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A PROPOSAL FOR 'PHILOSPHICAL METHOD' IN COMPARATIVE AND INTERNATIONAL LAW[1]

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Abstract:

A basic challenge of contemporary thought is to better understand the origin, persistence, and future course of international/ comparative law. I suggest that a foundational step is to begin treating the law as a philosophical matter. I propose that comparative and international legal theory require a distinct methodology that is as integrated and systematic as positivism, but which better recognizes the dialectic interdependence of normative and empirical and the metaphysical interdependence of theory and practice. Philosophical Method, as systematized by R.G. Collingwood, promotes the dialectic over the eristic, looks for overlap rather than definitive scientific classification, argues for comprehensive philosophy rather than isolated theory and recognizes a proper logical metaphysics of absolute and relative presuppositions rather than a positive legal practice isolated from its inherent philosophical determinants.

I. THE 'STATE OF THE ART'

[1] This proposal is written in reaction to discussion in a seminar on the current state of international and comparative legal theory, which took place on July 12, 2008 at the 25th anniversary celebration for the Lauterpacht Center at Cambridge University. This session suggested to me that many of the concerns raised at the gathering by theorists and practitioners might be addressed more comprehensively by an integrated and systematic competitive methodology acting as an alternative to the core positivism that determines the major variants of current international thinking. I offer this proposal in order to begin a discussion of whether Philosophical Method, as herein described, might 'fill this bill.'

Questions of legal governance are transcending state and inter-state systems and becoming global. Legal practice is no longer adequately defined by a strict norm of state sovereignty and the process of 'peaceful' international cooperation, but must justify norms, rules, and principles with various levels of definition and interdependence both within and outside a primary focus on the 'Westphalian' state structure. There is also the evolution of new organizations, courts, and tribunals to consider. The international jurisprudence that these novel international governance systems are creating must be understood in all its complexity, as well as the fundamental concern for the dialectic interaction between these institutions and the ideas that they create and that create them. International and comparative law need to respond to this growing complexity through the recognition that the current focus on valid practice, as the primary foundation of both empirical and normative analysis, must be transcended. Such a response is necessary because the most challenging questions of global governance, those connected with, for example, globalization, the transmutation of sovereignty, the international rights of the individual, or the intervention of one state in the affairs of another, are fundamentally 'philosophical' rather than technical or scientific questions, and have a distinct ontology requiring a specific method and epistemological assumptions that transcend the narrowly positivist predispositions of contemporary transnational law.

If we have more international human rights than are currently recognized in global legal practice, we need to be able to recognize a potential legal right, and how it gains legal status. If globalization is more than an economic phenomenon and should integrate human rights or environmental protection, then reciprocal trade may not be a proper vehicle for the constitutionalization of the international system. But, if it is not, then we need agreed-upon standards to make judgments and recognize a better governance alternative. If sovereignty is a principled *end-in-itself*, to be preserved as essential to the international system, then we need to be ready to sacrifice other ends to its power in the law of international practice. However, if sovereignty is a process-norm or means to other ends that can be sacrificed for a more persuasive legal organizing principle, without destroying the inherent stability of the international legal system, then we need a way to first tell the difference between principle and process as two normative categories in order to understand how these types of norms interact.

For example, only with a higher level of normative complexity than presently exists will we be able to effectively decipher and synthesize a fuller understanding of the relationship

of sovereignty, intervention, and self-determination. Overall, we need a new way to organize ideas in order to reasonably argue as to whether moral principles should continue to be lead by practice or transcend practice in the international and comparative law of the 21st century.

With Matti Koskenniemi, we can no longer afford to assume "that the problems of theory are non-problems and that the sociological and normative issues of world order can best be treated by closely sticking to one's doctrinal task of analyzing valid law."[2] Instead, in order to argue for a proposed global legal right, we will need to understand the dialectically related concepts inherent in its connection to morality, politics, and foundational agency or 'humanity in the person.' To justify a consistent policy argument for intervention that does not ebb and flow with practice but anticipates it, we will need to set legal standards and justify them within a deeper system of anticipatory metaphysical presuppositions than is allowed by the superficial and strictly retrospective focus of legal positivism. To assess why globalization is proceeding for the international economy but lagging behind in terms of human rights or the protection of the natural world, we need to understand concepts such as 'free trade', 'human dignity' and 'sustainability' through the many overlapping categories of interdependent classification that define their philosophical genus and are necessary for a complete sense of their joint and individual characters.

