

Proof of Foreign Law in US Courts: A Critique of Epistemic Hubris

PIERRE LEGRAND
Ecole de droit de la Sorbonne*

In a remarkable display of audacity, a US circuit court, taking full advantage of the latitude granted it by the relevant rules of evidence on proof of foreign law, purported to ascertain French law on its own motion by relying exclusively on English-language materials available to it in the United States, that is, without seeking any assistance from French expert witnesses — a majority of judges indeed expressing the view that expert testimony on foreign law is dispensable as a matter of principle. Along with the lone dissenting voice, this Article defends an approach to the identification of foreign law that would be at once more diffident and insightful, more productive and reliable.

Too many of our judicial opinions contain unexamined assumptions,
conventional and perhaps shallow pieties,
and confident assertions bottomed on prejudice and folklore.

Richard Posner¹

As it is fast becoming a truism to contend that laws are forced into ever greater interaction through the flows of persons, ideas and capital across traditional borders, one can confidently assert that the presence of foreign law within local law is at once ubiquitous

* I wrote this Article as Professor of Law and Director of Postgraduate Studies in Globalization and Legal Pluralism, Ecole de droit de la Sorbonne, Paris; as Board of Visitors Distinguished Visiting Professor University of San Diego Law School; and as Visiting Professor, Northwestern University Law School, Chicago. Professor Laurence Claus's kind suggestion that I present my argument at a faculty workshop at the University of San Diego Law School in September 2013 prompted me to develop aspects of the text under the best possible institutional and collegial circumstances during my annual teaching sojourn at San Diego. I owe my San Diego colleagues for the quality of their conversation, in particular Professors Larry Alexander and Steven Smith for their observations on ontology; Professors Paul Horton, Michael Devitt and Donald Dripps for their remarks regarding the law of evidence; and Professors Orly Lobel, Christopher Wonnell, Herbert Lazerow, Michael Kelly, Maimon Schwarzschild and Laurence Claus for their diverse comments or questions. Ms Heidi F Kuehl, of the Pritzker Legal Research Center, Northwestern University Law School, very ably assisted me with the collection of material. I am deeply indebted to then-Dean Kevin Cole and to Dean Daniel B Rodriguez for their generous invitations to the University of San Diego Law School and to Northwestern University Law School, respectively. *These academic opportunities make all the difference.* Dr Simone Glanert graciously offered a detailed critique of two drafts. I am also grateful to Professor Franz Werro for his insightful annotations. Though my two readers saved me from many infelicities, the usual disclaimer applies.

¹ Posner, RA (1990) *The Problems of Jurisprudence* Harvard University Press at 97.

and inescapable.² Against the ongoing patterns of dissemination of the foreign, this text explores the vicissitudes of *Bodum v La Cafetière*,³ a 2 September 2010 US circuit court decision regarding proof of foreign law. Two out of three judges then took the view that they ought to forgo expert testimony and proceed to ascertain French law themselves by reference to English-language materials available to them in the United States — and on the basis of these texts *only* (the other judge disagreed). In this critique, my overarching goal is to provide a mapping of the judgment from the standpoint of its epistemological commitments as it deems itself able to identify the relevant foreign law while perplexingly confining itself strictly to publications in the local language available locally. Though one may read judicial disdain for expert testimony on foreign law as striking a welcome democratic chord in reaction to the elitism that can be said to animate the cult of the expert, I claim that the majority of the court in effect succumbed to truculent theoretical banalization in the form of an empiricism that proves as naïve as it is reductionist, as mechanical as it is ethnocentric. In my view, the salient epistemological stakes manifest themselves in at least five guises.

- There being no thoroughly depersonalized gaze — no ‘raw’ descriptivism, then, being possible —, the court’s election to follow a particular approach in order to ascertain foreign law must be expected to have an impact on what foreign law is finally held to be stating on any given issue. In other words, one always reads foreign law pursuant to identifiable epistemic circumstances such that no enunciation of it can happen independently of the interpretive scenario being staged to achieve a formulation of it. To describe is to inscribe. Now, the identification of foreign law as positing ‘this’ rather than ‘that’ can be assumed to play a key role in the actual outcome of the case.
- Meanwhile, a decision to retain one approach towards the articulation of foreign law rather than another reveals assumptions pertaining to the judge’s disposition vis-à-vis the foreign. Specifically, the selection of given interpretive protocols points to a certain attitude in terms of how much recognition *of* the foreign and how much respect *for* the foreign one is prepared to concede.
- The majority view is to be located within a series of judicial decisions epitomizing the vexed political relationship that US courts, including the US Supreme Court, have been experiencing with foreign law, as judges have oscillated between motions of introjection into the local polity and strategies of rejection, between the motifs of imitation and repulsion. Though judgments like *Atkins v Virginia*, *Lawrence v Texas* and *Roper v Simmons* have been amenable to the ascription of normative value to

² Illustrations drawn from US civil litigation abound: *Lesley v Spike TV*, 241 Fed App’x 357 (9th Cir 2007) at 358 (applying Japanese law to a breach of contract allegation); *Bhatnagar v Surrendra Overseas Ltd*, 52 F3d 1220 (3rd Cir 1995) at 1234 (applying Indian tort law); *Curtis v Harry Winston, Inc*, 653 F Supp 1504 (SDNY 1987) at 1509 (applying Venezuelan law to an employment claim); *Kaho v Ilchert*, 765 F2d 877 (9th Cir 1985) at 883 (applying Tongan family law to a matter of adoption in an immigration dispute); *In re Condor Insurance Ltd*, 601 F3d 319 (5th Cir 2010) at 328-29 (applying Nevis bankruptcy law); *Rationis Enterprises Inc v Hyundai Mipo Dockyard Co*, 426 F3d 580 (2nd Cir 2005) [applying Korean law in an admiralty case]. Arguably, the significance of foreign law in the United States long antedates the current wave of *soi-disant* ‘globalization’. Eg, see Calabresi, SG and Zimdahl, SD (2005) ‘The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision’ (47) *William and Mary Law Review* 743.

³ *Bodum USA, Inc v La Cafetière, Inc*, 621 F 3d 624 (2010) [hereinafter: *Bodum*].

foreign law as persuasive authority (thus in *Roper*, the court expressly referred to the corroborative character of foreign law),⁴ *Bodum* is operating a retrenchment in as much as a majority of the court is only prepared to countenance a heavily ‘Americanized’ rendition of the foreign.

- Somewhat more philosophically, the recognition and respect a court proves willing to grant foreign law — or the measure of validation of the foreign a court is prepared to defend — is revealing of the views a judge holds as regards the fraught boundary between the self and the other (or, at the minimum, between the self-in-the-law and the other-in-the-law). Is one disposed to treat foreign law on par with local law (that is, as an *alter ego*)? Or will one approach the foreign in a way that suggests a susceptibility to the hierarchization temptation, or perhaps

⁴ *Atkins v Virginia*, 536 US 304 (2002); *Lawrence v Texas*, 539 US 558 (2003); *Roper v Simmons*, 543 US 551 (2005). The passage from *Roper* that I have in mind is at 554, where Justice Anthony Kennedy, writing for the court, observes how foreign law, ‘while not controlling our outcome, does provide respected and significant confirmation for our own conclusions’. These three judgments led to fierce, extensive and sustained debate in various venues, not least in the US Supreme Court itself. For statements against judicial reference to foreign law, see Posner, RA (2010) *How Judges Think* Harvard University Press at 347-68; Posner, EA (2009) *The Perils of Global Legalism* University of Chicago Press at 100-25. For a thoughtful argument also defending this stance, see Ramsey, MD (2004) ‘International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence*’ (98) *American Journal of International Law* 69. For claims in support of judicial initiatives accrediting the authoritative value of foreign law, see Jackson, VC (2010) *Constitutional Engagement in a Transnational Era* Oxford University Press; Waldron, J (2012) *Partly Laws Common to All Mankind* Yale University Press. Positions straddle the usual political lines. Eg, see Sunstein, CR (2009) *A Constitution of Many Minds* Princeton University Press at 209, where a prominent liberal academic contends that ‘it is not worthwhile, all things considered, [for American constitutional law] to consult foreign practices’ given that it boasts ‘a large stock of precedents on which to draw’ and that ‘its traditions are both developed and distinctive’. While I approve of judicial references to foreign law as persuasive authority, I have expressed strong reservations regarding the US Supreme Court’s representation of the foreign and its appreciation of the foreign’s relevance: Legrand, P (2006) ‘Comparative Legal Studies and the Matter of Authenticity’ (1/2) *Journal of Comparative Law* 365 at 401-30. For my critique of Jackson *supra*, see Legrand, P (2011) ‘Foreign Law: Understanding Understanding’ (6/2) *Journal of Comparative Law* 67 at 98-103. Since *Atkins*, *Lawrence* and *Roper*, the Supreme Court has not referred to foreign law as persuasive authority in a manner that has again attracted controversy. Indeed, even in *United States v Windsor*, 570 US ___ (2013) and *Hollingsworth v Perry*, 570 US ___ (2013), the two decisions effectively constitutionalizing homosexual unions, the Supreme Court chose not to incorporate foreign law in its reasoning — the exception being Justice Antonin Scalia who, in *Windsor*, referred to German constitutional law (see slip opinion at 3). The irony of the situation will not be lost on those who are aware of Justice Scalia’s pronouncement to the effect that ‘foreign legal materials can never be relevant to an interpretation of — to the meaning of — the US Constitution’: Scalia, A (2004) ‘Foreign Authority in the Federal Courts’ (98) *American Society of International Law Proceedings* 305 at 307 [emphasis original]. In *Schriro v Summerlin*, 542 US 348 (2004) at 356, Justice Scalia refers to foreign law while specifying that it remains ‘irrelevant to the meaning and continued existence of th[e] right [to jury trial] under the [US] Constitution’. The debate over foreign law has now been re-ignited in the legislative forum as seven states have passed legislation since 2010 barring state judges from considering foreign law, or specific aspects of foreign law such as Islamic religious law and customs, in their decisions. As of 1 January 2014, at least twenty-five other states had introduced analogous measures. The Oklahoma statute, the first such banning initiative, was found to be unconstitutional in *Awad v Zirriax* (WD Okla 15 August 2013). This decision reprises a circuit court judgment in *Awad v Zirriax*, 670 F3d 1111 (10th Cir 2012), which concerned a preliminary injunction. For a critical examination of the various state initiatives, see Volokh, E (2014) ‘Foreign Law in American Courts’ (66) *Oklahoma Law Review* 219. For a comprehensive survey, see Patel, F, Duss, M and Toh, A *Foreign Law Bans: Legal Uncertainties and Practical Problems*, 58 pp (May 2013). On 1 January 2014, this report, released under the joint auspices of the Center for American Progress and of the Brennan Center for Justice, was available at <http://www.brennancenter.org/sites/default/files/publications/ForeignLawBans.pdf>. I have a copy of this document on file. See also Fellmeth, A (2012) ‘US State Legislation to Limit Use of International and Foreign Law’ (106) *American Journal of International Law* 107.

