . I did it in solidarity with the South African students who toppled a statue of the white supremacist colonialist Cecil Rhodes."[18]

[12] HALLEY, 2008, 120.

[13] NPR NEWSHOUR, 2015.

[14] AKBAR, 2015.

[15] ZAPPI, 2016; CHAN, 2016.

[16] NEUMAN, 2015; BAILEY, 2016.

[17] MADENGA, 2016.

[18] TAYLOR, 2016.

As the legal process in one jurisdiction after another has failed to bring police officers to account for gunning down black and brown citizens, law students across the United States directed their anger at their own law schools, contrasting national expressions of grief and disgust with the relative silence of administrators and faculty.[19] Law students at Georgetown University blamed a professional culture of "legal deference."[20] At Harvard Law School, students argued that "racial terror is systematically reproduced and normalized through fidelity to the so-called rule of law."[21] Addressing the law school administration, the students complained, "the fact that you refuse to openly acknowledge this adds to our distress."[22] They challenged the law school to conceive of itself as "not merely a school of law, but also a school of *justice*."[23]

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American law students were ridiculed for including in their letters of protest a plea for additional time to complete their exams. But behind their plea lies a more serious critique of law school curricula. Law students at Columbia University wrote to their administration, "in being asked to prepare for and take our exams at this moment, we are being asked to perform *incredible acts of dissociation*."[24] Learning to think like a lawyer, the students conveyed, required painful disorientation, a disavowal of personal experience, and deadening of moral intuition. "You cannot require that we . . . dedicate our energy in this moment to understanding and replicating the same legal maneuvers and language on our exams . . . that [are] used to deny justice."[25] To acknowledge the pain of psychic alienation is not a frivolous self-indulgence, as some have argued, but an essential preparation to resisting injustice, one belonging to a long tradition of anticolonial thought and race-conscious critique.[26]

While much of the conversation on campuses and in the media has focused on the reshuffling of statues and names, widening

[19] HAR. L. COALITION, 2014.

[20] COALITION STUDENTS OF COLOR GEO. U. L. CTR, 2014.

[21] HAR. L. COALITION, 2014.

[22] HAR. L. COALITION, 2014.

[23] HAR. L. COALITION, 2014 (emphasis added).

[24] COALITION STUDENTS OF COLOR GEO. U. L. CTR, 2014 (emphasis added).

[25] COALITION STUDENTS OF COLOR GEO. U. L. CTR, 2014.

[26] DU BOIS, 1903; WOODSON, 1933; FANON, 1952; BIKO, 1978; WA THIONG'O, 1986.

coalitions of students—from Cape Town to Chicago to New Delhi—have expanded the scope of their demands to include diversifying the faculty, student body, and curriculum and democratizing access to higher education.[27] The current student movement is not without its excesses and failures, but it has succeeded in posing a provocative and, as yet, unanswered question: what would it mean to decolonize our institutions of higher learning? What role do law schools have to play, given their unique capacity to prepare students for the practical elaboration of shared ideals? What would it mean for law schools to conceive of themselves as schools of justice? And how might comparative law address the call to decolonize our institutions and thought? "Not diversify," as the students insist, but "*decolonize*."[28]

**This essay will explore how a decolonizing critique might respond to or ground questions of concern to scholars of comparative law—perennial questions about the object and method of study, about our responsibility towards and recognition of difference, and about the relevance of comparative study to the societal exigencies of our particular moment.**

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## I. THE CRITIQUE OF COMPARATIVE LAW

In his recent essay, "Jameses at Play," Pierre Legrand stages a powerful intervention in comparative legal scholarship.[29]

[27] In Chicago, students and faculty have protested funding cuts and the threatened closure of Chicago State University, a public university primarily attended by working class black students, BOSMAN, 2016. In New Delhi, protests focused on the suppression of political speech against the Hindu nationalist party currently in office., BURKE, 2016.

[28] CROCKER, 2016 (emphasis added).

[29] LEGRAND, 2017.

Legrand identifies two currents within the discipline: a traditional mainstream, which he associates with scientific positivism and disciplined reporting of legal rules; and a livelier countercurrent, characterized by contextualized study of legal rules, more active interpretation, and interdisciplinary engagement. Legrand is deeply critical of the former; the latter, he embraces and recommends as the path forward for comparative law. Though styled primarily as an adjudication of a disagreement between two prominent figures within comparative law, each named James and each representative of one or the other disciplinary current, I read his essay as an invitation to imagine a new and emancipated comparative law—one that might provide a home to decolonizing critique, as I suggest in the following section.[30]

Legrand begins by identifying what have always been the core values of a comparative approach to legal study: by inclining its practitioners towards the foreign and unfamiliar, comparativism becomes a way of suspending "self-centric and self-satisfied normality"; by disenchanting our most sacred institutions and disrupting intellectual routines, comparativism becomes a practice of repositioning oneself in the world and history.[31] The comparativist's commitment to honor difference, to represent the foreign with fidelity, enables her to resist both the "nationalizing and universalizing" impulses that govern so much legal scholarship.[32] Comparative law, he writes, "is informed by an engagement with the world's legal disparateness," which it regards "as beneficial and indeed as normatively *relevant*."[33] But Legrand worries that as comparative law scholars become preoccupied with policing what is or is not a proper object of study—what it will or will not recognize to be "the law"—they lose sight of the intellectual and ethical value of comparative methods.

Legrand opens his remarkably impassioned essay by confessing, "I have long felt profound intellectual discomfort and frustration that my professional existence should have been unfolding within a field that, in the main, has tended somewhat blatantly to keep even the most basic epistemic interrogations very safely out of the ambit of

[30] LEGRAND, 2017, 17-19.

[31] LEGRAND, 2017, 1 (citation omitted).

[32] LEGRAND, 2017, 1.

[33] LEGRAND, 2017.

scholarly investigation."[34] His is an effort to revitalize comparative study, "to contribute to the redemption of epistemology within comparative law"[35] by insisting upon a heightened self-reflection within the discipline. He urges his colleagues in comparative law to think critically about the conventions of knowledge-production that define the discipline, and the intellectual habits that allow only certain questions to be raised while banishing others.