International and comparative law is swiftly becoming an interdependent system of concepts and contexts with overlapping philosophical complexity beyond the understanding provided to us by a focus on validity, scientific observation, and the inductive extrapolation of legal practice alone. For example, rather than assuming that all legal standards can be classified as 'norms' and instantiated by practice, we may need to have a more detailed taxonomy of normative concepts for international and comparative law that distinguishes *moral principles from legal principles* from *norms* from *rules*. A more complex philosophical structure is able to justify a number of logical routes by which these distinct yet interdependent normative standards are made operational within legal practice as well as decipher what distinct roles they play in the translation of human values into valid law.[3]

If human will and moral principle are to lead legal practice, we may need to have more well integrated and morally persuasive arguments that can decipher and then describe the fundamental

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[2] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 2-3 (2006).

[3] *See* John Martin Gillroy, *Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of "Environmental Sustainability" in International Jurisprudence*, 42 STAN. J. INT'L L. 1 (2006).

presuppositions of our current international legal system while suggesting a range of possibilities for the future of governance under the rule of law. Perhaps our task should be not simply to ask what international law 'is' or what it 'should be' but to seek an understanding of the dialectic dynamic between its inherent ideas, merging theory↹[4]practice, ideas↹ institutions, and justice↹order now within an historical context, and in anticipation of future evolution.

However, the standard point of departure for legal study is the validity of its practice. The literature of both international and comparative legal theory traditionally infers norms from practice. The emphasis is on the positive nature of the law and its rules, processes, and institutions. There is an inherent assumption that this empirical analysis can be examined independently, free of any strictly moral or prior normative considerations which constitute a separate category of dialectically unrelated scholarship. This latter, separate category of normative argument has emerged, however, from within the same post-positivist milieu as its empirically-driven counterpart. Although many normative theorists have made headway in understanding the true complexity of the international legal system, they have largely accepted the proposition that practice is the starting point for legal study and that the normative and empirical dimensions of the rule of law should be considered distinct dichotomous realms of scientifically classified thought and analysis. [5]

Specifically, modern international legal argument is dominated by positivist predispositions that undergird most of the

[4] I will use this symbol to indicate a dialectic relation between ideas. Here, dialectic is defined not just in the formal Hegelian sense but also in the general sense that no philosophical concept has its essence in itself alone, but in the tension (represented by the small vertical lines) between itself and its other (represented by the arrows in opposition).

[5] My point here is that the core of what is wrong with each type of current international and comparative legal theories is that they deny dialectic and begin with an assumption of the priority of practice. This includes all those that call their work normative and those who identify themselves as empirical. For example, Terry Nardin, creates a moral argument that begins and ends with legal practice. *See* TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES (1983). Alexander Wendt, protesting that he was only engaged in empirical theory, suggested three distinct constructivist models for international practice that he called Hobbesian, Lockean, and Kantian but which have no direct connection with any of these philosophers' writings and still employ a positivist method. *See* ALEXANDER WENDT, SOCIAL THEORY AND INTERNATIONAL POLITICS (1999). Allen Buchanan examines 'moral foundations' that also begin with legal practice but are built upon the un-argued assertion that justice should be based on human rights, which Philosophical Method tells us is incorrectly treating a relative presupposition as absolute. *See* ALLEN BUCHANAN, JUSTICE LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW (2004).