to an imperialist haunting, such that local law is deemed superior or exceptional vis-à-vis foreign law?

- Ultimately, and once more from a predominantly philosophical perspective, a judge's attitude concerning foreign law tells about the fashioning of self-definition. How one addresses alterity signals, in significant ways, what kind of person one is. For example, it is meaningful that as the circuit court in *Bodum* is asked to ascertain French law, it gives effect to its understanding of it based strictly on English-language materials at hand in the United States rather than strive to realize a French lawyer's vision of French law.

For these five clusters of reasons at least, the 2010 circuit decision in *Bodum* deserves a thorough analysis. Incidentally, this judgment offers 'comparative law', as research into foreign law is institutionally labelled within the academy, a welcome occasion to show the sceptical observer how it amounts to more than the historical residue of colonialism and to more also than an intellectual fad. In particular, 'comparative law' finds itself able to demonstrate that its interest in foreign law is far from being simply theoretical and, in line with the *Zeitgeist's* expectations, to establish how it can feature practical applications even in such a reputedly technical field as evidence. Through the deployment of its disciplinary apparatus, a critical comparativity can thus engage in a deconstruction exercise and illustrate the three blatant contradictions informing the majority view in *Bodum*. First, even as it claims to be in search of foreign law, the majority is paradoxically acting so as to subject the foreign to a brand of fetishization of local language and of local materials. Thus, while it inveighs against 'intellectual provincialism',⁵ the majority engages in the provincialization of the foreign in the sense that it deems to count as foreign law for purposes of adjudication what are, in the end, but interpretations of it released in the local language in publications circulating locally. Secondly, despite the fact that it wishes to be seen to adopt a robust empiricism, the majority disconcertingly purports to liberate itself from the demands of empirical verification of foreign law as it exists in the foreign location and in the foreign language. Thirdly — and this is perhaps the tension that proves particularly bewildering —, the majority, though proclaiming an unwillingness to suffer bias in the expert witnesses' descriptions of French law, proceeds most deliberately to indulge its own highly contestable contortion of it.

These inconsistencies solicit further preliminary thoughts from the vantage of 'comparative law' with specific reference to the limits of interventions into foreign law, which *Bodum* discloses in noteworthy fashion and which I reckon every sensible comparatist must accept. One of 'comparative law's principal wagers is that a standpoint giving effect to local interpretive assumptions can yield crucial discernment into a foreign legal configuration — often the brand of insight that jurists envisaging their own law at close range may be expected to miss. But there are situations involving an intercultural interpretive enterprise where the local outlook, no matter how allegedly perspicacious, has to give way to foreign appreciation in recognition of the fact that the local interpreter (for example, the local judge) cannot be sufficiently acquainted with the life of the law as it unfolds abroad. Such is the case when it becomes necessary to identify, say, foreign posited law because, as in *Bodum*, it governs the agreement. In principle, under these

⁵ *Bodum* supra note 3 at 633 (Judge Richard Posner).

circumstances, no account of the law in force (say, French law) by a local interpreter (say, a US judge) can reckon to match the credibility of an answer supplied by a foreign jurist (say, a French lawyer) who, given her technical and cultural competence (including her linguistic proficiency), is optimally familiar both with foreign theoretical postulates and with foreign practical assumptions. Then, the local interpreter must avoid overplaying his hand and withhold any claim to preeminent understanding. He must concede that the posited law could by none be so adequately uttered as by a foreign jurist and therefore grant that foreign knowledge must carry over his own evaluation. In this Article, I defend the view that precedence in favour of foreign interpretation ought to have obtained in *Bodum*, an assessment which, in the event, held sway with one judge only.

•

Bodum involved the interpretation of an agreement regarding the sale of a French-press coffee-pot (sometimes known as a ‘plunger pot’ or a ‘cafetière’). While the plaintiff claimed that the US defendant, a company having incorporated in Illinois, was unlawfully selling a model too similar to the one expressly prohibited by contract, the retort was that there was no breach since the agreement concerned exclusively sales in certain countries and under specific names, and that it therefore neither covered the United States nor the particular coffee-maker at issue. The contract having been executed in France, both parties accepted that it was governed by French law. Adjudicating on the defendant’s motion for summary judgment, which had been granted in the court below,⁶ three judges from the United States Court of Appeals for the Seventh Circuit thus found themselves having to determine whether, as a matter of French contract law, evidence of pre-contractual negotiations ought to be allowed to assist in the interpretation of the contested contractual wording. The plaintiff, with a view to the sale of the coffee-pot being prohibited, wanted this question answered in the affirmative. For the defendant, though, a recourse to evidence extrinsic to the written agreement must depend on the contract being ambiguous. Since, so went this argument, the language of the contract in the case at hand was plain, and given that it clearly allowed the sale of the French press at stake, reference to the parties’ dealings ought not to be permitted.

As regards French law, the resolution of this controversy called in the main for two provisions of the *Code civil* to be considered — and indeed reconciled.⁷ Much of the court’s

⁶ *Bodum USA, Inc v La Cafetière, Inc* (ND Ill 24 March 2009), case 07 C 6302 (Judge Matthew Kennelly) [hereinafter: *Bodum* (ND Ill)]. On 1 January 2014, the judgment was available at <http://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2007cv06302/214296/100>. I have a copy of this opinion on file.

⁷ The contents of the typical civil code have been admirably described by Professor Bernard Rudden: ‘Essentially there are the same four things which have been pondered, debated and refined for the last 2,000 years: persons, property, obligations and liability. Private law recognizes human beings as bearers of rights, assists them to create other “juridical” persons such as companies, and deals with the relations between them. These persons may own property either for its own sake (to occupy, use, sell and so on) or as investment. They may create obligations by their agreements (and the legislator provides a handy stock of nominate contracts which they may use if they wish) and are obliged to make good any damage unlawfully caused to others. The whole system is completed by provisions for liability under which these persons’ property may be taken to discharge their obligations’. Such are, in Rudden’s words, the ‘elements [that] lie at the heart of all modern [civil-law] systems’: Rudden, B (10 July 1992) ‘From Customs to Civil Codes’ *The Times Literary Supplement* at 27 col 4. Little wonder that Jean Carbonnier, a French legal scholar generally held in high esteem in France, once opined that the *Code civil* is ‘France’s genuine constitution’: Carbonnier, J (1986) ‘Le Code civil’ in Nora, P

attention in *Bodum* therefore focused on how French law has articulated the tension between these two legislative texts. As concerns interpretation of contracts, Article 1156 holds that ‘the common intention of the contracting parties’ (*la commune intention des parties contractantes*) must prevail over ‘the literal meaning of the terms’ (*[le] sens littéral des termes*). For its part, Article 1341 states that ‘there is to be received no proof by witnesses against or beyond the contents of the documents, or over what might be alleged to have been said before, while or after the documents [were drafted]’ (*il n’est reçu aucune preuve par témoins contre et outre le contenu aux actes, ni sur ce qui serait allégué avoir été dit avant, lors ou depuis les actes*).⁸ The three judges in *Bodum* agreed with the defendant’s argument, took the view that the contract clearly allowed for the sale of the coffee-maker and held that pre-contractual negotiations were accordingly to be deemed irrelevant as a matter of French law — a resolution which, in the end, each judge envisaged as not raising any serious legal difficulty.⁹ Nonetheless, the case generated three individual opinions including a concurrence expressly dissenting on the matter of reference to foreign law. In the main, the judicial conversation discussed what could pertinently count as ‘French law’ with a view to identifying the law governing the parties’ contract. As I have previously indicated, two of the three judges decided that they ought to forsake expert testimony and ascertain French law for themselves — a position which the third judge disputed.

For Chief Judge Frank Easterbrook, expert witnesses — in this instance, three French law professors from Paris law faculties — were superfluous. The judge was not in doubt that the court could safely mobilize French contract law so as to adjudicate upon the parties’ legal entitlements by relying solely on scholarly writings in English available in the United States, whether these texts concerned French law specifically or the ‘civil-law tradition’ in general,¹⁰ and whether they were authored by French jurists or by foreigners. Though concurring in the result, Judge Richard Posner chose to write separately on the issue of judicial acquisition of foreign legal knowledge for the express purpose of emphasizing his support for Chief Judge Easterbrook concerning the inadequacy of expert testimony and the merit of court-initiated, English-language and US-oriented research. For her part, Judge Diane Wood, while also acquiescing in the decision, registered a dissent within her own concurrence in order explicitly to mark her opposition to her fellow judges as regards the securement of knowledge of foreign law through exclusive reliance on English-language, US-based, sources. She insisted on the value of expert testimony.