The main problem with comparative legal scholarship, Legrand asserts, is that it has become trapped by an excessive positivism, characterized by a narrowed focus on authorized legal texts and a committed indifference to almost everything else.[36] In his words, according to the reigning orthodoxy, the comparative study of law should "remain squarely set on the rules—on what has been posited by authorized officials as 'what the law is.'"[37] These, in turn, should be represented in as "scientific" a manner as possible. This understanding of the discipline has encouraged comparative law scholars to produce dutifully descriptive accounts of cases and statutes, uncontaminated by either "political commitment or personal investment," uncluttered by references to historical or cultural context, and free of authorial interpretation, critical or otherwise.[38] They regard their task as one of "arrang[ing] the law in the form of an orderly, coherent, and systematic representation of the different rules in force, largely applying them at the behest of the state."[39]

Legrand is appropriately skeptical of the positivist's pretensions to scientific objectivity. But the positivist, he argues, can only fulfill his claim to pure objectivity by denaturing his object of study. In the positivist's construction, law is made to appear rational and coherent; law is cleansed of its essential ambiguity, indeterminacy, and inconsistency. At the same time, by imagining that man-

[34] LEGRAND, 2017, 18.

[35] LEGRAND, 2017.

[36] To be clear, the "positivism" to which Legrand and I refer here is *not* the positivism of John Austin nor the positivism the positive law/natural law debates in which most American lawyers are schooled. Instead, positivism here refers to a set of epistemological conventions defining of scientific rationality in the western world since the early nineteenth century. Rather than *legal* positivism, it is *logical* or *scientific* positivism at which Legrand primarily takes aim.

[37] LEGRAND, 2017, 4.

[38] LEGRAND, 2017, 4, 60.

[39] LEGRAND, 2017, 4.

made laws operate as naturally or with the same autonomy as the Pythagorean theorem, positivists invest their own science of legal reasoning with a transcendental quality while effacing the contests and contingencies that have allowed legal reasoning to proceed as a self-authorizing force.

Just as positivists attribute to their law-object an internal purity, they assume that legal objects come with clear external boundaries. In their view, law is clearly distinguishable from not-law. As Legrand writes, positivists "regard the legal aspect of an issue as discrete and as crisply detachable from its other dimensions." But here, too, positivist legal discourse maintains its conceptual clarity only by suppressing historical contingencies, cultural contaminations, and so on. And by refusing to look beyond the usual parameters of legal discourse, to explore the conditions that give rise to its own knowledge conventions, the positivist fails to acknowledge the contingency of both his object and method of study.

For Legrand, the most concerning feature of positivism in legal scholarship is that it maintains its authority by excluding challenge. It safeguards its rationality and coherence by denying and devaluing certain forms of inquiry—particularly those that are most disruptive of its internal logic and order. As Legrand writes, "certain knowledge is banished from the sphere of significance, and some issues are made never to arise, therefore allowing for . . . an ultimately immaculate development of internal heuristic processes generating ultimately immaculate *legal* results."[40] By insulating itself from outside challenge, by refusing to question its own working assumptions, positivism within legal discourse becomes an entirely self-referencing and self-replicating epistemic regime.[41] It replicates itself in law schools by cultivating a particular mindset in new students. As Legrand puts it:

> The positivist mind channels the energies of law schools and of law teachers into the career preparation of students in a manner that ensures the solidification and the perpetuation of the existing institutional order through the annual "delivery" of sets of mentally homogenous and socially receptive individuals pliably disposed to apprehend the law as

[40] LEGRAND, 2017, 6-7.

[41] LEGRAND, 2017, 7.

> consisting in a set of textual commands requiring but (sophisticated?) technical mastery.[42]

I want to suggest that the students of color who resist sitting for their criminal law exams while police killing continues unabated and unredressed—those students escape Legrand's critical description. Those students explain that they did not want to participate in the ideological reproduction of the status quo by mastering rules that, for instance, allow police officers to use deadly force against innocent and unarmed men and women.

But many law students *do* fit Legrand's description. For instance, last year, students at one American law school complained to their criminal law professor that the statement "Black Lives Matter," worn on her t-shirt, "was an inappropriate and unnecessary statement that has no legitimate place within our institution of higher learning."[43] In an anonymous letter that has since been widely circulated, the students explained, "*We are here to learn the law*":

> This is not a political science class or college. We are a law school. We have undertaken the solemn duty to learn and respect the law. We do not need the mindless actions of our professors to distract and alienate us. Just as our personal beliefs have no place in law exams, your personal beliefs have no place in the classroom."[44]

The students' confidence that law school has nothing to do with politics or personal belief; that they can learn criminal law without having to be distracted by assertions about black humanity; that as the "solemn" keepers of the profession, they owe nothing to those who challenge its effects—these are all symptoms of the epistemic enclosure of which Legrand warns. History, other people, and conscience—these become someone else's problem.

Notwithstanding its claim to objectivity and ideological innocence, positivism is always political.[45] There is, of course, a politics to sanctioning indifference by policing disciplinary boundaries. In the United States, as in other contexts, racial inequality is sustained by historical amnesia and, often, by an unexamined faith in the

[42] LEGRAND, 2017.

[43] JASCHIK, 2016 (including links to both the students' complaint and the professor's response).

[44] JASCHIK, 2016.

[45] LEGRAND, 2017, 7.

essential goodness of law. Positivists promote the view that law has within itself the resources to gradually perfect itself, "through the self-regulatory and teleologically ordained use of the posited."[46] In this sense, positivism in legal discourse tends uncomfortably towards authoritarianism. It is more concerned with a respect for governing authority than it is with the expression of governed collectivities.