theoretical schools of 'international legal theory' to the detriment of a more comprehensive philosophical understanding of the foundations and dynamics of global legal practice. To date, we have settled for either the non-philosophical examination of validity located in empirical legal practice alone, or for non-comprehensive and non-dialectic normative arguments that begin with law as practice rather than recognize it as a product of the dynamics of philosophical ideas, legal institutions, and social reality. Given the current literature, one must ask if we are capable of transcending the assumptive structure of positivism that we learned as students of the law and which has substantially created the intellectual world in which we all live. If the dynamic between our physical surroundings and their metaphysical foundations must be studied as an interconnected whole for a true understanding of the evolving international rule of law to emerge, then we need to approach this study with the proper ontological, epistemological, and methodological standards, which, I maintain, we are not now doing. We need to see beyond the surface validity of the law and the false dichotomy of normative and positive to find the dynamic or dialectic core of the international legal system. Only then can we overcome our positivist prejudices and take a fresh look at the origins, persistence, and future of international law.

II. SETTING THE TASK BEFORE US

To enhance the study of legal process and integrate the realities of international and comparative law as a philosophical subject of analysis, we need to be able to overcome five specific tendencies of contemporary legal analysis, which represent the core prejudices of an overly simplistic definition of practice.[6] First, our approach to international law should not be satisfied with ***theory*** replacing ***philosophy***. Since the positivist revolution of the mid-nineteenth century, we all have been trained in distinct disciplines to pursue theory adequate only to explaining one's particular corner of the socio-political or legal landscape. Unlike our predecessors in the 17th and 18th century, we no longer seek a comprehensive philosophical understanding of how the human social milieu came into being, how it shapes and is shaped by the individual humans within it, and how and why it renders, in particular circumstances, particular institutional and legal structures for its persistence over time. We no longer see our part

[6] This analysis seeks to apply, with enhancements, the works of R.G. Collingwood. *See generally* R.G. COLLINGWOOD, AN ESSAY ON PHILOSOPHICAL METHOD (1933) [hereinafter EPM]; R.G. COLLINGWOOD, AN ESSAY ON METAPHYSICS (2002) (1940) [hereinafter EM]; R.G. COLLINGWOOD, THE NEW LEVIATHAN (2005) [hereinafter NL].

of the theoretical whole within its greater philosophical context and as an application of greater socio-legal forces to specific cases and controversies.

When philosophical material is utilized within this isolated theoretical exercise, as it sometimes is, it does not involve a comprehensive understanding of any philosopher's greater integrated system, but the use of bits and pieces of their exegesis. These disembodied components are then applied in isolation from one another to make specific contextual points within the modern theorist's argument. This practice is fostered by positivism, which discounts integrated philosophical systems and seeks only components of those systems that aid in the understanding of specific empirical or normative questions. But is it our seeming satisfaction with these 'theoretical' corners or isolated components of the greater philosophical space that retards our analytic progress in understanding contemporary international law?

Second, we have moved away from the ancient assumption that the core of legal argument is ***dialectic*** to one that scholarly discourse is essentially ***eristic*** with ideological confrontation over normative matters being the rule rather than the exception. We no longer start from the assumption that "[i]n a dialectical discussion you aim at showing that your own view is one with which your opponent really agrees, even if at one time he denied it; or conversely that it was yourself and not your opponent who began by denying a view with which you really agree . . . . The essence of dialectical discussion is to discuss in the hope of finding that both parties to the discussion are right, and that this discovery puts an end to the debate."[7]

As the core of positivist political and legal scholarship, eristic argument begins with one component of a dichotomized pair, for example, empirical without normative, and demands separate scholarships for each. Eristic positivism demands that an idea be adequately assessed without benefit of its dialectic counter-arguments. Instead of assuming that normative↹positive, process↹principle, or order↹justice are integrated dialectic pairs where one component cannot be assessed in the absence of the other, and instead of seeking a synthesis solution where principles are refined within the dialectic itself through interactive political and legal debate, we assume that discourse and argument are about forming and dichotomizing distinct points of view where the value of any position is its internal purity alone.

As purveyors of eristic legal debate in the study of practice we no longer seek agreement where none exists, but the victory of one point of view or principle over the other. Instead of associating an argument's integrity with the active interaction of

[7] NL, *supra* note 6, at 181-82.

concepts and agreements through synthesis, in eristic discourse we define a policy's integrity from, and also within, each distinct side of the issue. Eristic argument discourages debate and abhors synthesis because any movement from strictly interpreted and defined principle within one detachable side of the argument is defeat for that side, ceding victory to the other.