(ed) *Les Lieux de mémoire* vol II/2 Gallimard at 308-09 [*(l)la véritable constitution (de la France)*]. Along with other omissions, this entry fails to appear in the English version of the book. See Nora, P (ed) [1997] *Realms of Memory* Kritzman, LD (Eng ed) Goldhammer, A (trans) vol II Columbia University Press. In the court of appeal, two of the three judges note that rather than be governed by the French *Code civil*, the case could have fallen within the ambit of the French *Code de commerce*, or commercial code. For observations on the case as commercial law, see *Bodum* supra note 3 at 629 (Chief Judge Frank Easterbrook) and 636 (Judge Posner). While it remains unclear why the parties did not plead commercial law rather than civil law, their determination does not at all affect my critique of the *Bodum* decision.

⁸ Interestingly, the lower court does not refer to either provision. However, it discusses Articles 1157, 1163 and 1602 of the French *Code civil*. See *Bodum* (ND III) supra note 6 at 8; 15, 8 and 9; and 15, respectively. The court of appeal does not address any of these three legislative texts.

⁹ Though also reaching a decision in favour of the defendant, the lower court had taken the view that it must read the agreement ‘in conjunction with the prior drafts and correspondence between the parties’: *Bodum* (ND III) supra note 6 at 15. It had based its interpretation on its understanding that ‘French law allows the Court to look beyond the four corners of the agreement even if it is not ambiguous’: id at 10. For the court of appeal’s observations on the ‘four-corners rule’, see *infra* text at note 50.

¹⁰ The expression is Chief Judge Easterbrook’s: *Bodum* supra note 3 at 630-31.

In *Bodum*, the court faced a redoubtable challenge in as much as, even as it valorized the ‘hereness’ of a US-based trial which, for example, was to proceed in English according to local rules of evidence and procedure, it had simultaneously to honour the ‘elsewhereness’ of French law. In important respects, then, so as to make sense of a different epistemological model, the judges needed to overcome the single economy of meaning within which they habitually dwell on account of their cultural conditioning. Now, because there can be no access to immaculate, intangible and intemporal French law ‘as such’ (assuming something like this can even be imagined) and since any version of French law as it is taken to be (any *worlding* of French law) must be indebted in significant ways to its representator (and to the representator’s epistemic circumstances), one would have expected this interpretive predicament to prompt the court to summon French jurists to explain, dependably, the French law entailed by the contract at hand, which, I contend, is evidently *French-law-as-it-is-lived-in-France* — a French law, I claim, that is bound to differ from *French-law-as-it-is-apprehended-in-the-United-States*.¹¹ Indeed, place — for instance, the interpreter’s place, his situation — matters significantly to an understanding of law. Place is more than a mere static backdrop to legal meaning; it is a dynamic constituent of it. In other words, place is not simply a physicalist conception but also an existential notion. Law emerges only in and through place. Law and place are inextricably enmeshed, so that there is no ungrounded law. For law, any law, to exist ‘as law’, it must stand forth as an experience of place, for example, in terms of an interpreter’s epistemic framework.

Yet, against all reasonable expectations, Chief Judge Easterbrook and Judge Posner decided to warrant *French-law-as-it-is-apprehended-in-the-United-States* instead of seeking to ascertain *French-law-as-it-is-lived-in-France*, either on the assumption that the two configurations are interchangeable or because they deemed the English-language local readings of French law in the United States to be ‘good enough’. In other words, the two judges elected not to supplement their judicial monolingualism. Rather, they resolved to conduct a re-spatialization of foreign law by firmly anchoring it within their local, familiar, discursive parameters. Spurning all material other than texts in the local language readily accessible locally, Chief Judge Easterbrook and Judge Posner inscribed a (heedless) catachresis whereby every articulation of foreign law was achieved as a manifestation of scholarship available to them in ‘their’ language in ‘their’ country.¹² As a result, foreign law found itself semanticized within a US lexicon, whatever fell beyond this vocabulary being reputed *hors-texte*. In assigning foreign law to their ‘own’ law-world in a context where, as I shall show presently, the English-language, US-based, publications prized by Chief Judge Easterbrook and Judge Posner happen to be largely the work of foreigners who

¹¹ I have more to say on ‘*French-law-as-it-is-lived-in-France*’ as I develop my argument. Suffice it to indicate at this stage that ‘*French-law-as-it-is-lived-in-France*’ is a complex notion; that it is not understandable objectively; and that it need not make itself vulnerable to the charge of essentialism. (As I refer to essentialism, I understand this doctrine to imply that there would be fixed or essential properties characterizing an entity such that only members of that entity, sharing in these irreducible traits, could have interpretive access to the entity.)

¹² A catachresis (from the Greek for ‘misuse’ or ‘abuse’) is a figure of speech marking a displacement or re-purposing of language through an arbitrary semantic connection. The ascription can happen accidentally (as in ‘Paris Hilton is a famous socialist’ — for ‘socialite’). But the mismatch may also be pursued deliberately for stylistic effect (as in ‘the inhabitants of a cemetery’). In *Bodum*, the majority consciously applied words out of ‘English-language, US-based, materials’ to the matter of ‘French law’, which the terms cannot properly denote. While the arrangement is not fortuitous, Chief Judge Easterbrook and Judge Posner proceeded regardless of its incongruity — hence my reference to judicial impetuosity.

claim no experience of French-law-as-it-is-lived-in-France and who at times discuss the French model no more than tangentially, the two judges failed, somewhat spectacularly in my view, to render foreign law the justice they owed it as its representators. They found themselves repudiating their *debt* towards foreign law.

I claim that a close reading of Chief Judge Easterbrook and Judge Posner's opinions demonstrates the superficiality of their research into French law, which offers little more than a presumptuous and disconcerting montage inflected by chance processes and improvised juxtapositions. I argue that such a parody of French law ultimately discloses a refusal to grant it the recognition and respect, the *voice*, to which French-law-as-it-is-lived-in-France was entitled in *Bodum*. Moreover, the maintenance by a majority of the court of an epiphanic trance to the effect that French law can somehow be confined to its US manifestations discredits 'comparative law' — or so I want to establish. As if to emphasize the point that epistemological practice is more than ornamental nuance, the judicial treatment of French law *à l'américaine* on display in *Bodum* enfranchises a reading of the French *Code civil* which in one important regard is, quite simply, grammatically unsustainable in the French language.

The leitmotiv I adopt for my argument is that *it matters where one thinks*. In terms of the scrupulosity of any representation of French law on offer, there is, then, a compelling analytical distinction to be drawn between interpreters of French law whose reading pertains to French-law-as-it-is-lived-in-France and others whose focus would be, say, on French-law-as-it-is-apprehended-in-the-United-States. On the basis of this delineation — which, adopting a decidedly post-structuralist perspective, neither purports to avoid all ambivalence or oversiding (there will be situations 'in between', straddling the dual register) nor to track the unconvincing categorization between 'insiders' and 'outsiders'¹³ — I claim that Chief Judge Easterbrook and Judge Posner's stratagem supplies an interpretive yield proving woefully inadequate to the task before them, which, in deference to the contracting parties, was to identify the French law the parties themselves had retained upon executing their contract in France. In this regard, it seems incontrovertible, again, that the parties, as they elected to be governed by French law, would have contemplated French-law-as-it-is-lived-in-France rather than French-law-as-it-is-apprehended-in-the-United-States (or, indeed, French-law-as-it-is-apprehended-anywhere-else).¹⁴ While I would maintain that there are limits to how much appreciation of French-law-as-it-is-lived-in-France a US court can ever achieve, I contend that Chief Judge Easterbrook and Judge Posner ought to have approached French law at much closer range than they chose to do. To draw on Samuel Beckett's uncanny perspicuity, as is my wont, while the judges were destined to fail to bridge the epistemological gap between Chicago and Paris, they had at their disposal intellectual resources allowing them to '[f]ail better'.¹⁵

¹³ A decisive argument against this dichotomy is in Merton, RK (1972) 'Insiders and Outsiders: A Chapter in the Sociology of Knowledge' (78) *American Journal of Sociology* 9. I remain grateful to Dean Michael Palmer for suggesting this reference some years ago.

¹⁴ A discussion with Professor Michael Kelly prompts me to add that such can be assumed to be especially the case as the parties to the contract were (initially) a Swiss company and a French businessman. Though, as Professor Kelly underlines, the parties would not have expected French law to stand still, so that they were in effect agreeing to have their contract governed by French law as it would develop over time, they cannot reasonably be assumed to have had in mind any other French law than France's French law.

¹⁵ The expression is in Beckett, S (2009 [1983]) *Worstward Ho in Company/III Seen III Said/Worstward Ho/Stirrings Still* Van Hulle, D (ed) Faber and Faber at 81.

