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Globalization and Legal Knowledge: Implications for Comparative Law

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Globalization brings laws and legal cultures into more direct, frequent, intimate, and often complicated and stressed contact. It influences what legal professionals want and need to know about foreign law, how they transfer, acquire, and process information, and how decisions are made. We might expect the field of comparative law, therefore, to be replete with efforts to comprehend globalization and its impacts on law and to develop strategies for dealing with them. If the central objective of comparative law as a discipline is to "know" foreign law, then these issues should be central to its project. So far, however, comparatists have paid relatively little attention to these influences and their implications. In this Article, I suggest some ways in which the comparative law agenda might be expanded to respond to these challenges.

My central claim here is that globalization calls for increased attention to goals and methods that have been either neglected or little developed in comparative law studies. Specifically, globalization demands development of more sophisticated tools for structuring and interpreting foreign legal knowledge, and it requires more attention to the processes by which legal information is acquired, processed, and transferred.

Note the scope of this claim. Globalization has many effects on legal systems and how they operate, but I am here concerned only with its effects on legal knowledge.[1] The central issue I address is what is involved in "knowing" foreign law—what do we and should we know, and how do we and should we go about knowing it?

In this Article, I first look briefly at the phenomenon of globalization itself and specify how I am using that term. I then review some of globalization's impacts on how legal professionals "know" foreign laws. This leads to the central part of the Article, in

1. *See, e.g.*, Henry H. Perritt, Jr., *The Internet Is Changing the Public International Legal System*, 88 KY. L.J. 885, 885-955 (1999-2000) (describing how the low cost and easy access to information the Internet provides enhances the effectiveness of international law by catalyzing its acceptance and the development of new law, and by helping to police violations).

which I explore the implications of these types of changes for comparative law and suggest ways in which the comparative law community might respond to the challenges they pose.

I. DIMENSIONS OF GLOBALIZATION

Globalization is a loaded and imprecise term that is used in many ways, and it is therefore important that I specify how I am using it here.[2] I use the term to refer to three processes—technological, economic, and normative. Their common element is that they tend to reduce local and regional constraints on conduct. Note that the reference is to processes rather than outcomes or conditions. I am concerned with the ways in which those processes of change affect legal knowledge.

One component of globalization is economic.[3] Local and national constraints on economic activity are being reduced on several levels. On the ownership level (including financing arrangements), the asset pools that are used to finance economic activity are increasingly shared across borders. Moreover, groups of shareholders and other stakeholders "own" business entities with little regard to the location or allegiance of the individuals participating in the ownership relations. On the management level, those who direct enterprises are increasingly chosen with little or no regard to the country of their nationality and drawn from a global talent or personnel pool. In addition, global economic activity requires that managers from many countries act together in a single enterprise or in often complex networks of corporate relationships. Finally, the markets on which firms compete are increasingly global. Firms must conceive strategies in order to meet competition from firms "located" in many parts of the world.

A second globalization process is technological—the development and spread of advanced information technology. The Internet and e-mail are resolutely and fundamentally global; they are

2. For an insightful and broad-ranging discussion of globalization generally, see THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (1999).

3. For influential perspectives on the economic aspects of globalization, see generally ROBERT GILPIN, THE CHALLENGE OF GLOBAL CAPITALISM: THE WORLD ECONOMY IN THE 21ST CENTURY (2000), which examines the political and economic characteristics of the global economy and America's role in helping overcome its weaknesses, and JOHN GRAY, FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM (1998), which describes the instability of global capitalism and the worldwide free market.

not constrained by local or regional boundaries.[4] As this technology is diffused around the world, it greatly increases the speed of transborder communication and information flow and reduces their cost.[5] This then facilitates and encourages particular forms of communication and interaction.

The third element of globalization I include here is normative or regulatory. This refers to the extension of normative functions beyond local, national, and regional borders. This extension has two dimensions. One is institutional. During the last several decades, international organizations such as the World Bank and the World Trade Organization have acquired important roles in establishing norms and processes that have global application and influence.[6] Perhaps less obvious, but equally important, is a "softer" form of normative globalization in which individuals from governmental and nongovernmental institutions interact in making decisions that generate norms and procedures that have global dimensions. This includes, for example, the interactions between officials relating to the application and enforcement of competition laws.[7] Here the frequent exchange of information and ideas generates pressure to think about normative problems in similar ways, enact similar norms, and follow similar procedures in legal systems around the globe. Another "soft" normative form relates to nongovernmental organizations (NGOs) such as Amnesty International, whose influence on local, regional, and international organizations is growing rapidly.[8] These NGOs often involve individuals and institutions around the world in participatory decision making, and they often develop normative claims that are then diffused transnationally.[9]

These technological, economic, and normative processes are interrelated in many ways. In his influential book on globalization, Thomas Friedman argues that these and other processes are closely interwoven, that they reinforce each other in powerful ways, and that together they form a process of globalization that fundamentally

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4. The reduced cost and increased speed of transportation is also an aspect of technological globalization, because it reduces the constraining influence of geography. Its influence on legal professionals is, however, peripheral and no longer particularly new.

5. For a discussion of this phenomenon and its ramifications, see, for example, JEREMY RIFKIN, THE AGE OF ACCESS (2000).

6. *See* Perritt, *supra* note 1, at 885-955.

7. *See, e.g.*, David J. Gerber, *The U.S.-European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective*, 34 NEW ENG. L. REV. 123, 123-43 (1999).

8. *See* Perritt, *supra* note 1, at 885-955.

9. *See id.*

changes virtually "everything."[10] I suspect that he overstates the consistency of the reinforcement and the total impact, but for our purposes the important point is that the three processes reinforce and relate to each other in important ways.

II. SOME CONSEQUENCES FOR KNOWING FOREIGN LAW

In many contexts, the effect of one or more of these processes is to change what is involved in "knowing" foreign law. The act of knowing takes on new spatial, temporal, institutional, interpersonal, and technological dimensions, and it is influenced by different and frequently changing factors.