Third, eristic positivist methods have given us a primarily retrospective legal analysis that focuses on the objective of scientific ***discovery*** but not the ***refinement and justification*** of the law as a set of philosophical ideas. Instead of a 'science' of law, where the point of scholarship is the discovery of valid practice, we should be focused on philosophical method applied to law beginning with concepts already known to us at some level of sophistication and seek, through dialectic analysis, the refinement of our understanding of them and their inherent complexity as applied ideas.

Our search should be for comprehensive philosophical paradigms as a starting point in an effort to seek the "generic essence" of any specific legal concept. Instead of a concentration on the observable surface, the search should be for that "essence" indigenous to the idea itself and revealed through progressive philosophical analysis. Legal theory, as analyzed from the scientific perspective, is generally considered to be about the discovery of valid practice, which is a fit subject of study in and of itself, being positive and based upon observation and induction. This superficial definition of practice, and even the norms that regulate it, are considered to be the product of positive action and choice, separable from foundational philosophical considerations, and revealed by the examination of empirical phenomena alone. Rather than refinement toward philosophical essence, the 'discovery' of valid practice is, from this perspective, the true expression of the application of reason to the world, unlike normative concerns prior to practice which, if they exist at all, are assumed to contribute only to an environment of opinion and ideology rather than argument and truth.

The search for generic essence, the refinement process, is made accessible by the fourth characteristic of philosophical legal argument. Unlike scientific concepts that can be definitively classified, for example, by their genus and species, philosophical concepts ***overlap*** and create a ***scale of forms*** with their dialectic interaction and synthesis. A genus within scientific method contains distinct species, which is its purpose. These species classifications sort, separate, and effectively allow the scientist to study each one independently. Within philosophical method, a macro-concept like sovereignty may be considered a 'genus' from the standpoint of philosophical method, but its inherent ideas, or

species, like 'self-determination' or 'effective control', are not philosophically independent of one another, nor can they be studied separately.

Because the 'species' of a philosophical 'genus' have no single definitive classification, they are improperly studied as scientific or positive concepts alone.[8] The idea of the overlap of categories into which a single philosophical concept simultaneously fits frustrates the scientific classification of social, political, and legal ideas into one and only one of those observational classifications. Further, a philosophical concept cannot be definitively defined by its empirical surface alone but must be understood in terms of both what can be observed and the ideas that are below the surface but which define and justify the concept. Approaching international law through philosophical method is a multi-faceted effort and needs more than observation and induction of any single facet of, for example, the concept of justice. In addition to a study of justice-in-practice, attention needs to be paid to the dialectical relations of theory and practice as well as to the various overlapping and dialectically interdependent 'species' of, for example, justice-as-allocation, justice-as-order, justice-as-dessert and justice-as-distribution. In addition, outside its genus one may also need to consider the many material and metaphysical ideas that share the same legal argument or policy design space[9] with justice, as, for example, do the ideas of obligation, wealth, respect, and human agency.

With the overlap of categories, philosophical method replaces the objective of empirical discovery with the imperative of philosophical refinement toward specificity of essence. The progress of the legal concept along this scale of forms toward its essence, involves all of those variables that contribute to its essence including its dialectic and overlapping relations. The scale of more and more sophisticated definitions of a concept cannot be understood, and its essence is essentially denied if the philosophical concept is treated as a strictly positive one that can be uniquely classified and studied in the absence of dialectic. If we approach even the idea of 'practice' as if it has no dialectic with principle and does not exhibit overlap and a scale of forms toward deciphering its essence, then human understanding of practice itself becomes impossible. In the same way, to seek the refinement and justification of the generic essence of the international rule of law requires more than treating the law as a

[8] EPM, *supra* note 6, at 41-42.