Appropriately, Chief Judge Easterbrook begins his discussion by observing that the Federal Rules of Civil Procedure leave a court free to receive expert testimony or not and that they allow for the judicial canvassing of ‘any relevant material or source’.¹⁶ He quotes from the Committee Note accompanying the 1966 reform of the relevant provisions so as to buttress his opinion that ‘[t]he court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail’.¹⁷ Remarking that ‘French law [...] is widely available in English’ (a statement I trust many comparatists would, like myself, treat as eminently unconvincing), the judge finds that ‘[i]t is no more necessary to resort to expert declarations about the law of France than about the law of Louisiana’.¹⁸ Chief Judge Easterbrook, having baldly characterized the ‘English-language descriptions of French law’ in circulation as being ‘objective’, indicates that ‘[h]e prefer[s] them to the parties’ declarations’.¹⁹ He explains that his reticence vis-à-vis expert testimony stems at once from the fact that it is ‘expensive’ — ‘experts must be located and paid’ — and that it imparts ‘an adversary’s spin, which the court then must discount’.²⁰

After firmly stating the primacy of English-language commentary in circulation in the United States over French expertise, Chief Judge Easterbrook introduces three texts in particular.²¹ Lest one is prepared to satisfice — that is, simply to use information rather than probe it — these indications, brief as they are, must invite careful scrutiny. After all, when it comes to what source of information counts as authority — the question of *authorization* of knowledge — it matters whether a given claim is endorsed by ‘the experts in the field’ or by ‘less respected individuals’.²² In the light of the inquiry that follows, I maintain that Chief Judge Easterbrook’s three references are deficient in important respects, none of his sources offering demonstrated and acknowledged cognitive authority on the French-law-of-contractual-interpretation-as-it-is-lived-in-France, the specific issue I contend to have been before the court. Arguably, none of the three authors mentioned even purports to pretend to the kind of competence Chief Judge Easterbrook assumes on their behalf.

The judge’s first analyst is Professor Alberto Luis Zuppi, an Argentine academic who, at this writing, combines a post as legal adviser to the Argentine senate (*Honorable Senado de la Nación Argentina*) with an international legal practice in Buenos Aires. For a number of years, Professor Zuppi was affiliated with Louisiana State University which then claimed him as an expert in international criminal law, international human rights, international law and international sale of goods. He is a graduate of the Universidad de Buenos Aires and of the Universität des Saarlandes in Germany. At the latter institution, he worked as a research assistant and later taught in the field of international business transactions. The object of Chief Judge Easterbrook’s reference in *Bodum* is a text that Professor Zuppi

¹⁶ Fed R Civ P 44.1.

¹⁷ *Bodum* supra note 3 at 628.

¹⁸ *Ibid.*

¹⁹ *Id* at 629.

²⁰ *Ibid.*

²¹ *Id* at 629-30.

²² Elder-Vass, D (2012) *The Reality of Social Construction* Oxford University Press at 226-27. Cf Shapin, S (1995) ‘Here and Everywhere: Sociology of Scientific Knowledge’ (21) *Annual Review of Sociology* 289 at 302-03: ‘The recognition of trustworthy persons is a necessary component in building and maintaining systems of knowledge’.

published in the 2007 edition of the *Georgia Journal of International and Comparative Law*.²³ In this piece, Professor Zuppi focuses on what he styles, in common-law parlance, the 'parole evidence rule'. Ranging widely, he discusses the common-law world, the civil-law tradition and the so-called '*lex mercatoria*'.

While Professor Zuppi's study offers discrete sub-sections on the laws of England, Australia, Canada, New Zealand, Scotland, South Africa and Québec, it does not devote any to France. However, it features a five-page overview of the civil-law tradition. Despite its terseness (or perhaps on account of it), this civil-law survey purports to cover much ground. Although mostly reviewing the laws of Spain, Italy, Germany and Switzerland, it is also interspersed with some references to French law, including one bearing on the issue before the court in *Bodum*, that is, the dynamics between writings and orality in the interpretation of contractual relationships. In his opinion, Chief Judge Easterbrook directs his readership to this particular passage, though without quoting from it. The judge's targeted excerpt states as follows: '[U]nder the French Civil Code, whenever the object of an agreement exceeds a certain sum of money, a contract should be made in writing and no proof by witnesses will be allowed against it'.²⁴ For his part, Professor Zuppi bases this contention on Article 1341 of the *Code civil*.

Since my principal claim concerns the US court's approach to the ascertainment of foreign law and given that Chief Judge Easterbrook expressly relies on Professor Zuppi's contribution in order to identify French law, I find it important to signal that Article 1341 of the *Code civil* cannot grammatically support the interpretation being suggested here. Indeed, the French provision holds that above a certain sum, contracts must be made in writing and that *irrespective of the contractual amount* (no matter how small, then), oral testimony shall not obtain against a written agreement.²⁵ Incidentally, as Chief Judge Easterbrook adopts for himself the law-review's unsustainable interpretation, he reformulates it in clearer language thereby making it even more blatantly problematic.²⁶ Still as part of his panorama of the civil-law world, though in a passage Chief Judge Easterbrook does not emphasize, Professor Zuppi offers a liminary general pronouncement to the effect that '[i]n relation to the interpretation of contracts, the Roman law system recognizes that if the terms of a contract are clear and unequivocal on the intention of the parties, they prevail over any other interpretation'.²⁷ In the supporting note, one finds a reference to four provisions from four civil codes, including a mention of Article 1156 of the French *Code civil*. (As Chief Judge Easterbrook does not specifically endorse this extract, I shall avoid quibbling over Professor Zuppi's disputable restatement of Article 1156.)

²³ See Zuppi, AL (2007) 'The Parol Evidence Rule: A Comparative Study of the Common Law, the Civil Law Tradition, and *Lex Mercatoria*' (35) *Georgia Journal of International and Comparative Law* 233.

²⁴ *Id* at 259.

²⁵ The full text of the relevant part of Article 1341 of the *Code civil* reads thus: 'Documents must be executed before a notary or under private signature in all matters exceeding a sum or value set by decree, [...] and there is to be received no proof by witnesses against or beyond the contents of the documents, or over what might be alleged to have been said before, while or after the documents [were drafted] though it be a question of a lesser sum or value' [*Il doit être passé acte devant notaires ou sous signatures privées de toutes choses excédant une somme ou une valeur fixée par décret, (...) et il n'est reçu aucune preuve par témoins contre et outre le contenu aux actes, ni sur ce qui serait allégué avoir été dit avant, lors ou depuis les actes, encore qu'il s'agisse d'une somme ou valeur moindre*].

²⁶ *Bodum* supra note 3 at 629 [Article 1341 of the Civil Code forbids evidence about what negotiators said to one another (...) when the value of the dispute exceeds 5,000 francs (roughly 800 euros)].

²⁷ Zuppi, AL 'The Parol Evidence Rule: A Comparative Study of the Common Law, the Civil Law Tradition, and *Lex Mercatoria*' supra note 23 at 263.

At this stage, I deem it necessary to underscore that there appears to be nothing in Professor Zuppi's published text, or indeed in his professional background, to suggest that his contribution supplies demonstrated and acknowledged cognitive authority on French-law-as-it-is-lived-in-France. It is unclear, as I have mentioned, that the author is in fact claiming such ascendancy as he seeks to offer a forty-four-page Cook's tour of a large array of laws. After all, he devotes no more than a few sentences to the French model — which very much 'smell['] of the lamp'.²⁸ Though I have long held that Cook's tours discredit the study of foreign law more or less as a matter of course, my purpose here is not to belabour this point (in effect, this would be another story). I prefer to insist on the fact that a close examination of the contents of Professor Zuppi's text and a perusal of his professional credentials show that there is simply no deployment on offer of a specific expertise on French-contract-law-as-it-is-lived-in-France. Perhaps I may be allowed to refer once more to the author's indefensible interpretation of Article 1156 of the *Code civil* in support of my argument.

In the light of these observations, the other two scholars whom Chief Judge Easterbrook also enlists to buttress his reasoning need only be discussed summarily. The second commentator is Professor Stefan Vogenauer, a German academic teaching in England. Chief Judge Easterbrook quotes at some length from Professor Vogenauer's '[c]oncluding [c]omparative [o]bservations' on the '[i]nterpretation of [c]ontracts', a twenty-eight-page survey chapter featured within a collection of essays on contract terms published by a leading university press in 2007.²⁹ The third analyst is Professor Jacques Herbots, a Belgian academic. Here, Chief Judge Easterbrook's reference, without any quotation, is to a twenty-three-page chapter on '[i]nterpretation of contracts', a contribution to an '[e]ncyclopedia of [c]omparative [l]aw' released by a trade publisher in 2006, a large book which ranges from 'Consideration' to the 'Czech Republic' to 'Mixed Jurisdictions' to 'Social Security'.³⁰

Chief Judge Easterbrook's second and third sources purport to offer but sweeping views of the laws of disparate jurisdictions hailing from the common-law or civil-law traditions with particular emphasis on European and North-American laws. As a result, in both cases, inevitably I should think, French law finds itself being addressed in cursory fashion (though levels of 'cursoriness' vary as between the two texts). Problematically, Chief Judge Easterbrook's second and third authors of choice are foreigners vis-à-vis French law. Unsurprisingly, there is no way in which the treatment of French contractual interpretation on display in either instance comes remotely close to the detail that can be expected before one's account is in a position to be legitimately ascribed demonstrated and acknowledged cognitive authority on French-law-as-it-is-lived-in-France. Needless to add, as I refer to detail my claim is not about quantity. Rather, I am addressing the matter of depth, of *interpretive yield*.

Having made much of the superior value of scholarly commentary in English available in the United States, Chief Judge Easterbrook refers only to the three analyses I have indicated — each one a compass aiming to embrace both the common-law and civil-law

²⁸ Merryman, JH (1985) *The Civil Law Tradition* (2nd ed) Stanford University Press at 66. I deliberately refer to the last edition of this book to have been written by Professor Merryman himself.