It is important to introduce at this point a distinction that will play an important role in the following analysis—the distinction between "information" and "knowledge."[11] The two terms are often used imprecisely and synonymously, but I distinguish them sharply. I use "information" to refer to data in the abstract, without regard to a particular "knower." Facts, rules, procedures, and any other data about or from a legal system exist as representations independently and outside of any relationship to a knower. They can be transferred, processed, and manipulated as linguistic artifacts. In contrast, I use "knowledge" to refer to information in its relationship to one or more knowers. The act of cognition relates the information to a knower, thereby transforming information into knowledge.[12]

A. Changing the Relationship of the Knower to Information

1. Information Density

The almost instantaneous availability of immense amounts of information through the Internet and other digital formats alters the basic task of knowing foreign law in many situations. Prior to this avalanche of data, gaining access to the relevant information was typically a central task in knowing foreign law. The main job of a legal professional charged with providing guidance on foreign law was often to find out what the potentially relevant legal data was.

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10. *See* FRIEDMAN, *supra* note 2.

11. For a somewhat similar distinction, see JOHN SEELY BROWN & PAUL DUGUID, THE SOCIAL LIFE OF INFORMATION (2000), which decries a single-minded focus on information in favor of a broader perspective on knowledge and social combat in the development of the information revolution.

12. The terms "objective knowledge" and "subjective knowledge" are sometimes used to describe a related distinction, but I find that usage cumbersome and potentially misleading.

For a large and rapidly growing set of situations, information technology has rendered this task far less important and has trained attention instead on the task of making sense out of the extensive amounts of information available. Where the knower has ready access to copious amounts of information, the problem is no longer obtaining enough "information," but rather having the capacity to use the available information effectively.[13] The emphasis shifts from the process of getting information to the process of transforming it into useful knowledge—that is, structuring and interpreting information so as to provide answers to the questions posed or problems presented.

2. Filters and Their Absence

Globalization not only renders legal information more readily available, but often also considerably more opaque. By this I mean that the new sources of information often present that information in a form that is more difficult to evaluate and interpret than information available in more traditional forms. In part, this is because the vast amounts of information accessible in digital form, particularly over the Internet, are often unstructured. They often represent collections of statutes, cases, documents, or other data that is raw and unaccompanied by information that can be used to interpret it. Information from these sources may also be opaque in another sense: the principles and processes used to structure it are often difficult or impossible to perceive. The knower has little or no means of knowing how accurate the information is, who has chosen and structured it, and in what contexts and for what purposes it has been assembled.

3. Time as Context

The technological component of globalization combines with the other two components, economic and normative, to alter dramatically the time frame within which knowledge must be acquired, processed, and transferred. The Internet, e-mail, and cellular phones all tend to constrict the time frames for these processes, compressing them and requiring that they be performed increasingly quickly. When a legal professional is required or expected to respond quickly to a particular decisional situation, she usually needs a different kind of knowledge than when she has a longer time frame in which to perform the same operations. Knowing is located in and conditioned by the temporal

13. I do not, of course, suggest that in such situations access is or was sufficient *by itself.* Interpretation and application skills are virtually always needed to develop useful knowledge of foreign law.

conditions in which it takes place. As a result, we know in different ways, depending on those conditions, and we need to understand the impacts of these changes in temporal context.

4. The Need for Process Information

Economic and normative globalization also create more direct, immediate, and intense contact with the operations of foreign legal systems, including their training and other acculturation effects. As legal professionals from one system are required to make decisions that have effects in other countries or to respond to information flowing from or imbedded in other systems, they require more information about how those systems actually work—who does what, how decisions can be influenced, and the like. Moreover, as decision makers from different legal systems increasingly interact in both private and public contexts, they need to know more about the forces that influence the thought, representational practices, and decision making of those with whom they must interact.

In short, they increasingly need what I call "process information"—that is, information about how systems influence thought and decision making. In these interactive contexts, the focus shifts to choices and decisions that often have relatively little to do with specific provisions of substantive or procedural law—the traditional focus of comparative law knowledge—and more to do with how the operations of a system influence the choices of individuals and groups.

This represents something of a paradox of globalization: as economic and other processes become more global in one sense, they also become more local in another. The kinds of contacts, relationships, and tasks created by globalization often call for local information about how a system and its participants operate and interact.

B. Changing the Relationships Among Legal Professionals

Globalization also changes the relationships between legal professionals in ways that influence the processing and transmission of legal information. Legal professionals are a particularly important source of information about foreign law. They typically have primary responsibility for structuring information for use in particular situations. They decide what is relevant, assess the relative importance of pieces of information, and interpret specific situations in light of the total set of available information. Thus the relationships among legal

professionals are central to the creation and transfer of legal knowledge.

1. Dialogue as Model

The potential impact of globalization on these relationships is profound. For example, more frequent, rapid, and low cost communication transforms the basic patterns of much intraprofessional communication into what I call "dialogue" form. In this form, messages are understood less as discrete units than as part of an ongoing process of relatively rapid responses. Communication is "on-line" in the sense that a virtually instantaneous response is always possible, almost costless, and typically expected. Until recently, only oral communication took this form, but e-mail has imbedded written text for the first time in a dialogic format.[14] The spread of Internet technology means that this form of communication is, or soon will be, a dominant form of communication between legal professionals, and thus it is central to the relationships among legal professionals from different systems.

This development means not only that messages tend to take a particular form, but also that the medium of transmission and the expectations and economic pressures associated with that medium create powerful incentives to use that form and similarly powerful disincentives against the use of other forms. This message form has come to represent the standard and expected form of communication for a wide range of situations.

Dialogic form then shapes the ways in which legal professionals represent and transfer knowledge to each other. For example, e-mail messages tend to be relatively short. Aware that the recipient can access the message immediately and respond immediately, the sender has incentives to be brief. Conceiving the individual message as part of an ongoing interaction, the sender has incentives to operate on the assumption that if the recipient wants more information or clarification, that person can ask for it. This, in turn, urges the sender to compress the information that is being transferred.