[9] *See generally* JOHN MARTIN GILLROY, BREENA HOLLAND & CELIA CAMPBELL-MOHN, A PRIMER FOR LAW & POLICY DESIGN: UNDERSTANDING THE USE OF PRINCIPLE & ARGUMENT IN ENVIRONMENT & NATURAL RESOURCE LAW (2008).

valid, isolated, and static concept, which is what positivism prescribes. "The result of this identification [of essence] is that every form, so far as it is low in the scale, is to that extent an imperfect or inadequate specification of the generic essence, which is realized with progressive adequacy as the scale is ascended."[10]

Legal concepts, in this way, should be assumed to form an escalator of conceptual refinement as they move closer to their generic essence through philosophical argument and dialectic synthesis. This linkage between distinct levels of overlapping complexity creates a 'scale of forms' for that concept,

> . . . [F]or if the species of a philosophical genus overlap, the distinction between the known and the unknown, which in a non-philosophical subject-matter involves a difference between two mutually exclusive classes of truths, in a philosophical subject-matter implies that we may both know and not know the same thing; a paradox which disappears in the light of the notion of a scale of forms of knowledge, where coming to know means coming to know in a different and better way.[11]

Specifically, with the assumption of a scale of forms for the world of legal ideas, analysis as part of synthesis can use philosophical method to create ever deeper definitions of a concept's nature as persuasive products of dialectic argument. In effect, this will move any concept to ever higher levels of complexity in terms of our understanding of that idea. Meanwhile, it raises its scale of complexity and understanding on a foundation of those presuppositions necessary to our knowledge of the concept and its inherent essence and logic.

Lastly, in relation to the deciphering of a scale of forms for a concept, we should acknowledge that the search for essence creates a ***metaphysical*** dimension to the law that distinguishes ***relative*** from ***absolute*** presuppositions. Our current world of empirical positivism, having separated and isolated the evidence of valid practice as the primary component of its research, analysis, and method, has neglected the critical importance within all systems of argument (i.e. both scientific and philosophical), of a set of metaphysical presuppositions or assumptions upon which to base and justify applied argument.

Specifically, on a scale of forms, a series of ***relative*** presuppositions lead, finally, to an ***absolute*** presupposition that

[10] EPM, *supra* note 6, at 61.
[11] *Id.* at 161.

defines the core 'truth' of the concept. The absolute presupposition is the moral primitive of the concept, its essence,[12] and necessary to the concept's integrity, with no further presuppositions informing it. The scale of forms, built into a metaphysical logic, while not necessary to scientific discovery, is critical to philosophical justification. Seeking an ever greater depth for legal concepts responds to the needs of a progressively more complex and sophisticated system of interlocking ideas↹institutions to be analyzed and produces a much more complex definition of legal practice. This depth toward generic essence is also necessary to make legal ideas more reasonable or persuasive in contemporary jurisprudence and policy argument as the international rule of law gains needed complexity in a globalizing world.

Within positivism, a metaphysics of absolute and relative presuppositions is replaced by layers of equally relative presuppositions, all assumed to be true without argument or analysis.[13] This, in fact, confuses the role of absolute and relative presuppositions and ignores their philosophical character, metaphysical interrelations, and dynamic dialectic evolution along the scale of forms necessary to legal ideas. When a policy argument, for example, assumes all its presuppositions to be relative, it is not assuming a dynamic dialectic connection between them, but a circular logic, as each relative presupposition is an 'answer' to one level of questions, while, as a presupposition, it poses questions for the next level of similarly relative presuppositions. By assuming that all of these relative presuppositions are true without analysis, the purpose of any inherent metaphysical scale of forms is defeated, for it is impossible to create a logical scale of forms for the intellectual refinement of a concept without being able to sort and justify connections between its inherent presuppositions. It is also the case that without a single common and fundamental foundation as a point of departure for the repeated dialectical progression between theory and practice toward essential refinement, practice remains superficial and correspondingly less useful in an ever more complex international legal system.

Fundamental presuppositions are, rather, singular and foundational within the system of metaphysics for any

[12] A central idea of philosophical method is in seeking conceptual essence, even if it is never fully achieved. Although we may not ever know a concept as a 'thing-in-itself,' we can understand its inherent dialectical complexity, its overlap with other concepts, and its dynamic progress toward a more and more essential understanding of its essence.