²⁹ See Vogenauer, S (2007) 'Interpretation of Contracts: Concluding Comparative Observations' in Burrows, A and Peel, E (eds) *Contract Terms* Oxford University Press at 123-50.

³⁰ See Herbots, JH (2006) 'Interpretation of Contracts' in Smits, JM (ed) *Elgar Encyclopedia of Comparative Law* Elgar at 325-47. A second edition of this book was released in 2012.

traditions (or, at least, a number of jurisdictions deemed representative of these two legal traditions). Curiously, the judge does not mention a single French author — not even a French author whose work would have been translated into English and be available in the United States. For Chief Judge Easterbrook, it is obviously sufficient for French law to be relayed through compendiums in English accessible in the United States, though written by Argentine, German or Belgian scholars — which, once more, simply cannot be what the parties had in mind when they elected to have their contract governed by French law. In sum, there is no inclination on Chief Judge Easterbrook's part to pursue any course of action concerning the ascertainment of French law beyond the '[m]erest minimum'.³¹ From his standpoint, the three English-language references he marshals are 'solution clapped on problem like a snuffer on a candle'.³²

•

Judge Posner's opinion, as I observed previously, is designed 'to express emphatic support for, and modestly to amplify, the court's criticism of a common and authorized but unsound judicial practice', that is, 'the practice of trying to establish the meaning of a law of a foreign country by testimony or affidavits of expert witnesses, usually lawyers or law professors, often from the country in question'.³³ Judge Posner tracks Chief Judge Easterbrook in a number of ways. He, too, refers to the Federal Rules of Civil Procedure and notes that they do not compel a judge to allow expert testimony. And, like Chief Judge Easterbrook, Judge Posner draws a parallel between foreign law and the law of another US state. If anything, Judge Posner's assimilation is in fact closer than his fellow judge's since he refers to the law of other US states as 'foreign law', though framing the expression in quotation marks.³⁴ And, developing Chief Judge Easterbrook's point, Judge Posner mentions a number of US cases to the effect that a US court does not allow expert testimony on the law of another state.³⁵ Having stigmatized expert testimony because individuals are 'selected on the basis of the convergence of their views with the litigating position of the client, or their willingness to fall in with the views urged upon them by the client',³⁶ Judge Posner is especially critical of judicial reliance on expertise as regards the laws of Anglophone countries.³⁷ But, he adds, '[i]t is only a little less perverse for judges to rely on testimony to ascertain the law of a country whose official language is not English, at least if it is a major country and has a modern legal system' (I remain unsure about the semantic extension of these words. Is Denmark a 'major country'? Is Indonesia? Does Indonesia feature a 'modern legal system'? Does Nigeria?).³⁸

³¹ The words are in Beckett, *S Worstward Ho* supra note 15 at 82.

³² Again, the phrase is Beckett's: Beckett, *S* (1984 [1938]) 'Intercessions by Denis Devlin' in *Disjecta* Cohn, R (ed) Grove Press at 92.

³³ *Bodum* supra note 3 at 631. Judge Posner reprises — at times word for word — his opinion in *Sunstar, Inc v Alberto-Culver Co*, 586 F3d 487 (7th Cir 2009) at 495-96 [hereinafter: *Sunstar*].

³⁴ *Bodum* supra note 3 at 632. See also *Sunstar* supra note 33 at 495 (Judge Posner).

³⁵ *Bodum* supra note 3 at 632.

³⁶ *Id* at 633. For this argument, see also *Sunstar* supra note 33 at 495-96 (Judge Posner).

³⁷ *Bodum* supra note 3 at 632-33. Judge Posner errs in referring to English as 'the official language' of Canada, the United Kingdom and Australia. Since 1969, English has been one of two Canadian official languages. The other is French.

³⁸ *Id* at 633. While Judge Posner and Chief Judge Easterbrook both deem expert evidence unreliable, they do not mention anything in the actual expert evidence before the court as being unreliable (nor do they point

Not unlike Chief Judge Easterbrook's act of faith in the 'objective' character of scholarly commentary in English,³⁹ Judge Posner salutes how 'published materials, in the form of treatises, law review articles, statutes, and cases [...] provide neutral illumination of issues of foreign law'.⁴⁰ As regards French law specifically, he refers to the fact of 'abundant secondary material on [...] French contract and procedural law, published in English'.⁴¹ (I return to Judge Posner's references presently and only wish to say for now that his assertion regarding the 'abundan[ce]' of documentation on French law in English would strike comparatists familiar with the paucity of such material as puzzling, though one would readily admit that there is more in English on French law than, say, on the law of Portugal, Uruguay or Cambodia.) Taking the view that foreign law 'can be found well-explained in English-language treatises and articles',⁴² Judge Posner notes that 'often [...] there will be official, or reputable unofficial, translations' of it on offer.⁴³ For him, working from published translations in order to ascertain the parties' legal entitlements is not especially hazardous. After all, he remarks, '[t]ranslations figure prominently in a variety of cases tried in American courts, such as drug-trafficking and immigration cases; why not in cases involving foreign law?'.⁴⁴ Problematically, I think, Judge Posner does not elaborate on the reasons why it would make sense to model the US judicial approach to French contract law on the local treatment of drug-trafficking or immigration litigation.⁴⁵

According to Judge Posner, '[t]he civil-law culture is the basis for the plaintiff's claim to be entitled [...] to present evidence that its contract with the defendant was intended to mean something different from what it says'.⁴⁶ (Still on the matter of semantic extension, I wonder about the expression 'civil-law culture' — a form of words suggesting a naive indifferentiation across many countries over all continents. Be that as it may, even a cursory analysis shows that the judge is in error. The litigant is relying on French law, more specifically, in my view, on French-law-as-it-is-lived-in-France, and certainly not on 'civil-law culture', even if such an entity could be established to exist.⁴⁷) Now, Judge Posner opines that 'Article 1156 [...] is no different from warnings in American contract law

to any of the lower court's references to the expert evidence at hand as being problematic). Judge Posner's opposition in particular is clearly pitched at a more abstract level in the sense that he objects to expert evidence on foreign law as a matter of principle. Thus, he mentions an 'unsound judicial practice' and 'a bad practice': *Bodum* supra note 3 at 631 and 633, respectively. That her fellow judges are taking a principled stance is Judge Wood's perception also. Thus, she objects to her colleagues suggesting, as she sees it, that 'expert testimony is categorically inferior': *Bodum* supra note 3 at 638.

³⁹ Supra text at note 19.

⁴⁰ *Bodum* supra note 3 at 633. In *Sunstar*, Judge Posner mentions 'articles, treatises, and judicial opinions' as 'superior sources': *Sunstar* supra note 33 at 495.

⁴¹ *Bodum* supra note 3 at 633.

⁴² *Ibid.*

⁴³ *Id* at 634. As regards Article 1156 of the French *Code civil*, one of the two key provisions under discussion in *Bodum*, Judge Posner rapidly qualifies his support for official translations. He says that 'the official English version is stilted' and elects to retain an unattributed translation 'in idiomatic English': *ibid.*

⁴⁴ *Ibid.* Judge Posner uses the same analogy, also without explanation, in *Sunstar* supra note 33 at 496.

⁴⁵ Another difficulty concerns Judge Posner's casual assertion to the effect that in the absence of available translations 'the parties can have the relevant portions [of the law] translated into English': *Bodum* supra note 3 at 634. Quite apart from the fact that the commissioning of an English translation can be expensive, one readily imagines how awkward, and therefore how costly, it must be for parties locked in an adversarial stance to *agree* on a translation.

⁴⁶ *Bodum* supra note 3 at 635.

⁴⁷ Chief Judge Easterbrook's reference to the 'civil law tradition' (supra text at note 10) is similarly unconvincing in the specific context of this litigation.

to be wary of literal interpretations of contracts'.⁴⁸ Indeed, the judge asserts that 'despite the differences in origins, differences in outcome under the two legal regimes are small and shrinking' — though '[a] difference at least in tone remains'.⁴⁹ Judge Posner further represents Article 1341 of the *Code civil* as '[a]n approximation to [the parol evidence] rule' and 'the related "four corners" rule'.⁵⁰ To be sure, he observes, 'the civil law [...] of contracts places an emphasis on fault that is not found in the common law';⁵¹ 'civil law systems do not use juries in civil cases';⁵² and in '[civil law systems] rules on admissibility of evidence are notably looser than in common law jurisdictions'.⁵³ Still, the judge insists, the difference across French and US law is not what it seems: 'Unburdened by juries and tight rules of evidence, French courts *could* range further afield than American courts in search of subjective contractual intentions. *Could — but don't*'.⁵⁴

By then, a conclusion in favour of legal convergence has seemingly become inescapable. Indeed, Judge Posner writes as follows: 'It is at least as difficult to persuade a French court (because of its composition and usages) to admit extrinsic evidence in a contract case as it is to persuade an American court to do so'.⁵⁵ Perhaps because he deems the differences between French and US law to be so insignificant after all, Judge Posner sees no reason for the litigants to have introduced expert testimony, something which generated 'only confusion'.⁵⁶ Rather, '[t]he parties should have relied on published analyses of French commercial law'.⁵⁷ Judge Posner means, of course, 'published analyses' *written in English and readily accessible in the United States*. (Incidentally, along the way, like Chief Judge Easterbrook, Judge Posner adopts a reading of Article 1341 of the *Code civil* which the grammar of the French text cannot sustain. For him, Article 1341 'forbids using extrinsic evidence to contradict an unambiguous written contract [...] unless very small'.⁵⁸ As I have indicated, Article 1341 says otherwise.⁵⁹)

I now want to return to the authorities noted by Judge Posner in support of his claim to the effect that there is 'abundant secondary material on [...] French contract and procedural law, published in English'.⁶⁰ In this regard, Judge Posner refers to six texts,⁶¹ three of which were written by French jurists, whether law professors or lawyers. These publications are the works that primarily interest me here as, to my mind, they are obviously the texts more susceptible of evidencing demonstrated and acknowledged cognitive authority on French-

⁴⁸ *Bodum* supra note 3 at 634.