At the same time, this form places often severe time pressure on the process of acquiring and structuring knowledge about foreign law and formulating and responding to messages about it. It means that the sender is typically expected to respond quickly to messages requesting information about foreign law or conveying information

14. For a discussion of related issues, see DAVID HAKKEN, CYBORGS@CYBERSPACE: AN ETHNOGRAPHER LOOKS TO THE FUTURE (1999).

about it. Thus, the sender must not only write shorter and more condensed messages, but she also has less time in which to write them.

The need to compress information while producing messages more quickly can lead to serious problems in conveying information about foreign law. For example, the premise of dialogic form is that messages can be short, because the recipient can ask questions that will indicate what kinds of additional information are required. Where parties to the communication operate within the same legal system, the recipient is likely to know what questions need to be posed to achieve the desired information. When foreign law is the subject of the message, however, the recipient may not have adequate knowledge to pose the appropriate questions.

Traditional, usually lengthier presentations of legal material (e.g., memoranda) may, of course, be transmitted electronically as attachments to e-mail messages. Where the form of a message does not fit the dominant conception of the communication relationship, however, there are disincentives to use that form, and, as a result, material presented in other forms often has diminished roles and status.

2. "Stripped" Communication: The Evanescence of Context

Particularly important for our purposes is the impact of this dialogic form of communication on the process of interpreting legal information. The letter or memorandum is typically understood as a relatively self-contained message unit. The sender is understood to be responsible for providing the material that is necessary and appropriate for interpreting its content. In contrast to letters and memoranda, e-mail tends to "strip" messages of context. In shorter messages that are understood as part of a dialogue, time pressures, space constraints, and response expectations associated with the medium often induce the sender to dispense with the cues that may be needed to interpret messages effectively and to apply legal knowledge correctly.

Intercultural communication is a complicated process under the best of circumstances.[15] Placing the transfer of information about it in e-mail form tends to eliminate the kinds of information that are most important for making the communication effective. At the very least, this calls for new strategies designed for this type of environment—strategies that focus on recognizing what questions should be asked, what factors are likely to influence the communications, what

15. For a discussion of related points, see RON SCOLLON & SUZANNE WONG SCOLLON, INTERCULTURAL COMMUNICATION 1-15, 122-54 (1995).

assumptions are built into the communication, and so on. There are other implications of the dialogic form of communication, but the basic point is that the form of communication shapes the information that is conveyed in it and, thus, the relationships surrounding it.

3. Participation as Process

The economic and normative components of globalization also heighten the importance of what I call "participatory relationships" among legal professionals from different legal systems. This term refers to situations in which legal professionals participate together in some form of decision-making process, whether governmental or private.[16] Such relationships are becoming far more common and now represent a central mode of relating, rather than a peripheral or occasional one. In business contexts, for example, legal professionals from different legal systems increasingly give advice relating to a single management decision or set of interrelated decisions, either because those decisions have consequences in more than one legal system, because the stakeholders have legal interests based in different systems, or because competitors are subject to incentives and constraints based in different legal systems. The advice of each legal professional is related to that of others by the decisions that are addressed. Typically, this also requires dialogic interaction among the participants, as each of the advice givers participates in the consideration, preparation, and execution of the decision.

Such participatory relationships are also becoming increasingly common in the governmental sphere. To return to the example given above, intergovernmental cooperation in the enforcement of competition (antitrust) law involves frequent contact between U.S. antitrust officials and their counterparts in the European Union.[17] The officials involved, often including lower-ranking officials, exchange information and discuss potential and existing investigations.[18] They thus participate together in the decision-making process.

Participation, particularly in dialogic form, intensifies the need for particular kinds of knowledge about those with whom one is participating. For example, it calls for knowledge of the influences that shape the other participant's thoughts and actions. This might

16. "Participation" is not limited to situations in which all participants seek the same outcome. The issue is whether they are interacting with a view to influencing the same decisions. It can thus include, for example, negotiations relating to a particular business or legal decision.

17. *See* Gerber, *supra* note 7, at 126-43.

18. *See id.*

include information about the thought patterns, procedural expectations, and linguistic practices that are part of the system in which the other operates. This knowledge can aid communication, avoid misunderstandings, solidify trust, enhance predictability, and produce other important effects on the shape, value, and success of the decision-making process.

These impacts are related. Changes in the form of communication have combined with the increasing importance of participatory relationships to alter the ways in which legal knowledge is transferred and the conditions under which it is interpreted.

III. WHAT WE NEED TO KNOW ABOUT FOREIGN LAW

These changes in the exchange of information call for an examination of how we know foreign law—i.e., the structure and contents of our knowledge. In my view, they highlight the need to provide new information in a different form ("what" issues) and to examine the processes of acquiring, processing, and transmitting information ("how" issues).

A. Criteria

Which kinds of information in what form provide value under the new circumstances? I suggest that four criteria are particularly important. The information should be: (1) sufficient in scope, (2) efficiently organized, (3) readily available, and (4) action oriented.

The sufficiency criterion refers to the need to develop information that is broad enough in scope to perform the tasks envisioned. If the central task of the knower in on-line, participatory situations is to interpret the messages and conduct she encounters, the knower needs information that enables her to perform those interpretive tasks. Since messages and conduct are artifacts of decision making, the information must be comprehensive enough to reveal the factors that have shaped the relevant decisions.

"Efficiency" is a second criterion. The information should not only be sufficient in scope to perform the tasks identified, but also structured specifically to aid in performing them. The need to respond quickly and the density and opacity of available information call for information that provides high levels of interpretive value in relation to the resources expended. Ideally, the information should be self-generating—that is, it should lead the knower to additional relevant information, as well as facilitate evaluation of its relevance and its relationships to other information.

Third, the information should be readily available—i.e., it should be structured for use under strong time constraints. The new technologies and the growing importance of participatory relationships demand information that can be employed effectively and quickly in on-line situations.

Finally, the information should be "action oriented." When legal professionals operate in an on-line context, either because of the medium they use or because of the participatory relationships in which they are imbedded, they need information that directly informs their conduct. They must respond quickly, and thus the information must be constructed so as to inform such responses.