To redeem the comparative study of law, Legrand argues, comparativists should muddy the pristine waters of the positivist mainstream by engaging in two kinds of dredging—what he calls "enculturation" and interpretation.[47] The comparative law scholar should free himself of the positivist's demand for certainty and embrace the essential unruliness of legal texts and legal culture. He should abandon the notion that law can be purified of its internal deficits (ambiguities, inconsistencies, and indeterminacies) or cleaved of its external contaminations (of history and culture) and instead recognize law to be "a massively incorporative cultural formation."[48]

Legal texts, like all other texts, Legrand writes, "exist as *intertextual* matrices . . . *as* interfaces where arrays of discursive threads have interlaced to be absorbed and transformed in order to be made to speak *legally*."[49] The fabric of any legal text consists of

> "… historical configurations enmeshed with traces of political rationalities intertwined with traces of social logics interwoven with traces of philosophical postulates plaited with traces of linguistic orders darned with traces of economic prescriptions interlaced with traces of epistemic assumptions.."

and so on.[50] While descriptive positivism limits itself to endlessly reinscribing a legal text with a particular significance, encultured interpretation opens the text to re-signification. Legrand reminds us that the meaning of a legal text is never exhausted by its authorized or official interpretation. On the contrary, when confronted with multiplicity of meanings contained in any legal text, the scholar is confronted with an inescapable choice, an ethical judgment.

[46] LEGRAND, 2017, 7.

[47] LEGRAND, 2017, 21.

[48] LEGRAND, 2017, 44.

[49] LEGRAND, 2017, 40.

[50] LEGRAND, 2017, 41.

He can either attend to the difference, the newness, or the challenge presented by the trace, and thereby "do justice" to it. Or he can ignore it. But by refusing to address the hidden trace discovered in a legal text—the trace of an imperial logic, for instance, or older racial episteme—the scholar participates in its silencing and erasure.

Encultured interpretation also pluralizes the position of the legal scholar or, as Legrand puts it, "necessarily encultured texts must be read by necessarily encultured interpreters."[51] Encultured interpretation unravels the Cartesian dualism, which holds the knowing subject apart from the known world, and restores the subject to the world of relation. While the objective knower is imagined to look out upon the world, as if from an enclosed and transcending perspective, encultured reading reminds us that "individuals are part of a community"—and a *particular* community.[52] Encultured interpretation forces the legal scholar to acknowledge the ways in which the confinements of language, culture, and experience structure his knowing.

## II. ANOTHER COMPARISON

Legrand's intervention thus comes at a critical time, when an already violent and unequal world finds itself lapsing into a tribal nationalism, as the calls for racial redress first sounded in marginalized communities make their way from college campuses into law school classrooms, and as law schools themselves redefine their purpose in the aftermath of the global economic crisis and the ascendance of authoritarianism. The question now looming before many law schools is whether they should narrow their conception of professional training to render graduates more competitive within the existing legal market, or whether they have a responsibility to encourage students to think more expansively about their role as global citizens and the relationship between law and justice.

After identifying some of the intellectual hazards posed by the kind of positivism governing the comparative study of law—including epistemic blindness, authoritarian inclination, and indifference

[51] LEGRAND, 2017, 53.

[52] LEGRAND, 2017, 19.

towards otherness—Legrand advocates a general opening up of the discipline, mainly through a committed practice of contextual reading, interpretation, and interdisciplinarity.[53] In this essay, I want to amplify his call by drawing upon a tradition of critical self-reflection, now well established in another field of comparative study, comparative literature. And in so doing, I want to propose that an emancipated, incorporative, and interdisciplinary comparative law might play an important role in decolonizing and democratizing legal thought.

More than fifty years ago, René Wellek, a leading figure in comparative literature, issued a set of complaints about the state of his discipline—complaints that now resonate with Legrand's. Wellek observed that comparative literature had long been "saddled with an obsolete methodology," one characterized by a "factual positivism" on the one hand, and nationalist arrogance on the other.[54] He suggested that, in an anxious effort to establish a distinct methodology, comparative literature became bogged down by attempts to "emulate the general scientific ideals of objectivity, impersonality, and certainty," and to "imitate the methods of natural science by a study of causal antecedents and origins."[55] Comparative literature, in Wellek's account, consumed with exhaustive accumulation of the "minutest details" of authors' reading habits and meticulous influence tracking, had regressed into a form of cultural accounting, a bookkeeping of national credits and debts.[56]

For Wellek, the problem was the perceived pressure to *compare*. The discipline could free itself of its obsolete and burdensome methods by abandoning the practice of comparison itself.[57] Wellek acknowledged that comparative literature had done an admirable job of "combatting the false isolation of national literary histories" by showing European literary traditions to belong to a unified web of interrelation.[58] But Wellek doubted that the study of literature "in comparison" was distinguishable from or more valuable than the study of literature "in general." Moreover, he argued, there is no

[53] DEMLEITNER, 1999; FRANKENGERG, 1985.

[54] WELLEK, 1963a, 285-290.

[55] WELLEK, 1963b, 256-257.

[56] WELLEK, 1963b.

[57] WELLEK, 1963a, 283.

[58] WELLEK, 1963a.

single way to approach a literary or cultural text—or a political or legal text, for that matter. In remarkably sweeping terms, he argued, "there are no proprietary rights and no recognized 'vested interests' in literary scholarship. Everybody has the right to study any question even if it is confined to a single work in a single language and everybody has the right to study even history or philosophy or any other topic."[59]

By suggesting that his colleagues abandon the "artificial distinction between 'comparative' and 'general' literature," Wellek did not rid comparative literature of its methodological anxieties or preoccupations. On the contrary, his intervention seemed to intensify both.[60] The "factual positivism" of which Wellek complained was almost immediately superseded by new forms of critical thinking—post-structuralism and deconstruction, feminism and psychoanalysis, postcolonialism and new historicism. With the introduction of critical theory, comparative literature took a fundamental turn, away from a traditional training in cultural heritage towards a more thoroughgoing investigation of "the contemporary conditions of knowledge production," as Stathis Gourgouris writes.[61]

**Though the forms of critical theory associated with comparative literature have generated more than their share of controversy, exasperation, and attack, most scholars would have to acknowledge that critical theory has radically transformed the university itself, particularly in the United States.**

Through its engagement with critical theory in the late 1960s, comparative literature transformed itself into one of the most compelling sites of intellectual production in the university, generating powerful tools for challenging previously unassailable conventions and enabling scholars across the humanities and social sciences to examine the logocentric, ethnocentric, and gendered biases that have sustained western thought since the enlightenment.[62] Though the forms of critical theory associated with comparative literature have generated more than their share of controversy, exasperation, and attack, most scholars would have to acknowledge that critical theory has radically transformed the university itself, particularly in the United States.[63] As Gourgouris writes, the turn to critical theory inaugurated in American universities "a fecund period of experimental practices of radical

[59] WELLEK, 1963a, 290.