⁴⁹ *Id* at 635.

⁵⁰ *Id* at 636. Readers familiar with US law will be aware that the 'four-corners rule' basically provides for a contractual term in plain language to be interpreted in relation to the contract as a whole without reference to extrinsic evidence, in particular to pre-contractual negotiations. See generally Perillo, JM (2009) *Calamari and Perillo on Contracts* (6th ed) West at 129-32; Posner, EA (2011) *Contract Law and Theory* Aspen at 142-49; Bix, BH (2013) *Contract Law* Cambridge University Press at 59-65.

⁵¹ *Bodum* supra note 3 at 634.

⁵² *Id* at 636.

⁵³ *Ibid*.

⁵⁴ *Id* at 637 [my emphasis]

⁵⁵ *Id* at 638.

⁵⁶ *Ibid*. It is possibly the confusion attacked by Judge Posner that prompted him to write a distinctly convoluted opinion, which stands in stark contrast to Chief Judge Easterbrook's forthright judgment.

⁵⁷ *Ibid*.

⁵⁸ *Id* at 636.

⁵⁹ *Supra* text at note 25.

⁶⁰ *Supra* text at note 41.

⁶¹ See *Bodum* supra note 3 at 633.

law-as-it-is-lived-in-France. Accordingly, I shall not consider the other three references at any length — a short introduction to French contract law by an English academic released through a leading university press in 1992;⁶² a law-review article on French civil procedure published in the United States in 1986 by a US lawyer and sometime professor of law at a US law school;⁶³ and the '[c]oncluding [c]omparative [o]bservations' of the German academic whom Chief Judge Easterbrook also mentions.⁶⁴ These three analyses are written by foreigners whose primary expertise lies in laws that are foreign to France's (namely, the laws of England, the United States and Germany). The first of the three texts is a law-student primer. For its part, the third work is, as I have remarked earlier, a survey chapter purporting to embrace the civil-law and common-law traditions over less than thirty pages. Though contributed by a foreigner, the second citation is arguably the least implausible of the three because the author claims experience in the practice of law in France; yet, Judge Posner simply mentions this commentary in a general way without making any targeted reference to it.⁶⁵

As I have noted, then, Judge Posner points to some French scholars, unlike Chief Judge Easterbrook who, as I observed, does not indicate any. I find it crucial to scrutinize Judge Posner's accolades. One is to a French lawyer and to his 1997 contribution (in English) to a US journal. Revealingly, I think, this text offers an '[o]verview' of 'French [c]ivil [p]rocedure'.⁶⁶ In addition, Judge Posner refers to two chapters included within an English-language introduction to French law released by a trade publisher in 2008 — one on contract, the other on civil procedure.⁶⁷ In as much as they were produced by individuals having a demonstrated and acknowledged cognitive authority in French-law-as-it-is-lived-in-France, these three texts do not suffer from the kind of credibility deficit which, for reasons I have explained, mars the other works I have examined thus far. Yet, they remain seriously flawed on account of the fact that they are but summaries prepared for foreign readerships in a hurry craving something like 'speed-learning'.⁶⁸

By way of illustration of the difficulties I have in mind, I want to address the introductory collection of essays that Judge Posner twice musters. Even leaving the question of the chapters' Englishes to one side,⁶⁹ the fact is that the concise treatments of French law on

⁶² See Nicholas, B (1992) *The French Law of Contract* (2nd ed) Oxford University Press.

⁶³ See Beardsley, J (1986) 'Proof of Fact in French Civil Procedure' (34) *American Journal of Comparative Law* 459.

⁶⁴ *Supra* note 29.

⁶⁵ In discussion, Professor Herbert Lazerow insists that US lawyers working in France typically practice within a US 'legal bubble', the expertise on French law being supplied by local French lawyers. Lazerow's remark prompts me to return to my leitmotiv. If even a Paris-based US lawyer needs to solicit French legal expertise, how would a Chicago-based US judge be in a position credibly to ascertain French law by making reference exclusively to scholarly writings in English available in the United States?

⁶⁶ See Larivière, DS (1997) 'Overview of the Problems of French Civil Procedure' (45) *American Journal of Comparative Law* 737.

⁶⁷ See Tallon, D (2008) 'Contract Law'; Cadiet, L and Amrani-Mekki, S (2008) 'Civil Procedure' in Bermann, GA and Picard, E (eds) *Introduction to French Law* Kluwer at 205-36 and 307-32, respectively.

⁶⁸ I am offering a contemporary translation of the expression '*erudicion á vapor*'. The phrase is in Alberdi, [JA] (1868) *El Proyecto de Código civil para la República Argentina* Jouby & Roger at 5, where the author objected to Saint-Joseph, A de (1856) *Concordance entre les codes civils étrangers et le Code Napoléon* (2nd ed) Cotillon 4 vol: '[H]e has created fast erudition, mechanical erudition, so to speak, with which history is made almost as easily as music is played on a barrel-organ' [*ha creado la erudicion á vapor, la erudicion mecánica por decirlo así, con que se hace historia casi con la facilidad con que se toca música en un órgano de Berberie*].

⁶⁹ The only reviewer of the book on the 'Amazon' web site, as of 1 January 2014, entitles an 11 September 2011 appreciation 'costly disappointment'. The assessment notes that 'the authors are non-native speakers of English, which lends a verbose, awkward style hard to trudge through. The writing is further handicapped

offer cannot satisfy. Predictably, it is said of that publication that '[it] presents matter as if intended for laymen' and that '[t]he book [...] fails as a stand-alone text'. Indeed, '[i]f you understand French', the argument continues, 'you'll be better served by referring directly to French sources'.⁷⁰ I want to elaborate on the problem I am contemplating by making particular reference to the chapter on civil procedure, one of the two Judge Posner mentions.

This contribution's lead author is Professor Loïc Cadiet, who has stood for many years as the unrivalled French specialist in the French law of civil procedure.⁷¹ Importantly, I am not basing this assessment on a personal appraisal for there is substantial corroborating evidence supporting Professor Cadiet's established status as the demonstrated and acknowledged cognitive authority *par excellence* on the French law of civil procedure. For present purposes, I shall confine my data to the fact that Professor Cadiet is the primary author of the leading text on French civil procedure in the French language which, currently in its seventh edition, stands at 837 pages.⁷² He is also the lead author of the major work on the French trial, a 993-page textbook initially published in 2010.⁷³ Moreover, Professor Cadiet is responsible for one of the two leading annual editions of the French *Code de procédure civile*, an annotated text comprising nearly 3,000 pages.⁷⁴ I trust it is superfluous to add that as I mention pagination, I am not engaging in a simplistic quantitative exercise that would suggest something like 'authority by numbers'. My point is, simply, to emphasize Professor Cadiet's occupation of the field of French civil procedure through breadth and depth of coverage.

Following upon this glimpse into the magnitude of Professor Cadiet's scholarship, I wish to mention Judge Posner's reference once more, which is to this French specialist's chapter in English numbering twenty-six pages exactly.⁷⁵ I suggest that the numerical contrast emerging from my data, though inevitably coarse, is very revealing. Indeed, I daresay that Professor Cadiet himself would not hesitate to warn an Anglophone readership that 'his' concise English-language statement of the French law of civil procedure can only be affected by significant shortcomings, whether simplifications or omissions.⁷⁶ Again, I am confident that Professor Cadiet would, in fact, counsel readers in search of reliable and current information on French civil procedure against investing undue reliance on 'his' English-language sketch of his subject-matter. I expect he would resist being held to the letter of many of these introductory statements in English, at least in the absence of an opportunity for further clarification. For his part, Judge Posner seemingly does not feel the matter to be at all awkward — and certainly does not find the situation to be

by its frequent lack of keywords and phrasings necessary to talk about the topics cogently, which in turn can easily lead the reader astray. This is most clear when the text fails to use established English-language legal terminology for civil/Roman law'. I have a copy of this commentary on file.

⁷⁰ *Ibid.*

⁷¹ Lest I should be found remiss in not disclosing an interest, I hasten to mention that Professor Cadiet is a Sorbonne colleague.

⁷² Cadiet, L and Jeuland, E (2011) *Droit judiciaire privé* (7th ed) Lexis Nexis.

⁷³ Cadiet, L, Normand, J and Amrani-Mekki, S (2010) *Théorie générale du procès* Presses Universitaires de France. A second edition featuring over a thousand pages was released in 2013.

⁷⁴ See Cadiet, L (ed) [2013] *Code de procédure civile 2014* (27th ed) Lexis Nexis. This edition numbers 2,849 pages.

⁷⁵ See Cadiet, L and Amrani-Mekki, S 'Civil Procedure' supra note 67.

⁷⁶ My quotation marks wish to emphasize my expectation that the English-language version of Professor Cadiet's text will have been indebted to meaningful editorial assistance, a matter which must raise the conjoined issues of authorship and authority.

uncomfortable enough to prevent him from unreservedly introducing this brief English-language chapter as compelling authority on French law.