B. Tools

These criteria call for instrumental knowledge—i.e., tools structured for particular uses. The significance of this idea might easily be missed, but it is fundamental to our project. Traditional comparative law has typically viewed information as a product rather than a tool. In that view, the operating assumption is that the information produced is an end in itself. Its function is to answer a question. The information is, of course, expected to be applied by someone, but it is not designed to enhance the abilities or capacities of the user. In contrast, the criteria we have developed for operating on-line insist that we develop information that is specifically designed to serve as a tool. This represents a basic shift in cognitive orientation, and it shapes the more specific suggestions below.

How then should the tools be shaped? The short answer is that they should be shaped according to the uses to which they are to be put. The uses we have outlined call for tools that (1) enhance the interpretive capacity and skills of the legal professional and (2) can be used effectively in on-line situations. The information should, therefore, be organized so as to enable the user to disaggregate and analyze complex and dense information sets, recognize the significance of individual units of information, and then reassemble them as effective tools of interpretation.

The most important feature of the tools is, therefore, their conceptual structure. The individual concepts should be sharply etched, easily recognized, and readily employed, and the relationships among the concepts should meet the same criteria. The primary function of the tools is to recognize patterns of conduct, meaning, and communication, as well as the influences they have on decision making. These patterns are the tools that enable the legal professional

to analyze and interpret data. Ideally, they enable the user to see more while looking at less.

C. System and Process

This tool-orientation means that we need to know how legal systems influence the decisions that are made by those acting within them. We need to interpret messages, information, and conduct, and these are shaped by the systems in which they are produced. They are artifacts of decision making within those systems.

The key to effectively structuring information for these purposes is, therefore, to develop analytically useful concepts for referring to systems and their operations. In legal contexts, the concept of "system" is typically used in vague ways to refer to the totality of factors involving law in a particular jurisdiction. Hence, "United States legal system" refers in a general way to the courts and laws of the United States. But this usage is of little analytical value, because it fails to capture either the relationships among system components or patterns of interaction.[19]

As I have suggested elsewhere, however, we can craft an analytically more powerful concept of system by using decisions as the focal point of analysis.[20] I here use a broad concept of "decision" that includes any choice by a legal actor—whether an individual, group, or institution.[21] It thus includes not only formal, authoritative decisions such as those of courts, but also, for example, the decisions of legal professionals concerning which kinds of arguments to use in litigation, which kinds of language to use in explaining a legal situation to a policy maker, and how to interpret specific language.

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19. For valuable attempts to use sociological systems theory in relation to law, see, for example, NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW (Elizabeth King & Martin Albrow trans., Martin Albrow ed., Routledge & Kegan Paul 1985) (1972); GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (Anne Bankowska & Ruth Adler trans., Zenon Bankowski ed., 1993). For a broader discussion of the potential value of systems theory in legal scholarship, see Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 488-97 (1997).

20. *See* David J. Gerber, *System Dynamics: Toward a Language of Comparative Law?*, 46 AM. J. COMP. L. 719, 722, 728-37 (1998).

21. A more developed version of this argument will require a discussion of what is meant by "legal." For present purposes, however, we can define the term broadly to refer to the process by which societies (and, in some cases, communities) articulate, apply, and enforce conduct norms. At the margins, the issue of what is "legal" may pose difficulties, particularly with regard to Asian systems in which Western concepts of "law" often do not "fit" easily, but I suspect that for most purposes this definitional issue will not pose major problems.

Using this concept of decision as the focal point of analysis, we can refer to a system of law as consisting of those factors that regularly influence the decisions of a community of legal decision makers. The idea is that for any legal community at any point in time, some decisional influences are sufficiently stable and important to influence decisions in predictable ways, and together these structures can be considered the system of law in that community.[22] "Process" then refers to how these factors operate together to influence specific decisions. Process is the system "in action."

By way of illustration, I will sketch one way of beginning to structure this type of information.[23] I identify four categories of influence on decision making: texts, institutions, decisional communities, and patterns of thought. They are merely starting points for structuring information. By examining patterns of influence within each category as well as the relationships among those influences, we can shape the kinds of tools we need.

Authoritative texts—such as statutes, regulations, and judicial opinions—represent one form of influence. These are important in all legal systems, because they embody the authority that is central to the operation of such systems. In modern legal systems, they guide, shape, and justify legal decisions. In many legal systems, the structures of certain texts become basic categories of thought among legal professionals. Civil codes, for example, often play such a role.

In analyzing the influence of texts, we explore factors such as the relative status of texts among groups of decision makers as well as the expectations of influence associated with them and the methods used in interpreting them. For statutes, issues include, inter alia, comprehensiveness, levels of abstraction, degrees of systematization, and specificity of language. We can analyze court decisions by looking at factors such as factual density, language formality and specificity, and reliance on external sources for meaning.

Institutions are a second major influence on decisions. This category includes formal, procedurally structured relationships within a legal system. Courts, legislatures, universities, and juries are obvious examples, but the category extends to any formally organized set of relationships—such as bar preparation courses or departments of law firms. Legal decisions are frequently, perhaps always, influenced by

22. Note that these patterns also help to identify the boundaries of the system.

23. I have previously experimented with elements of this type of analysis. *See, e.g.*, DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS (1998); David J. Gerber, *European Law: Thinking About It and Teaching It—An Introduction to the Symposium*, 1 COLUM. J. EUR. L. 379, 379-95 (1995).

these relationships, and thus these influences need to be perceived and evaluated.

Decisions are also made in the context of communities. I use the term "community" to refer to regularized patterns of relationship—here, among legal actors—that are not formally organized. We need to investigate the structures of such communities—the roles of the participants, patterns of relationship among them (such as those between judges and practicing lawyers and between judges and legal scholars), and patterns of prestige and status.[24]

Finally, individuals make and influence decisions; thus, patterns or modes of thought are key factors in understanding existing decisions and predicting future ones. We need, therefore, to investigate patterns of thought and discourse within legal communities and to ask, for example, how discourses code experience and how particular patterns of coding affect decision making. In this context, the role of traditions of thought within legal systems and the forces that strengthen or weaken the influence of such traditions are likely to be central. Scholars have demonstrated in recent decades the degree to which the "discourse" that communities use affects individual patterns of thought and the decisions that arise from them,[25] and yet this scholarship has been seldom used in the comparative analysis of legal systems.