[60] BERNHEIMER, 1996a.

[61] GOURGORIS, 2011.

[62] GOURGORIS, 2011, 76–77.

[63] SAUSSY, 2006.

interrogation, subversion of established modes of interpretation, daring cognitive ingenuity, and irreverent performativity. It was thus profoundly political, if nothing else in the barest sense of exposing unquestioned domains in the structures of power (of both domination and liberation) and producing new modes of consciousness as to what constitutes authority and agency."[64]

Even as the theoretical paradigms developed within comparative literature gain influence beyond the borders of the discipline, comparative literature itself continues to submit to periodic self-examination of precisely the sort that Legrand now recommends for comparative law. Since 1965, the American Comparative Literature Association, in accordance with its own bylaws, has produced a report on the state of the discipline roughly every ten years. The purpose of the report is to encourage continued reflection on the intellectual mission of the discipline and, increasingly, its relation to its historical moment. The 1965 report championed broad linguistic competency; the 1975 report emphasized interdisciplinary engagement and challenged the elitist preoccupation with "standards" in the previous report.[65] The 1985 report was never published, perhaps attesting to the realization that the existing form, "a report on standards," had become inadequate to its task.[66] The 1995 report advocated "a broadening of the cultural scope" of the discipline and active recruitment of faculty with expertise beyond European literatures. The 2006 report, offered as a "multi-vocal report" including statements from nineteen authors reflecting a growing diversity of voices and perspectives, focused on two models of comparativism gaining currency in the field: "world literature" and "the politics of empire."[67] The most recent report, published in 2015, further explodes the convention: presented as a website, it includes dozens of short essays (and videos), from authors responding to an open call (rather than invitation), under five broad themes (including "Ideas of the Decade," "Facts and Figures," "Paradigms," "Practices," and "Futures").[68]

[64] GOURGORIS, 2011, 77.

[65] BERNHEIMER, 1996b, 21; BERNHEIMER, 1996c, 28.

[66] BERNHEIMER, 1996a, 1.

[67] SAUSSY, 2006, vii.

[68] AM. COMPARATIVE LITERATURE ASS'N, 2015.

These reports chart variety of intellectual trajectories which comparative law scholars might pursue. At the very least, they plot an escape from the epistemic enclosure that now frustrates the development of comparative legal scholarship. There are four particular exits that I would like to point out, but in general, the vision I want to put forth is of a broadly expanded comparative law, one that assumes a leading role in addressing an entrenched Eurocentrism in legal discourse while providing hospitable ground for a variety of critical and interdisciplinary projects, especially those that might join in the effort to decolonize higher education and to project alternative, more equitable forms of coexistence.

**One of the great lessons learned by comparative literature scholars, and one that may come as a relief to comparative law scholars, is that the discipline does not have to forever shackle itself to that increasingly ill-fitting adjective, *comparative*.**

**A. Beyond Comparing**

One of the great lessons learned by comparative literature scholars, and one that may come as a relief to comparative law scholars, is that the discipline does not have to forever shackle itself to that increasingly ill-fitting adjective, *comparative*.[69] Observation, comparison, and classification may have been the most respectable methods of knowledge-production in the eighteenth century, but no longer. Some legal scholars may have good reason to organize their research around a comparison of the laws of different jurisdictions, but it is not merely the practice of juxtaposition that defines comparative law but a certain intellectual, and ultimately ethical, orientation. That same orientation—an inclination towards difference and defamiliarization—might lead comparativists towards new critical insights. Within the field of comparative literature, the related habit of self-examination has proven to be especially productive, encouraging students and scholars to continuously expand the field by redefining its intellectual mission as well as its contemporary relevance.[70]

In the past decade, a number of scholars and departments have begun to experiment with the idea of recasting comparative literature as "world literature," though not without appropriate hesitation.[71]

[69] BROOKS, 1994.

[70] BEHDAD; THOMAS, 2011, 3.

[71] The main worry, of course, is that western literature is merely reinscribed or aggrandized as "world literature." In 1960, Swiss comparatist Werner Friedrich cautioned that "world literature is a presumptuous and arrogant term. Sometimes, I think we should call our program NATO literatures. Yet even that would be extravagant, for we do not usually deal with more than one quarter of the NATO-nations." SPIVAK; DAMROSCH, 2014.

Others have recommended a more cautious "worlding" approach to literature, or one that situates literary cultures globally and assumes a worldly perspective.[72] In comparative literature, this has meant turning away from questions about how ideas traveled from France to England and vice versa, to investigate (rather than actively ignore) how the oriental rug, among other forms of opulence, came to furnish the rooms in Jane Austen's novels;[73] or how the madwoman in the attic, in Charlotte Brontë's novel, lost her mind on a Caribbean plantation.[74] In other words, a worldly orientation to familiar texts has prompted scholars to explore how the long and repressed entanglement between Europe and its colonies variously shapes our ideas, institutions, and domestic arrangements. Within legal scholarship, a similar worlding of legal texts might involve thinking critically about the ways in which the U.S. Constitution enshrines the very particular priorities of a colonial settler society.[75] Or how the institution of marriage has been shaped by a dread of foreign blood.[76] Writing from within the neighboring field of comparative legal history, Thomas Duve promotes a method that emphasizes the "ineradicable interconnectedness" or mutual "entanglement" of seemingly disparate peoples, places, and cultures.[77]