•

In her opinion, Judge Wood indicates at the outset that she is ‘unpersuaded by [her] colleagues’ assertion that expert testimony is categorically inferior to published, English-language materials’.⁷⁷ She proceeds to strike a key warning: ‘Exercises in comparative law are notoriously difficult, because the US reader is likely to miss nuances in the foreign law, to fail to appreciate the way in which one branch of the other country’s law interacts with another, or to assume erroneously that the foreign law mirrors US law when it does not’.⁷⁸ For Judge Wood, ‘many [published articles or treatises, written particularly for a US audience] will not [perform the same service as testimony from an acknowledged expert in foreign law], even if they are written in English, and especially if they are translated into English from another language’.⁷⁹ As regards the analogy drawn by her fellow judges between foreign and Louisiana law, Judge Wood notes that ‘[she] cannot agree with them’.⁸⁰ In particular, she observes that ‘Louisiana [...] is part of the federal system, and its courts function much like the courts of other states’.⁸¹

Answering the other two judges’ concern about the unreliability of expert testimony, Judge Wood writes that she finds it ‘hard to see why the person’s views cannot be tested in court, to guard against the possibility that he or she is just a mouthpiece for one party’.⁸² There are, she emphasizes, ‘tried and true methods set forth in Fed R Evid 702 for testing the depth of the witness’s expertise, the facts and other relevant information on which the witness has relied, and the quality of the witness’s application of those principles to the problem at hand’.⁸³ Surely, Judge Wood adds, these safeguards are enough ‘to protect the court against self-serving experts in foreign law’.⁸⁴

•

As I indicated early in the course of my argument, I cannot endorse Chief Judge Easterbrook and Judge Posner’s ultimately nonchalant approach to foreign law (nonchalance remaining such, despite its dogmatic allure). Because Judge Wood opposes her fellow judges’ creolization of French law, I am, however, most supportive of her views, which I regard as offering a lucid appreciation of the challenge awaiting a US court seeking to make sense of, say, French contract law. At once humble and discerning, responsible

⁷⁷ *Bodum* supra note 3 at 638.

⁷⁸ *Id* at 638-39.

⁷⁹ *Id* at 639.

⁸⁰ *Id* at 640.

⁸¹ *Ibid*.

⁸² *Id* at 639.

⁸³ *Ibid*. Article 702 of the Federal Rules of Evidence states as follows: ‘A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case’.

⁸⁴ *Bodum* supra note 3 at 639.

and perceptive, Judge Wood's opinion reveals her to be aware both of the need to show fidelity to the French model and of the serious limitations inherent to representations of foreign law being conducted for the benefit of Anglophone readerships, for example, in the United States — which is not to maintain, of course, that she regards expert testimony as a panacea (it goes without saying, for instance, that experts, whose testimony will have to be translated or interpreted, cannot offer unproblematic access to foreign law, if only because they will be speaking at the behest of one of the parties and will be contradicting each other). If it were a question of a word to say, then, I would describe Judge Wood's brief opinion as *informed*.⁸⁵ Contrariwise, I claim that the majority in *Bodum* is doing bad foreign law and, specifically, poor French law, that its French law is impoverished — that it offers a particularly weak rendition of French-law-as-it-is-lived-in-France (I refer to Chief Judge Easterbrook and Judge Posner's striking misreading of the French *Code civil*). In the process, the majority also fails to address the particular circumstances of the case, which, lest it be forgotten, do call on the court to apply French-law-as-it-is-lived-in-France pursuant to the parties' election to execute their contract in France — or so I maintain.⁸⁶

I have organized my critique of Chief Judge Easterbrook and Judge Posner's fraught enterprise as ten clusters of contentions. In the process, I purport to establish that these judges' opinions feature 'unexamined assumptions' (eg, what French-law-in-English there is in the United States is at once plentiful and reliable such that it can allow for a sound understanding of French law); 'conventional and perhaps shallow pieties' (eg, writers of French-law-in-English are impartial); and 'confident assertions bottomed on prejudice and folklore' (eg, since it is ultimately not so different from US law, one can, of course, understand French law through French-law-in-English).⁸⁷

1/ Engagement, Inevitably

Before all else, I want to reject the idea that any scholarship about French law can ever be 'objective' (Chief Judge Easterbrook's word) or offer 'neutral illumination' (Judge Posner's expression).⁸⁸ In this regard, it hardly matters that the author is a foreigner or a French jurist thoroughly familiar with French-law-as-it-is-lived-in-France. Now, if by resorting to their formulations the two judges simply mean to distinguish between a configuration where, say, a French law professor has been retained by a litigant to explain French law to

⁸⁵ Whether as regards Judge Wood's sensibility and my affinity with her response, it bears specifying that in 2001 and 2007 we both taught on the Paris summer programme of the University of San Diego's Institute on International and Comparative Law.

⁸⁶ While observing that the plaintiff in *Bodum* could have had the matter arbitrated in Paris by the International Chamber of Commerce (ICC) — Chief Judge Easterbrook notes that the contract actually contemplated arbitration proceedings under the auspices of the ICC (*Bodum* supra note 3 at 631) — but may have preferred to sue in 'illiterate Chicago' so as to facilitate the enforcement of a judgment against a company having incorporated in Illinois — recourse to arbitration was obviously not binding on the parties —, Professor Paul Horton remarks that this case features a defendant who is very confident in its legal position and a plaintiff desperately trying to avoid an unfavourable decision on a motion for summary judgment. Horton is moved to ask whether there was not an extent to which the plaintiff wanted 'poor' French law to be applied to the case since that might well have been the only way in which it could hope to secure victory. For his part, Judge Posner opines that the decision to sue in the United States would have had to do with the plaintiff wanting to take advantage of 'American trial procedure, which permits a far-ranging evidentiary exploration in many types of case but not in cases charging a breach of a clear written contract': id at 637.

⁸⁷ I refer to my epigraph: supra text at note 1.

⁸⁸ Supra text at notes 19 and 40, respectively.

a US court on this party's behalf, on the one hand, and a situation where a US academic has been writing a textbook or a law-review article on French law in the privacy of her Chicago study, on the other, if such is indeed the contrast being drawn here, I accept that the latter set of circumstances can prove less overtly prone to partisanship than the former. But qualifications are in order.

In the United States as in France, each law textbook or essay is committed to the defence of a certain conception of the legal. To be sure, French undertakings will typically adopt a more conceptual form and eschew the candid policy concerns that are familiar to US academics. One can therefore expect more on systemics and less on patriarchy, more on categories and less on externalities, more on subsumption and less on critical race theory. Still, the advancement of an agenda is not in doubt, even in the briefest of case-notes. Again, there is not a single US or French scholar who can legitimately lay claim to the production of objective or neutral work — that is, to writing that would inscribe the abnegation or irrelevance of the writing self, that would not be *beholden*. Any other view would be 'absurd' and contradict 'the finitude of our historical existence'.⁸⁹

All that a US or French writer on law can possibly do is to *interpret* the material at her disposal — for instance, the relevant statutes, cases or commentaries. In the manner in which interpretation operates, it compels the making of innumerable micro-decisions along the way, none of which is ever entirely mandated. One cannot not *choose* whether to emphasize this case or discard it; to quote this treatise in the body of the text or merely to mention it in the notes; or to use this harsh critical term instead of that moderate word — which means that any scholarly production is inherently evaluative. Every single one of the micro-decisions at work is a living determination, an active affirmation, implying critical selection, whether consciously or not — a new intervention based on the openness of the material before one. It is not that the material produces closure by itself, but that an interpreter enforces an interpretive *dénouement* on it.

Whether it be for the purpose of excluding (saying 'no' to that text) or including (answering 'yes' to this text), the US or French scholar's interpretive motion cannot but be animated by her 'own' predispositions or predilections — her 'pre-understanding' — and framed in her 'own' language.⁹⁰ The (ascertainable) fact is that 'interpretation [...] is grounded in a fore-conception'.⁹¹ Whatever documentary or semantic articulations the US or French scholar retains are thus in part at least the result of her inclinations (which include the predilections she will have been made to adopt because of institutional or socialization

⁸⁹ Gadamer, H-G (2004 [1990]) *Truth and Method* (5th ed) Weinsheimer, J and Marshall, DG (trans) Continuum at 118 ['(w)idersinni(g)'/d(ie) Endlichkeit unseres geschichtlichen Daseins'].

⁹⁰ The matter of 'ownness' deserves greater attention. In effect, a scholar's pre-understanding is very much the product of enculturation. As such, it is not at her free disposal. In this sense, it is not 'hers', though a course of internalization will have taken place. An analogous observation concerns language. One cannot do what one wants with language. If anything, it is language that holds one under its sway (there is what language allows one to do). Strictly speaking, it is excessive for one to refer to one's language as 'one's' (as in 'my native language is...'). The expression 'pre-understanding' is in Bultmann, R (1955 [1950]) 'The Problem of Hermeneutics' in *Essays* Greig, JCG (trans) Macmillan at 239 ['Vorverständnis'] (emphasis omitted). I have modified the translation.