These factors are interrelated, and a key function of the analysis is to "perceive" them as part of a system—that is, to see their interrelationships. For example, the influence of texts on decision making will be tied to patterns of thought and interpretation, which will, in turn, be tied to the structures of power and influence within communities and institutions.

The analytical structure presented here is, of course, rudimentary, because my objective is merely to indicate one way of pursuing the objectives I have outlined. These suggestions for structuring the analysis will have to be developed, and their utility will have to be tested.

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24. I explore the role of such relationships in David J. Gerber, *Authority, Community and the Civil Law Commentary: An Example from German Competition Law*, 42 AM. J. COMP. L. 531, 537-42 (1994) (reviewing GWB: KOMMENTAR ZUM KARTELLGESETZ (Ulrich Immenga & Ernst-Joachim Mestmäcker eds., 2d ed. 1992)).

25. *See generally* GILLIAN BROWN & GEORGE YULE, DISCOURSE ANALYSIS (1983) (examining the construction and interpretation of linguistic messages in communication); HOWARD MARGOLIS, PARADIGMS AND BARRIERS: HOW HABITS OF MIND GOVERN SCIENTIFIC BELIEFS (1993) (positing that cognition, or habits of mind, is a process of recognizing patterns, and that habits of mind yield patterns of thinking that pose barriers to acceptance of new ideas).

IV. HOW WE KNOW FOREIGN LAW

How we know foreign law under globalization's on-line conditions is at least as important as *what* we know. As important as it is for the comparative law community to develop new knowledge about foreign law, there is an equally pressing need for its members to explore the cognitive processes used in knowing foreign law. Comparative law scholars have paid little attention to such issues, presumably because they have perceived insufficient incentives to do so. But globalization makes that lack of attention increasingly costly. In on-line, participatory situations, the issues of how we acquire, communicate, and process legal information take on enhanced importance.

The first move toward developing such knowledge is to seek it. Only if those engaged in the process of knowing foreign law care about better understanding that process will there be the kind of introspection about the process that is necessary. It is important, therefore, to recognize the potential benefits of this kind of knowledge.

Some might respond that comparative law scholars have spent too much time and effort on introspection regarding issues of what they do and how they do it.[26] I suspect, however, that there is usually value in serious attempts to gain insight into the enterprises in which an intellectual community is engaged.[27] More serious problems are likely to arise when there is too little rather than too much self-analysis. Moreover, while articles on the aims and methods of comparative law are not rare,[28] that literature seldom addresses the kinds of knowledge issues addressed here. As far as I am aware, those issues have seldom been explored in any sustained way.

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26. *See, e.g.*, Herbert Bernstein, *Comparative Law*, 40 AM. J. COMP. L. 261, 261-63 (1992) (reviewing BERNHARD GROßFELD, THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW (1990) and criticizing it for containing too much "soul-searching" and too little hard analysis).

27. The notion that a discipline is "sick" if it spends a significant amount of effort defining its mission and methods reflects a view of science that may have been prevalent thirty years ago, but it does not comport with contemporary notions of science. Self-analysis is a constant theme of scientific writing, even in "hard sciences" such as physics. *See, e.g.*, PETER GALISON, IMAGE AND LOGIC: A MATERIAL CULTURE OF MICROPHYSICS (1997).

28. See, for example, the well-known exchange on the subject between O. Kahn-Freund and Eric Stein. *Compare* O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 1-27 (1974) (stressing, for example, the importance of political context in the development of foreign law and its effects on transplanting substantive law), *with* Eric Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 NW. U. L. REV. 198, 198-216 (1977) (summarizing Kahn-Freund's ideas and concluding that education in comparative law must become systematic in order for America to reap the benefits of using comparative law). For a more recent discussion, see Basil Markesinis, *Comparative Law—A Subject in Search of an Audience*, 53 MOD. L. REV. 1, 1-21 (1990).

A. Cognition and Foreign Law

What then do we need to know about knowing? In essence, we need to examine how legal *information* is transformed into legal *knowledge*, particularly under the new circumstances created by globalization. This entails examining the processes by which individuals, groups, and communities acquire, structure, and process information and experience.

This examination should start with the recognition that legal knowledge is a particular category of knowledge—that it possesses particular characteristics and is used in particular ways for particular purposes. Legal knowledge obviously shares characteristics with other forms of professional and scientific knowledge, and much can be learned from looking at how other kinds of knowledge are processed and transmitted. It is important, however, to recognize that legal knowledge is also unique in many ways. It is imbedded in issues of authority and patterns of power and social interaction that are specific to it.

B. Conceptualizing the Knower: Cognition's Two Forms

In thinking about how we know foreign law, we also need to be careful about our assumptions regarding cognitive agency. "Who is the knower?" is an important and seldom treated question, because the answer to it (whether expressed or assumed) conditions how we think about the process of knowing. Legal thought and discourse generally assume that the act of knowing is an individual act. Who knows? Individuals know. Yet, for our purposes here, that conception is too narrow. It leaves too much outside our field of vision. We need to expand the notion of cognition to include what the cognitive scientist Andy Clark calls "social cognition" and I prefer to call "shared cognition."[29] Individuals know law as individuals, but they also "know" law as part of a social context. They share with others a common scaffolding of knowledge and assumptions, perspectives and values, and strategies and styles.[30] By identifying and analyzing what is shared, we are developing tools for interpreting individual legal decisions.

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29. ANDY CLARK, BEING THERE: PUTTING BRAIN, BODY, AND WORLD TOGETHER AGAIN 148-49, 193-218 (1997). For similar ideas, see EDWIN HUTCHINS, COGNITION IN THE WILD 353-74 (1995), which suggests that cognition and culture are processes that are inextricably bound together and that cannot be understood divorced from each other.