In the alternative, comparative law might embrace the notion that *all* study is comparative. Particularly in the humanities, but not just in the humanities, academic work involves the task of studying the *variance* between a particular construction of the world and some alternative experience of it. Historians often seek to challenge a prevailing narrative of the past. Social scientists may test a particular image of human behavior—as projected in legal reasoning, or in an economic model, a religious verse, and so on—against some form

[72] KADIR, 2014, 264. Of course, the odd choice of word, "worlding," is deliberate in that it avoids the more familiar "globalizing," which celebrates "the imposition of the same system of exchange everywhere." SPIVAK, 2003. Gayatri Spivak, for this reason, offers up the even odder term of "planetarity" to conjure an alternative, as a yet unrealized relationship to the planet and to one another. "The globe is on our computers. No one lives there. It allows us to think that we can aim to control it. The planet is in the species of alterity, belonging to another system; and yet we inhabit it on loan . . . When I invoke the planet, I think of the effort required to figure the (im) possibility of this underived intuition." SPIVAK, 2003.

[73] SAID, 1993.

[74] RHYS, 1966.

[75] RANA, 2015.

[76] DUBLER, 2006; GROSS, 2010; PASCOE, 2009.

[77] DUVE, 2014.

of counterevidence. The model of knowledge production here looks outward, allowing us to test a particular image of the world — presented in law, history, economics — against alternatives.

David Ferris, a literary scholar, recovers such an alternative and more expansive model of comparison in Aristotle's *Poetics*.[78] In his *Poetics*, Aristotle suggests that human beings enjoy looking at representations of the world (or "likeness" [*eikonas*]) because "as we look, we learn and infer."[79] Aristotle goes on to identify two modes of comparison. The first, identified with history, is "closed" because it limits itself to fact and evidence, or what already happened. The second, identified with poetry, is more open in that "it is defined in terms of possibility," or what could have happened.[80] But this second mode of comparison is not entirely open in that it is bound by the condition of possibility; *poesis* cannot entirely exceed the factual, evidentiary constraints of *historia*. Aristotle continues to explain, then, why *poesis*, an interpretive "making," is a better instrument of knowledge than *historia*:

> The writings of Herodotus could be put into verse and yet would still be a kind of history, whether written in meter or not. The real difference is this: that one tells what happened and the other what might happen. For this reason, poetry is something more scientific and serious than history, because poetry tends to give general truths while history particular facts.[81]

Ferris suggests to his colleagues in comparative literature that the irritating adjective "comparative" might stand for the sort of orientation that Aristotle describes, an orientation towards general truths—still rigorously grounded in historical fact but ultimately concerned with possibility. By comparing, in this general sense, we develop an understanding not only of "what the world is," to invoke Legrand's discussion, but what it may become. In this same vein, a more expansive comparative law might choose for its object the variance to which several law students refer in a number of their statements—the variance between law's image of the world and others' experience of it, and the variance between law and justice.

[78] FERRIS, 2011, 28.

[79] FERRIS, 2011, 36 (quoting Aristotle).

[80] FERRIS, 2011.

[81] FERRIS, 2011, 37 (quoting Aristotle); SPIVAK, 2002.

**B. Decentering Europe, Recognizing Others**

Scanning the chapter titles of recent anthologies, which we might take to represent the current state of comparative law, one cannot help but notice that there is painfully little discussion about legal cultures outside of Europe. Reflecting upon the lack of diversity represented in comparative literature departments in the 1960s, Sukehiro Hirakawa described the field to his colleagues in Japan as "a sort of Greater West European Co-Prosperity Sphere."[82] Forty years later, the same phrase might describe the scope of comparative legal study. Two philosophy professors in the United States, observing that the majority of philosophy departments offer not a single course on "African, Indian, Islamic, Jewish, Latin American, Native American or other non-European traditions," recently chastized their disciplines for their parochialism and suggested that departments rename themselves to better reflect their curriculum: they should call themselves departments of "European and American Philosophy."[83] Again, comparative law remains vulnerable to the same admonition.

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The Eurocentrism of comparative study, in the United States at least, reflects the different histories through which Europe and non-Europe entered American universities. Both comparative literature and comparative law in the United States were built by European immigrants, many of them intellectuals fleeing authoritarian regimes.[84] Asia, Africa, and Latin America, by contrast, entered the university primarily through area studies departments, which were tasked primarily with producing knowledge of the Third World for eventual strategic use. As Gayatri Spivak puts it, "U.S. comparative literature was founded on inter-European hospitality, [while] Area Studies had been spawned by interregional vigilance."[85] Comparative literature has widened its purview in the past several decades—partly in response to recommendations resulting from one of the discipline's regular self-examinations, and partly as a result of the powerful role that postcolonial critique has played in expanding the scope of not just literary studies but, again, the

[82] SPIVAK; DAMROSCH, 2014, 364 (David Damrosch citing Sukehiro Hirakawa).

[83] GARFIELD; VAN NORDEN, 2016.

[84] SPIVAK, 2003, 8; REIMANN, 1998.

[85] SPIVAK, 2003, 8.

humanities in general.[86] Comparative law, by contrast—and despite the efforts of many in the field—remains resolutely Eurocentric.[87]

Eurocentrism here is not merely an excessive focus on Europe and its New World outposts—"the West." Rather, the term refers to a set of knowledge conventions that provide the implicit foundation and justification for the western domination of non-western others. Eurocentrism may describe conventional research models in which the West is cast as the agent of universal history and the rest are measured in term of their resemblance to It. Or it may refer to the confidence that the West is the ultimate source of enlightenment in the modern world, of ideas like freedom and equality.[88] But in the broadest sense, Eurocentrism refers to the general habit of attributing authority to only certain forms of knowledge—what we might generally refer to as western rationality—while disregarding and disparaging others.