[13] EM, *supra* note 6, at 154, 176.

philosophical concept, and are necessary for an adequate argument or its application to practice.

> Metaphysics is concerned with absolute presuppositions. We do not acquire absolute presuppositions by arguing; on the contrary, unless we have them already arguing is impossible to us. Nor can we change them by arguing; unless they remained constant all our arguments would fall to pieces. We cannot confirm ourselves in them by 'proving' them; it is proof that depends on them, not they on proof. . . . We must accept them and hold firmly to them; we must insist on presupposing them in all our thinking without asking why they should be thus accepted, [b]ut not without asking what they are.[14]

Specifically, in a world that acknowledges the philosophical dimensions of human reason, there are both relative and absolute presuppositions in every facet of human life. An absolute presupposition is one that "stands, relative to all questions to which it is related, as a presupposition, never as an answer."[15] These exist, however, only at the most primitive and essential level of conceptual understanding, and are fundamental components in a greater logical-philosophical system of relative presuppositions that are dynamic both within themselves, on the scale of forms, and with other interrelated concepts that connect theory to practice through dialectic linkage. These absolute presuppositions are necessary in and of themselves to argument, discourse, and the logical structure of the social or legal system, but can exist untested by argument only to the extent that they are nested within a system of relative presuppositions which are constantly so tested. Absolute presuppositions should also be openly acknowledged by the analyst, and tested themselves, in terms of their ability to support a logically intact and therefore persuasive argument.

In effect, because of a reliance on a narrow definition of empirical practice as a source of both normative and positive legal argument, we, who study and use international law, have accepted an underlying set of relative presuppositions related to the observational history of the practice of, for example, sovereignty, intervention, justice and globalization that are treated as absolute presuppositions. This grants us neither a scale of forms with a dynamic dialectic nor an analyzed metaphysics as an integrated

[14] *Id.* at 173.
[15] *Id.* at 31.

system of logical concepts to undergird international law as it faces new nor more demanding global challenges.

III. A VERY MODEST PROPOSAL

To create a more vital international law for the new century the field must be philosophically invigorated through the enhancement of the conventional positivist influence in the five areas just discussed, by promoting:

1. Comprehensive Philosophy over a Compartmentalized Theory;
2. Dialectic Argument over Eristic;
3. Refinement of Ideas over the Imperative of Discovery;
4. Overlap of Concepts over their Definitive Classification;
5. An Essential Metaphysics of Absolute and Relative Presuppositions over a Primary Dependence on Surface Validity.

However, this begs the question of whether we are capable of thinking outside of our positive predispositions. What if the study of 'norms' as dialectically related by philosophical method has been so overtaken by a social science of superficial practice with a core positive norm of validity that we cannot escape the idea that the logical separation of law and morals[16] leads to the inevitable scientific classification of these concepts as distinct and independent 'species?' This is the basis for the conventional claim that law and morals are separable concepts, where each ought to have its own distinct body of scholarship. What if the scientific world view is so ingrained in our predispositions toward the analysis of concepts in our field that the primary focus of our energies will continue to remain the positive and retrospective analysis of practice? Are we capable of changing our essential point of view to rediscover the fundamentals of international and comparative law?

After all, our training comes from within this tradition and does not routinely consider the dialectical interrelationships of the legal and philosophical, or the metaphysical and material context of socio-political concepts. If, in both the scholarly and practical context, the law and its inherent policy debate are assumed to be the product of non-philosophical, eristic arguments about practice rather than the synthesis of principles and process evolving within a dialectical scale of forms, how do we overcome these inherent

[16] See the Hart—Fuller debate. *See, e.g.*, H. L. A. Hart, *Positivism and the Separation of Law and Morals* 71 HARV. L. REV. 593 (1957-1958); *see also* Lon Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

prejudices and create a stronger definition of the law? What are we to do if we hope to transcend our age with its epistemological blinkers and metaphysical blinders?