30. The term "scaffolding" in this context was suggested by Andy Clark. *See* CLARK, *supra* note 29, at 45-47.

C. *Communication: Transferring Information and Knowledge*

Communication—the process of transferring and receiving information and knowledge—is a principal means by which legal professionals know foreign law.[31] Our concern here is primarily with communication across the borders of legal systems, that is, communication about foreign law and with or about foreign lawyers and foreign clients. Communication among participants in the same system may also be important to our investigation, however, because how information and knowledge are transferred within a community shapes what and how that group knows. Communication is part of shared cognition, and thus we need to understand its effects.

Assuming that the objective of communication is to transfer knowledge and information accurately and effectively, we need to investigate the conditions under which that objective can best be achieved.[32] This involves two sets of issues: the characteristics of the messages sent and the processes used to transmit them.

1. Transferability

How senders package and structure messages influences the effectiveness of communication. The objective is to maximize the correspondence between what a sender intends to convey and what the intended recipient believes the sender wants to convey. At one level, this is an issue of vocabulary, and here comparative law has developed important insights. Function/context analysis directs the sender to avoid the categories of legal language unique to the sender and to use language that is as direct and concrete as possible. This is an exceptionally valuable lesson.

As important as this is, however, it is only part of the task. How does each party understand and evaluate the language used? Each legal system has its own patterns of representation and communication. Each utilizes, for example, particular levels of abstraction, values, and styles, and favors particular kinds of arguments. These patterns, expectations, and preferences affect the ways in which parties formulate and interpret messages, and we need,

31. One can transfer "information" in its abstract or in a cognized state, that is, in relation to a knower or a knowledge community (e.g., in the form of a claim, opinion or belief).

32. Communication may be used for manipulatory or obfuscatory purposes as well. We will not refer to these goals here, but much of what we learn about common-goal communication is also likely to be useful in analyzing these uses.

therefore, to understand these differences and their potential effects on communication, particularly in on-line situations.

2. The Communication Process

In addition, we need to know more about the effects of various means of conveying information, because the effectiveness of communication depends not only on the characteristics of the message, but also on the transmission process employed. For example, as noted above, electronic communication affects the way messages are used and perceived, and we need to study those effects. This will include, for example, looking at the ways in which differing feedback expectations impact the formulation and interpretation of messages in different situations. In addition, we need to recognize the factors that can distort and hamper this process and develop strategies for minimizing their impact.

D. The Role of Language

Language is necessarily a key factor in each of these contexts. Legal information is carried by language; language is its medium. Within groups, the social dimension of cognition means that language is part of the very fabric of knowing. Yet, despite the obvious centrality of language, comparative law scholarship has paid relatively little attention to its roles.[33]

Knowing foreign law means crossing a linguistic border—even when the same base language is used in both legal systems—as anyone who has looked carefully at the uses of language among different English-speaking common law countries can attest. Each legal system uses language in its own ways; thus, transferring information and knowledge across linguistic borders is an act of translation in the broad sense of that term. We need, therefore, to understand the dimensions and impacts of such translation acts. This does not require starting from scratch. Much can be learned from studies of sociolinguistics in other areas, but it needs to be applied to the legal context and understood as part of the analysis of how we know foreign law.[34]

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33. I have recently looked at the curious lack of attention paid to the language issue by Ernst Rabel, arguably the most influential figure in modern comparative law. *See* David J. Gerber, *Sculpting the Agenda of Comparative Law: Ernst Rabel and the Facade of Language*, *in* RETHINKING THE MASTERS OF COMPARATIVE LAW (Annelise Riles ed., forthcoming 2001).

34. *See, e.g.*, DELL HYMES, FOUNDATIONS IN SOCIOLINGUISTICS: AN ETHNOGRAPHIC APPROACH (1974).

E. Accuracy in Imaging: Perceptual Biases and Obstacles

When the objective is to know foreign law, the processes by which images of foreign law are created are obviously central. At issue is how information is transformed into knowledge, as an individual or group perceives, assimilates, and evaluates information. We need to examine, therefore, the factors that affect the accuracy of those images. When the knower recognizes such factors, she can take steps to reduce or eliminate their influence.

1. Perceptual Biases

The primary distorting factors are the assumptions, expectations, and values that individuals and communities rely on in processing information. These factors shape the perception of legal information and represent perceptual biases. They range from simple assumptions such as those relating to the sources of law that carry authority to complex stereotypes that structure what people believe about the operations of an entire system. Stereotypes of the characteristics and influence of the U.S. legal system, for example, often have powerful effects on the way individuals and groups perceive information about American law and those who operate within it. Confirmation bias—the tendency to perceive what one expects to perceive—is a pervasive influence on the perception of legal information, and we need to study those influences more carefully.

2. Globalization Effects

Globalization may influence the accuracy of knowledge of foreign law by intensifying the impact of such distorting factors. The less time there is to formulate responses to messages, the more likely it is that the knower will rely on preexisting assumptions about foreign law. Time pressures create disincentives for reflection, evaluation, and careful checking of information.

Such pressures may also exacerbate the effects of two basic cognitive strategies that are common in relation to foreign law. One I call the "illusion of similarity." As information moves more rapidly and becomes denser, individuals and groups have stronger incentives to simplify their tasks by assuming that legal systems and their artifacts are similar. This assumption saves resources and reduces uncertainty, and thus it becomes an attractive strategy.

A related illusion assumes that even though there might be differences between systems, they are easily bridged or simply unimportant. It is common to hear those confronted by actual or

potential differences between legal systems claim that "even if there are differences between the systems, they do not cause any problems." This is the "illusion of ease," and it is also an important device for dealing with situations involving foreign legal elements. It allows the individual or group to ignore or minimize the potential effects of differences between systems, again reducing uncertainty and lowering costs.