The positivism that Legrand attributes to comparative law also participates in a fallacy that has sustained colonial reasoning since its beginning—the Cartesian fallacy through which the knower knows himself to be detached from the known world. The contemporary philosopher, Achille Mbembe, explains that western epistemic traditions, to which positivism belongs, rest on "a division between mind and the world, or between reason and nature as an ontological a priori." [89] Mbembe explains that these "are traditions in which the knowing subject is enclosed in itself and peeks out at the world of objects and produces supposedly objective knowledge of those objects. The knowing subject is thus able, we are told, to know the world without being part of that world."[90] The problem with this tradition, Mbembe argues, is that

[86] BERNHEIMER, 1996d, 39 (recommending that language study might be extended beyond the "classical" languages to include students' native languages; that scholars and teachers study canon formation and reconceive the canon; that departments should "plan an active role in furthering the multicultural recontextualization of Anglo-American and European perspectives". BERNHEIMER, 1996d at [pincite].).

[87] MARKESINIS, 2003 (dismissing charges of Eurocentrism as "trendy" "political correctness"; defending it by suggesting that "the most developed ideas" or legal systems deserve more "careful study" than more "primitive" ones).

[88] For this reason, as some have demonstrated, comparative legal scholarship that focuses on the "reception" of Anglo-European law in other parts of the world does not escape the charge of Eurocentrism. LANGER, 2004.

[89] MBEMBE, 2015.

[90] MBEMBE, 2015.

"it has become hegemonic." On the one hand, "it has generated discursive scientific practices and has set up interpretive frames that make it difficult to think outside of these frames"; on the other hand, "it actively represses anything that actually is articulated, thought and envisioned from outside of these frames."[91] Positivism, like Eurocentrism, is pernicious in that it tends to insulate itself from counter-knowledge, remains assured of its own truth, as it naturalizes the conditions that sustain its authority.

Generations of critics have observed that "Europe" has an uncanny capacity to attribute to itself the accomplishments of other non-European societies. W.E.B. Du Bois, for instance, quipped, "Why, then, is Europe great? Because of the foundations which the mighty past have furnished her to build upon: the iron trade of ancient, black Africa, the religion and empire-building of yellow Asia, the art and science of the 'dago' Mediterranean shore…"[92] More recently, scholars remind us that post-structuralist and deconstructive critique, which now assume a certain prestige in the western academy as "high" theory, were themselves shaped by the anti-imperial movements of the early twentieth century. When scholars locate the origins of critical theory in France in 1968, for instance, they forget that "French theory" drew much of its revolutionary character from Maoism and its negative dialectic from anticolonial critics like Franz Fanon and Aimé Césaire.[93] And long before American academics discovered Foucault, generations of black radicals had written devastating accounts of the complicities between knowledge and power. In Jacques Derrida's seminal *Of Grammatology*, the word "ethnocentrism" appears before "logocentrism," but it is the latter term that is now rooted at the center of critical theory.[94] As critical theory limits its regard to the minute operations of elite discourse and distances itself from earlier forms of race-conscious critique, critical theory risks reproducing the very ethnocentric self-enclosure that it once intended to disrupt.[95]

[91] MBEMBE, 2015.

[92] DU BOIS, 1999.

[93] WOLIN, 2012; CHOW, 2012; FANON, 1961; CÉSAIRE, 1972.

[94] SPIVAK, 2016.

[95] LIONNET, SHIH, 2005.

### C. The Minor and Transnational

Comparative study has long been guided by an impulse to dislodge and dismantle the national frameworks that organize scholarship in traditional fields. In recent decades, scholars working across a range of disciplines have shattered the conventional framework of analysis beyond the nation-state to explore the many relationships that minoritized subjects forge with one another across national boundaries.

**In recent decades, scholars working across a range of disciplines have shattered the conventional framework of analysis beyond the nation-state to explore the many relationships that minoritized subjects forge with one another across national boundaries.**

In an earlier essay, I proposed that comparative law might unsettle an entrenched nationalism in legal discourse by promoting study of not just the foreignness that one discovers beyond national borders, but the foreignness that lies *within* a nation's borders.[96] What I described as "minor comparativism" shares with traditional comparative law scholarship a commitment to challenging and expanding the understanding of one's own legal culture by embracing a foreign perspective. But it departs from more traditional scholarship in that it does not compare the legal culture of one state with another. Instead, it sets the official image of a legal culture, one authorized by the nation-state, against the reflections of its minoritized subjects.[97] My own essay sought to challenge the United States' self image, as a nation of immigrants, one founded in the dream of universal inclusion, by engaging the self-published writings of an Indian immigrant who was subject to denaturalization by the American government and lived under constant threat of racial exclusion.

Observing that the study of minority communities is often framed in terms of their "vertical" relationship to a national majority, Lionnet and Shih advocate a model of comparativism that situates minority communities in horizontal relation with one another.[98] In the United States, for instance, the standard narrative of racial progress is one in which a succession of black, immigrant, and indigenous groups travel separate but parallel paths to citizenship and inclusion. Even the most critical accounts of racial formation in the United States reproduce implicit binaries of opposition/assimilation, exclusion/inclusion, colored/white. But both the

[96] MUNSHI, 2015.

[97] MUNSHI, 2015, 665. *See also* COHEN, 2018.

[98] LIONNET, SHIH, 2005, 2,7.

standard and critical accounts end up reinscribing the supposed universality of American social and political institutions and the essential particularity of its ethnic minorities.

Nation-centered accounts of minorities also efface the historic relationships between racialized minorities as well as their *potential* collaborations, particularly with respect to their shared confrontation with colonialism and its legacies. For instance, as W.E.B. Du Bois came to recognize that the problem of the color line in the United States was "but a local phase of the world problem," he reflected that a potential solidarity among the darker peoples of the world had been forestalled by a lack of knowledge about one another.[99] In his 1935 essay, "Indians and American Negros," Du Bois acknowledged that black Americans knew almost nothing about the decolonization movement in India, other than what British newspapers reported. Likewise, what Indians knew of black Americans was limited to "the conventional story spread by most white American and English writers: ignorant black savages were enslaved . . . they were finally emancipated by a benevolent government and given every aid to rise and develop."[100] It was only through personal contact and exchange that black radicals and Indian anticolonialists began to learn from one another that they shared a common history of colonial displacement and that they might collaborate to imagine a postcolonial future.