We might all agree that it is too late to stop the specialization of fields and the march of scientific method that has created the intellectual environment in which we learn and teach, but if our contemporary context is inhibiting the full use of philosophical method, we may need to look back to a 'pre-positivist era' when this was not the case, to see if its philosophical systems can be understood as paradigms and then applied to our current legal debates, with more essential and comprehensive results. From the mid-seventeenth to the mid-nineteenth century, before the positivism of Bentham and Austin gained dominance of the legal landscape and when the intellectual world-view was inherently one more akin to what is here defined as Philosophical Method, assuming dialectic and the refinement of moral concepts on a scale of forms, scholarship and its application both sought to replace revelation with reason in matters of the physical and philosophical universe. Perhaps by utilizing these systems of thought, created from a set of assumptions akin to Collingwood's Philosophical Method, we can make better progress in completing this objective for comparative and international law.

These thinkers operated in an atmosphere in which the task was to create comprehensive philosophical models where context and ideas interacted dialectically within the socio-legal landscape. Whether classified as empiricists, like David Hume, or idealists, like Immanuel Kant, philosophers of this era treated the human socio-legal context as a philosophical subject, acknowledging, even in a search for a science of human social life, an effort to create a comprehensive and logically integrated philosophical system. Philosophical systems created in this era were based on a predisposition toward the dialectical relations of ideas and a search for persuasive arguments about the absolute and relative presuppositions that would increase our knowledge of what is essential about an idea within its scale of forms. This was a time when the scholar was not a lawyer, or scientist, or economist, but a philosopher, regardless of whether they were trying to chart the heavens, understand human nature, decode chemical reactions, find the origin of government, or analyze theoretical mathematics. There were few hard divisions to the academy or to one's thought or writing and although we may not be able to go back to this environment, we can transplant it through the philosophical system logically integrated within its intellectual atmosphere and still available to us.

Consider that Thomas Hobbes in his argument for *Leviathan* demonstrate Philosophical Method by beginning with

optical physics followed by the psychological origins of the human will, and later moving on to describe the individual and his social context simultaneously in terms of its material, political, moral, and spiritual interdependence. For Hobbes, concepts like liberty, self-preservation, and consent are simultaneously principle and process; they are both normative and empirical and supportive of justice and order. By assuming that we can take these pre-defined systems of thought, not created for application to policy or law but effective for us toward this end, we may be able to move past the retrospective prejudice of existing legal practice to the integration of Philosophical Method, Pre-Positivists Paradigms, and Policy Arguments for Legal Design, using different philosophical paradigms to represent distinct sets of values and their logical entailments in codified international and comparative contexts.

Applying paradigms to specific issues in law would then be a way, be it an indirect one, to apply pre-positivist philosophical method to the design and construction of law and policy for the new century. In effect, through what I will call ***Philosophical-Policy And Legal Design***,[17] the philosophical systems of that era can be combined with the modern tools of legal design from existing practice to provide a vehicle for the contemporary interaction of theory⇆practice that may provide a new methodology, as powerful and logically consistent as positivism that is applicable to concrete policy and law, but is more encouraging to the full understanding of humanity and its legal systems. Might we yet be able to transcend our ingrained and impoverished positivist predispositions and, with a new methodology, ascertain if we might be missing a range of essential insights into the past, present, and complex future of the international rule of law?

[17] *See* GILLROY ET AL., *supra* note 9; *see also* JOHN MARTIN GILLROY, JUSTICE & NATURE: KANTIAN PHILOSOPHY, ENVIRONMENTAL POLICY AND THE LAW (2002), for my attempt to put this suggestion into action for environmental policy. I have also applied Philosophical Method and Philosophical-Policy to International Law in an article, John Martin Gillroy, *Justice-As-Sovereignty: David Hume and the Origins of International Law,* 78 BRIT. Y.B. INT'L L. 429 (2007), and in a book manuscript on the same subject, tentatively entitled THE GENESIS OF INTERNATIONAL LAW IN SOCIAL CONVENTION: AN APPLICATION OF HUME'S PHILOSOPHICAL-POLICY TO TRANSNATIONAL LEGAL PRACTICE (unpublished manuscript, on file with author).