V. CURRENT APPROACHES TO COMPARATIVE LAW AND THEIR UTILITY

Current approaches to comparative law do not satisfy the criteria outlined above. For purposes of this discussion, I identify four such approaches: simple description, synthetic description, function/context, and political comparison.

One approach to comparative law is purely descriptive or "anatomical." In this approach, the objective is merely to describe the situation in a foreign legal system (with perhaps implicit comparisons) or to describe differences and similarities between two or more systems. The knowledge is not well developed along either theoretical or analytical lines. This obviously has little utility either to the process of epistemological self-examination or to the development of interpretive tools.

A second approach is what I call "synthetic description." This approach involves "big picture" presentations, in which the objective is to synthesize and describe large areas of law or even entire legal systems. This type of information can be of value for the kind of enterprise I suggest here, because these descriptions can allow us to see relationships within a legal system that are important for our purposes. This type of information is neither designed nor structured, however, for use in on-line situations.

The function/context methodology represents a third basic approach. It is particularly important because it probably represents the dominant academic approach to comparative law, at least in much of the United States and Europe. The objective of this methodology is to compare how different legal systems treat particular social problems. The analyst identifies a specific problem or social function of law and analyzes the differences among legal systems in treating that problem. Ideally, the analyst also provides insights into the reasons for the differences. In the hands of a skilled practitioner, this type of analysis can be of great value. The information it produces can be developed and integrated for the enterprise envisioned here, and the

skills developed in using it will be important to the success of such an enterprise. Nevertheless, that form of analysis does not address the basic concerns outlined in this Article. It does not focus on the issue of how we know law, nor does it provide a mechanism for organizing information for use in on-line situations.

We can also discern the beginnings of a fourth approach to comparative law. I call it "political comparison." This rather crude label refers to attempts to look at the political dimensions of knowing and talking about foreign law.[35] In it, the basic thrust is to uncover the impact of power factors on the ways in which legal systems operate in general and the way comparative law is practiced in particular. While its insights are likely to be valuable for our purposes here, the approach primarily serves other aims, and its scope remains far narrower than the method that I envision in this Article.

Each of these approaches to comparative law has a function and provides value. None focus, however, on the issues that we have identified as important for improving our capacity to know foreign law, particularly under the conditions created by globalization.

It is important to note that recent work by individual scholars is likely to be useful for the enterprise I have outlined.[36] For example, Mirjan Damaška has used political science to analyze procedural law and the law of evidence.[37] Rodolfo Sacco has illuminated the role of what he calls "legal formants"—factors that shape the development of legal norms.[38] Ugo Mattei has experimented with new ways of organizing the large-scale map of legal knowledge.[39] Vivian Curran, William Ewald, and Mitchel Lasser have employed interpretive methodology in new ways to gain insights into the operations of legal

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35. "Political comparison" is the basic theme of many of the papers included in a recent symposium on new directions in comparative law. *See, e.g.*, Daniel J.H. Greenwood, *Akhnai*, 2 UTAH L. REV. 309, 309-58 (1997); David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 2 UTAH L. REV. 545, 545-637 (1997); Mitchel de S.-O.-l'E. Lasser, *Comparative Law and Comparative Literature: A Project in Progress*, 2 UTAH L. REV. 471, 471-524 (1997).

36. *See generally* Symposium, *New Directions in Comparative Law*, 46 AM. J. COMP. L. 597 (1998) (exploring theoretical foundations and agendas in comparative law in order to revitalize what has been seen as a stagnant discipline).

37. *See* MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT (1997); MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986).

38. *See* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (pt. 1), 39 AM. J. COMP. L. 1, 21-34 (1991); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (pt. 2), 39 AM. J. COMP. L. 343, 394-97 (1991).

39. *See, e.g.*, Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 5-44 (1997).

communities.[40] And Annelise Riles has drawn on anthropological insights in studying Asian legal systems and issues of interdisciplinarity.[41] Again, although they are potentially useful for the purposes outlined here, these efforts do not directly address the concerns raised by globalization. Moreover, these efforts remain isolated, and their full potential is not likely to be realized unless they are related to each other.

VI. TOWARD A REVISED AGENDA FOR COMPARATIVE LAW

This brief review of some of the impacts of globalization on how legal professionals acquire, process, and transfer legal information suggests ways in which the agenda of comparative law might be expanded in response to current and future needs. This applies to both scholarship and teaching, and the two can be profitably interrelated.

A. Scholarship

With regard to scholarship, we have identified two central goals—developing effective tools for interpreting legal information in on-line situations and better understanding the processes by which we acquire, process, and transmit legal information. These goals demand basic research into how legal professionals acquire, process, and transfer information and knowledge, but they are attainable goals.

The core of the enterprise is the structuring of knowledge about foreign legal systems. This requires a type of scholarship that is more "scientific" in some ways than comparative law scholarship has traditionally been. For example, it calls for greater attention to theory in the broad sense of conceptual structure, because theories are the mechanisms for structuring information. Theory has seldom been an important part of comparative law scholarship, because it has been perceived to have little value for existing objectives. For the objectives outlined in this Article, however, it is not only desirable, but necessary. In order to perceive patterns in the operations of legal systems and in the conduct of legal actors, it is necessary to structure information and knowledge effectively.

This requires the interaction of a community of scholars working toward the same ends, incrementally relating individual knowledge

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40. *See* Vivian Grosswald Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657, 657-68 (1998); William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1891-98 (1995); Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1402-09 (1995).

41. *See, e.g.*, ANNELISE RILES, THE NETWORK INSIDE OUT (2000).

and projects to each other. Theory thus also operates as a mechanism for relating the experience and knowledge of individual scholars to each other. This is the social component of science—the understanding of science as the efforts of a community to develop particular kinds of knowledge.[42]

Scholars who pursue this agenda will often benefit from the learning, methods, strategies, and techniques of other disciplines. Political science, economics, sociology, and anthropology, for example, are each likely to provide insights that will aid the study of how institutions and communities influence legal decisions, while cognitive science and psychology can help to illuminate the ways in which information is processed, structured, and transferred by both individuals and communities. The objective in turning to these disciplines is not to copy their methods or to import their conceptual frameworks, but to investigate them with an eye to their potential value in the comparative law context.