A number of scholars working across national, linguistic, and disciplinary boundaries have begun to explore the dynamic relationships—collaborations as well as contestations—between minoritized groups, in settings that scale from the intimate to the global.[101] These scholars recast minorities within an expanded and complicated field of transnational networks, diasporic attachments, and interethnic solidarity. Intellectual and political movements that had previously been rendered scattered and discrete—mainly by disciplinary conventions that stabilize the study of national histories and cultures—have been brought together within experimental frameworks that might generally be described as transnational.

[99] DU BOIS, 1995.

[100] DU BOIS, 1936.

[101] Some recent monographs include BALD, 2013; BURTON, 2016; EDWARDS, 1003; HORNE, 2008; LOWE, 2015; SHAH, 2011; SINGH, 2005; SLATE, 2012.

For instance, in her remarkably ambitious volume, *The Slave's Cause: A History of Abolition*, Manisha Sinha offers a startling counter-narrative of the long struggle to end slavery in the United States, broadening her frame of reference far beyond the people and places generally associated with abolition to trace the influence of the Haitian Revolution in shaping the movement for emancipation in the United States. She describes a radical and incorporative movement in which "men and women, black and white, free and enslaved found common ground in causes ranging from feminism and utopian socialism to anti-imperialism and efforts to defend the rights of labor."[102] Sinha challenges conventional wisdom by asserting that "slave resistance, and not bourgeois liberalism, lay at the heart of the movement."[103] At the same time, she reverses Eurocentric assumptions about the agents of enlightenment, freedom, and equality in the modern world.

An expansive comparative law might make itself home to similarly ambitious legal scholarship, scholarship that identifies sources of not just moral but *legal* authority that lie far beyond the posited law and in the collective capacities of ordinary men and women. Hannah Arendt located this generative authority in public engagement. In *The Human Condition*, she wrote, "the only indispensable material factor in the generation of power is the living together of people . . . Whenever people gather together, it is potentially there, but only potentially, not necessarily and not forever."[104] A comparative law that challenges law's faith in its own perfectibility, I want to suggest, might open itself to a better understanding of how law is more radically transformed.[105] At the same time, it would preserve and nurture the fragile potential that Arendt describes, the potential to transform our world through radically democratic engagement. In this sense, comparative law might conceive of itself as a discipline that preserves both past and future—reminding us of past generations' hope for a genuinely postcolonial future, while cultivating the legal, political, and ethical capacities that will be required of that world to come.

[102] SINHA, 2016.

[103] SINHA, 2016, 1.

[104] ARENDT, 1998, 199.

[105] AKBAR, 2015.

### D. Race in Relation

Scholars and activists interested in exploring the contingencies of racial forms have long turned to comparative methods to broaden their framework of analysis.[106] Comparing the history of segregation and its aftermath in the United States to the experience of apartheid in South Africa, for instance, may help Americans to expose otherwise normalized forms of racial governmentality or expand our sense of political possibility. So might a comparison of immigration policies in the United States and Australia alert Americans to otherwise imperceptible shifts in political rationality or government tactics.[107] But traditional models of comparison that juxtapose the legal culture of one state against that of another often take for granted the current organization of the world, seen, as on world maps, as an "inherently fragmented space, divided by different colors into diverse national societies, each rooted in its proper place."[108] By leaving unexamined the relationship between racial formation and the contemporary nation-state system, nation-centered models of comparison may conceal as much as they reveal.

**By leaving unexamined the relationship between racial formation and the contemporary nation-state system, nation-centered models of comparison may conceal as much as they reveal.**

For this reason, David Theo Goldberg recommends an approach that is "relational" rather than comparative.[109] Goldberg distinguishes the nation-centered models of comparison that have taken shape with academic departments from another tradition of political thinkers—including Arendt and Du Bois, among many others—whose investigations of race and racism invariably lead to the colonial roots of the contemporary nation-state form.[110] Goldberg writes, "what a relational account adds . . . is not just the historical legacy. It enables one to see how the colonial shaped the contemporary, planted racism's roots in place, designed its social conditions and cemented its structural arrangements."[111] Postcolonial critics remind us that the colonies were sites of legal experimentation in which European powers invented new forms of sovereignty and rights of contract and property, spatial orders and regulated intimacies,

[106] A few recent examples in comparative law scholarship include BHANDAR, 2018; COTTROL, 2013; HERNANDEZ, 2016; MAWANI, 2009; PRASHAD, 2000; MCKINLEY, 2016; RUSKOLA, 2013.

[107] MOUNTZ, 2010.

[108] GUPTA, 2008.

[109] GOLDBERG, 2011, 357.

[110] DU BOIS, 1915, 707; ARENDT, 1998, 128.

[111] GOLDBERG, 2011, 365.

racialized communities and subjects for management and control.[112] As Goldberg writes, "it's not that racism is reducible only to some narrow connection to colonial subjection and repression, ordering and governmentality. Colonial outlooks, interests, dispositions, and arrangements nevertheless set the tone and terms, its frameworks for conceiving and thinking about the possibility for engaging and distancing, exploiting and governing, admitting and administering those conceived as racially distinct and different."[113] Social practices invented in the colonies did not always remain in the colonies. Practices of biometric identification invented in colonial India—the fingerprint, most famously—would become a routine part of criminal investigation in Europe and eventually everywhere.[114] Arendt famously argued that the efficiencies and brutalities rehearsed in colonial Africa were but "a preparatory stage for coming catastrophe" in Europe.[115]

For Goldberg, a relational approach to race and racism allows us to recover the colonial roots of contemporary, globalized racial forms. At the same time, it reminds us that race cannot be understood in isolation or as an aberration; it saturates the nation-state and its organization of the world. Where "a comparativist account undertakes to reveal through analogy" across nations or states, Goldberg suggests, "a relational account reveals through indicating how effects are brought about as the result of historical political or economic, legal or cultural links, the one acting upon another." Where "a comparativist account contrasts and compares," "a relational account connects, materially and affectively, causally and implicatively."[116]

Let me conclude by illustrating the value of relational investigation in the context of immigration law. One of few legal academic texts devoted to the comparison of immigration laws, a volume entitled *Controlling Immigration: A Global Perspective,* surveys the immigration laws of fifteen countries, which the editors divide into three groups: "(1) nations of immigrants, in which immigration is

[112] COHN, 1996.