Note that this enterprise starts with a fund of relevant information and knowledge. There is already a great deal of knowledge about foreign law and its operations, and thus a base of information and experience exists from which we can draw in developing the kinds of analytical tools we need. Moreover, there is much learning about the ways in which other knowledge communities operate, and some of this is likely to be useful in examining the operations and effects of legal systems.

Finally, if we look to the longer term, globalization also intensifies the need for a language of comparative law, that is, a broadly accepted vocabulary and grammar for dealing with the issues and experiences of foreign law. As I have suggested elsewhere, the potential value of such a language for the comparative law enterprise is enormous.[43] The lack of such a language hampers the transmission of information within the comparative law community as well as the development of relationships with other knowledge communities, and the gradual evolution of such a language might be a valuable product of pursuing the goals I have outlined in this Article.

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42. *See, e.g.*, DAVID L. HULL, SCIENCE AS A PROCESS: AN EVOLUTIONARY ACCOUNT OF THE SOCIAL AND CONCEPTUAL DEVELOPMENT OF SCIENCE (1988). Ernst Rabel saw the value of collaboration and established his institutes of comparative law in order to achieve it. These became the famous Max Planck Institutes for International and Comparative Law in Germany. For Rabel, however, the primary value of such collaboration was to assemble knowledge relating to many legal systems under one roof. It thus had very different objectives than those envisioned here. *See* Ernst Rabel, *On Institutes for Comparative Law*, 47 COLUM. L. REV. 227, 227-37 (1947).

43. Gerber, *supra* note 20, at 722, 728-37.

B. Teaching

The effects of globalization also have potentially important implications for teaching law. The teaching situation intensifies the need for tools that can be used to penetrate the density of information. Students typically have little time and background knowledge about foreign legal systems and few resources to invest in learning about them. This should place the pedagogical focus on developing abilities rather than transmitting data. Students need to develop the ability to orient themselves within a foreign institutional and intellectual landscape and to interpret information about the situations they may face. In many cases, the most valuable of these abilities is to know which kinds of questions to ask and where to look for information.

In order to achieve this objective, we will still need to teach students about how foreign systems operate. In fact, much of what is included in current casebooks in the United States and teaching texts in other countries can be used to achieve the kinds of objectives that I have outlined. The challenge is to add new ways of shaping the knowledge that prepare students to operate effectively under the circumstances created by globalization.

The teaching and scholarly agendas can, and should, reinforce each other. Organizing information in terms of the relationships among components of a system, for example, places material within a manageable conceptual framework while *at the same time* efficiently revealing features of the landscape within which students will need to orient themselves.

C. Costs and Obstacles

Some may wonder whether what I suggest here is feasible. These suggestions might appear to greatly increase the amount of information legal professionals need to have and the skills they need to acquire in order to know foreign law. They might seem to require that comparative law scholars acquire a great deal of new knowledge, when at least arguably the need to know languages and understand cultures already imposes far higher knowledge requirements than those applied to other legal academics. Should a comparative law scholar now be expected to master numerous new fields of social scientific knowledge?

There are at least two answers. First, the comparative law scholar is not alone. The distinction between individual and shared cognition is critical here. The proposed agenda calls for interchange and division of responsibility among scholars pursuing these ends,

with individual scholars recognizing patterns in conduct, influences on decision making, and so on, and relating them to the findings of others to recognize patterns of operation and thereby forge tools of analysis. As with any other such knowledge project, some participants will presumably focus their efforts on new theoretical insights, while others will gather new data. Second, legal academics have demonstrated that they can effectively utilize the techniques and insights of other academic disciplines, as, for example, in the case of the law and economics movement. In short, the enterprise is certainly feasible.

Acquiring the knowledge discussed here and developing the concomitant skills and strategies will have costs—in effort, time, and other resources—but we ought not overestimate them. Developing these tools will not necessarily require the acquisition of new information. Often it will entail restructuring and organizing information that is already available. The existing literature already contains much valuable information that can be structured for use in on-line situations. In this sense, the project utilizes knowledge and experience that have value but that are not currently being fully exploited.

Those who are pursuing the current agendas of comparative law might object to this type of project. Some may do so because they do not find the objectives and approach to be of sufficient potential value. For them, I can only note that this Article is an initial attempt to suggest the value of the project and request that they "stay tuned" for a fuller development of some of these themes. I hope that the proposals at least justify experimentation. More importantly, I do not suggest here that these objectives should replace the current agenda. I am merely arguing for adding some new elements to it.

Others may be concerned that such a project would reduce the perceived value of what they currently do. To them, I say that not only should there be sufficient numbers of comparatists to pursue both the existing goals and those I have outlined here, but also that the current comparative community is critical to the success of any such enterprise. Its members are by far the most important source of relevant expertise and experience.

VII. CONCLUDING PERSPECTIVES

The processes of social change that I refer to as globalization are not wholly new. Each has earlier analogues. What is new is the vastly increased scope and intensity of these processes and their impact on law, legal communities, and the operations of legal professionals. As

these processes change the way legal professionals acquire and process knowledge, they present important challenges to comparative law.

At the very least, these changes demand examination and response from comparative law scholars. I have suggested in this Article that they call for new ways of thinking about comparative law and its roles. In order to meet the challenges effectively, comparative law is likely to have to develop new tools and methods. The careful analysis of function and context needs to be supplemented by tools designed to enable legal professionals to operate effectively in new contexts, under conditions of greatly heightened time pressure, and with new forms of communication and new sources of information.

The increased interest in comparative law in the United States and elsewhere in recent years reflects an awareness that legal professionals are becoming ever more closely involved with foreign law, foreign lawyers, and foreign clients; thus, issues of how we know foreign law are becoming more important. These developments present important opportunities for members of the comparative law community to engage in the kinds of basic research and analysis that are needed to meet the challenges of globalization. If they fail to do so, it is unlikely that others will, and the costs to all are likely to be great.

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