[113] COHN, 1996.

[114] *See generally,* COLE, 2001.

[115] ARENDT, 1998, 123.

[116] GOLDBERG, 2011, 362–63.

part of the founding national ideal; (2) countries of immigration, in which immigration has come to play an important role in social and economic development but is not part of the process of nation-building; (3) latecomers to immigration."[117] The first group consists of the United States, Canada, and Australia; the second consists of seven countries of Europe; the third consists of Japan and Korea.

Besides limiting its scope primarily to the countries and settler colonies of Europe, the structure of comparison here is troubling for at least a few reasons. The first returns us to Legrand's important critique. As even the title betrays, *Controlling Immigration* has us seeing like a state. It narrows our focus to the ordering imperatives of the state, such that we risk losing sight of countervailing perspectives (namely those of immigrants) as well as counter-authoritarian concerns (including a respect for the natural capacity of human beings to move).

Second, to group the United States, Canada, and Australia in terms of their own founding mythologies is to perpetuate a set of grievous fallacies. To identify the United States as "a nation of immigrants" is to embrace a deeply ideological construction of the national project, one that participates in the myth of American exceptionalism while refusing to acknowledge, among other things, that the "nation of immigrants" is also a settler nation.[118] Indigenous Americans are not immigrants; many of them refuse passports, in defiance of the ongoing crisis of colonialism in which we are all implicated.[119] In the past decade, scholars of Asian-American studies in the United States, who have long framed their own relation to the United States in terms of national recognition and inclusion, have recently begun to explore the complicities between Asian immigration and settler colonialism—indeed, identifying Asian Americans as participants in an ongoing settlerism.[120] These scholars, engaged in comparative scholarship of the relational and minor-translational varieties, have begun to raise challenging new questions about immigration and citizenship

[117] HOLLIFIELD, MARTIN, ORRENIUS, 2014.

[118] So does it obscure histories of excluding and expelling non-European immigrants—to say nothing of the still unresolved legacies of African enslavement.

[119] SIMPSON, 2014.

[120] FUJIKANE; OKAMURA, 2008; VOLPP, 2015.

in the settler colonial context, and they have done so by holding themselves accountable to indigenous others.

Finally, the structure of comparison leaves unexamined certain normative assumptions about the contemporary nation-state system. For instance, it leaves unexamined the notion that, but for some limitation, national sovereignty consists of the right to exclude unwelcome foreigners from national territory. But until the turn of the twentieth century, European nations imposed few restrictions on immigration and generally recognized "the inherent and inalienable rights of man to change his home and allegiance."[121] In my own work, I have tried to show that, in the United States and other parts of the white-settler New World—so-called "nations of immigrants"—it was the mass migration of Asian laborers that prompted new formulations of sovereignty, territorial boundaries, and national identity.[122] In legal scholarship on immigration, as in public discourse, we often take for granted the conceptual and normative priority of nation-state borders, as though nations came first, migrants second. But as the history of Asian exclusion from the white-settler New World demonstrates, new forms of migration continuously give rise to new articulations of the nation.[123] Likewise, in our present, we often take for granted the relative permanence of the international system of nation-states, but this is a relatively recent arrangement, one that took shape against the backdrop of the European world war, the closing of New World frontiers, and intensification of decolonization movements in Asia and Africa. If we were to limit ourselves to describing "what the law is," we would acknowledge only that states have broad authority to exclude foreigners. But we would fail to understand the political and historical contingencies that gave rise to our present; we would limit our imagination of alternative, more humane futures.

## CONCLUSION

At the turn of the twentieth century, white South Africans looked to the American South to devise legal solutions to their own "race

[121] U.S.-CHINA, 1910.

[122] MUNSHI, 2016.

[123] MUNSHI, 2016.

problem." Two years after Mississippi introduced a literacy test and a poll tax to disenfranchise black voters, the Cape Colony adopted similar measures.[124] Given that the Mississippi strategy had proven so effective, the United States adopted a literacy test to restrict undesirable immigration, primarily from Southern and Eastern Europe.[125] The literacy test for immigration was twice vetoed in the United States but quickly adopted in Natal to restrict immigration from India.[126] With encouragement from the British imperial government, the literacy test was adopted in Australia, primarily to exclude Chinese immigrants.[127] Determined not to repeat the mistakes made in the United States—namely of relying on racialized castes of "free" or cheap labor—leaders of the new Commonwealth were careful to adopt laws that would keep Australia white.[128]

**Robin D. G. Kelley reminds that the sensibility among African American scholars and activists, however varied, has always been comparative [...]**

Colonialism has always stimulated comparisons. So has resistance to colonialism and its racial legacies. Robin D. G. Kelley reminds that the sensibility among African American scholars and activists, however varied, has always been comparative: defined by a double consciousness—what Du Bois described as "this sense of always looking at oneself through the eyes of others"—an identification with an African past and others of the African diaspora, and a solidarity with other racialized minorities in the United States and colonized peoples elsewhere.[129] The student movements now spreading across continents, like the transnational movement taking shape under the broad banner of *Black Lives Matter*, belong to this second, decolonizing tradition of comparative thought. In this essay, I have tried to advance a vision in which a creative and expansive comparative law might play an essential role in decolonizing and democratizing legal thought.

[124] LAKE, 2005.

[125] LAKE, 2005, 218.

[126] LAKE, 2005, 219–21.

[127] MARKUS, 1979.

[128] LAKE, 2005, 213.

[129] KELLEY, 1999.

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