⁹¹ Heidegger, M (2010 [1927]) *Being and Time* Stambaugh, J (trans) State University of New York Press at 146 ['die Auslegung (...) gründet in einem Vorgriff']. Likewise, Bultmann holds that '[a] comprehension — an interpretation — is [...] never without its own presuppositions: or, to put it more precisely, [...] it is governed always by a prior understanding of the subject': supra note 90 at 239 ['Ein Verstehen, eine Interpretation ist (...) nie voraussetzungslos (...); genauer gesagt, (...) sie ist immer von einem Vorverständnis der Sache geleitet'] (emphasis original). I have modified the translation.

processes having framed her induction into the law), such that her report of the law on any given issue is ultimately *autobiographical*. No statement of the law, irrespective of how loyal it aims to be, how strictly repetitious it wishes to be, how so purely descriptive it aspires to be, can find itself operating as a strictly mimetic protocol. Rather, every account of the law is ascriptivist and takes the form of an ‘iteration’, that is, a repetition of the law incorporating the interpreter’s inflection, a repetition *with a difference*.⁹²

Still on the matter of partisanship, and by way of further reservation as regards Chief Judge Easterbrook and Judge Posner’s assumptions, I suggest, admittedly in advance of empirical verification, that it is not reasonable to assume that most French scholars, should they be solicited by litigants to act as expert witnesses, are unlikely to prove willing to defend a reading of French-law-as-it-is-lived-in-France so outlandish as might compromise their intellectual integrity and adversely affect their professional reputation. In other words, it seems an exaggeration to intimate that French experts would say anything whatsoever to be of service to their clients at the risk of being taken to have forsworn all credibility. In sum, even allowing for a generous interpretation of Chief Judge Easterbrook and Judge Posner’s words, their binary arrangement between bias and disinterestedness appears incautious.

2/ French Law For All

I do not harbour the view, a variation on the theme of ‘essentialism’, that only French jurists might know about French law because only they would be in a position to share in the invariable properties that would define the ‘whatness’ of Frenchness-in-the-law.⁹³ Indeed, one would be hard pressed to identify any student of foreign law defending this shallow position. For example, though I am not French and did not initially study law in France, I have fashioned myself, since the early 1980s and against the background of various postgraduate degrees at Oxford and at the Sorbonne, into an interpreter of French law on the assumption that I could learn something of it — and indeed that I could do so well enough for my interventions to contribute something interesting and indeed seminal about it. But even as I make French law into my focus of research, what I am pleased to call my ‘understanding’ of it will differ from that of a French academic having attended a *lycée* in France; having studied law in a French law faculty for five years; having worked on a doctoral dissertation on French law in France under a French supervisor for five

⁹² Even as he refers to the ‘neutral’ character of scholarship in *Bodum* (supra text at note 40), Judge Posner is willing, in a different forum, to acknowledge the judge’s ‘preconceptions’; to record judicial ‘beliefs and intuitions’; and to remark on ‘the underestimation of the influence on judicial decisions of subjective factors’: Epstein, L, Landes, WM and Posner, RA (2013) *The Behaviour of Federal Judges* Harvard University Press at 44, 45 and 47, respectively. For an earlier statement to the same effect, see Posner supra note 1 at 125: ‘[T]he preconceptions that judges bring to cases are not extraneous and impertinent foreign matter’.

⁹³ French law, or Frenchness-in-the-law, hardly qualifies as an essence. It is hybrid and polyglot. Specifically, it features many discursive formations such as Roman law, canon law and feudal law — not to mention foreign law and European Union law. To be sure, no law is ‘[m]onogenealog[ical]’: Derrida, J (1992 [1991]) *The Other Heading* Naas, MB (trans) Indiana University Press at 10 [‘*monogénéalogi(que)*’]. A law is ever-changing, too. Indeed, it is a characteristic of any law, as befits a cultural configuration, ‘to not be identical to itself’: id at 9 [‘*n’être pas identique à (lui)-même*’] (emphasis omitted). In other words, ‘[e]quivocity is the congenital mark of every culture’: Derrida, J (1989 [1962]) ‘Introduction to “The Origin of Geometry”’ in *Edmund Husserl’s Origin of Geometry: An Introduction* Leavey, JP (trans) University of Nebraska Press at 103 [‘*L’équivocité est la marque congénitale de toute culture*’].

additional years; and having subsequently been accredited by the French *Conseil national des universités* as an assistant professor and, later still, by the *Ministère de l'éducation nationale* as a professor of law pursuant to an eight-month national competition featuring four oral examinations before a jury of senior French academics.⁹⁴

In effect, I am returning to my earlier point. Because understanding is unavoidably correlated with one's pre-understanding, and therefore with the fact of one having been *thrown* into a particular culture and into a specific academic and legal culture, a US lawyer's apprehension of French law will differ from a French jurist's understanding thereof.⁹⁵ Even as he most fervently attempts to eschew the input of any added value whatsoever to the French law he is seeking to interpret, a US lawyer's appreciation cannot but take the form of an iteration — which means that he cannot but repeat French law with a difference (the character of this differential repetition inevitably harking back to the US lawyer's own pre-understanding).

One decisive way in which a US lawyer's apprehension of French law differs from a French jurist's understanding is that it is perforce comparative since, from the US lawyer's standpoint, French law is a subsequent law, a law that he is approaching after having learned his 'own' law.⁹⁶ Vis-à-vis French law, US lawyers are comparatists, 'second persons'.⁹⁷ And since one always carries over one's 'own' law-view, the foreign standpoint is never experienced fully in the way in which it would be appreciated elsewhere. Consider Montesquieu's evocative remark on the persistence of one's cultural formation: '[I]f triangles created a god, they would give it three sides'.⁹⁸ Contrariwise, the typical French jurist's understanding of French law, which she will have learnt before any other law, is not — and cannot be — comparative. The epistemological implications of this structural

⁹⁴ In France, an assistant professor is officially known as a '*maître de conférences*' — literally, 'master of conferences'. The word 'conference' connects with the Latin verb '*conferre*', which means 'to put ideas in common'. Historically, the '*maître de conférences*' was responsible for animating small-group discussion. For its part, the professor's task would be confined to the much more prestigious delivery of *ex cathedra* lectures before very large audiences. Nowadays, the direction of small-group discussion mostly falls to teaching assistants while '*maître de conférences*' lecture as a matter of course. Still, it is not unusual for a '*maître de conférences*' to be entrusted with small-group animation especially in the early stages of an academic career.

⁹⁵ Again, my explanation is not essentialist and my delineation features no sharp edges. Thus, I allow for the case of the Italian or Brazilian national studying French law according to the long chronological sequence I have just indicated in the body of the text. The idea of 'thrownness' ('*Geworfenheit*') is a key Heideggerian motif. For a recent (and particularly helpful) discussion, see Haugeland, J (2013) *Dasein Disclosed* Rouse, J (ed) Harvard University Press at 143-47.

⁹⁶ Law, like language, does not *belong*. Though one may want to say 'my law', in effect one is, in many respects, very much acting in a situation of subordination vis-à-vis the law. As every law student learns in short order upon beginning his legal education, he is *not in charge*.

⁹⁷ I adopt and adapt Baier, A (1985) *Postures of the Mind* Methuen at 84.

⁹⁸ Montesquieu (1949 [1721]) *Lettres persanes*, in *Œuvres complètes* Caillois, R (ed) vol I Gallimard letter LIX at 218 ['*si les triangles faisoient un Dieu, ils lui donneroient trois côtés*']. One can also formulate this claim from the perspective of cognitive psychology as regards second-language acquisition. Research on neural mechanisms regulating the coexistence of different languages in bilingual persons with specific reference to the inhibitory processes enabling the activation of the target language, and the concurrent suppression of interaction from the language not then being deployed, demonstrate that there is interference from the language not in use with respect to the production of the target word, both 'at the levels of lexical selection and phonological representation': Rodriguez-Fornells, A, De Diego Balaguer, R and Münte, TF (2006) 'Executive Control in Bilingual Language Processing' in Gullberg, M and Indefrey, P (eds) *The Cognitive Neuroscience of Second Language Acquisition* Blackwell at 139. See also, eg, Bialystok, E and Hakuta, K (1994) *In Other Words: The Science and Psychology of Second-Language Acquisition* Basic Books at 16, who observe that the bilingual individual 'never reaches the ideal goal of a new phonological norm'.

asymmetry are significant since any comparative outlook is bound to colour the French law being examined. For instance, while, acting upon the pre-understanding he will have embodied through institutionalization and socialization processes having framed his apprenticeship of the law, a US lawyer will readily find that French judgments are lacking in policy discussion, a French jurist will not think in terms of there being anything missing to the practice of adjudication as she knows it. Now, in a meaningful sense a judicial-decision-lacking-in-policy-discussion and a judicial-decision-without-anything-missing are *different* decisions.

The US iterations of French law — these repetitions-of-French-law-with-a-difference — cannot be overcome, which means that the US lawyer has no choice but to accommodate French law through his pre-understanding. Even if one somehow managed to extirpate the US lawyer's pre-understanding from him on the ground that it distorts his apprehension of French law, another difficulty would rapidly emerge, which is that the US lawyer would then find himself epistemologically bereft. In the absence of any pre-understanding for him to mobilize as he apprehended French law, the US lawyer would remain without any enabling interpretive equipment allowing him to make sense of it (say, to get him to see a text as a judgment rather than a poem or as a law-review article instead of a recipe). Only within the pre-given sign-system within which one has been framed can one ascribe meaning. In other words, there is a preliminary structure preceding understanding which is inherently constitutive of any understanding and which exists, as such, as a *condition* of understanding: no one can proceed to understand against a 'no-background' situation (how could a 'no-background' situation even be imagined?).⁹⁹ Paradoxically, then, the presence of a pre-understanding is as unavoidable as it is necessary.¹⁰⁰ Because of it, understanding will be distorted.¹⁰¹ But without it, there could be no understanding.¹⁰²

It is not, then, that a US lawyer cannot understand French law. I have already mentioned that I reject such an essentialist approach. But given the way understanding

⁹⁹ Thus, Gadamer refers to '[p]rejudices as [c]onditions of [u]nderstanding': Gadamer, H-G *Truth and Method* supra note 89 at 278-306 [*Vorurteile als Bedingungen des Verstehens*].

¹⁰⁰ Kermode, F (1979) *The Genesis of Secrecy* Harvard University Press at 68: '[A]ll interpretation proceeds from prejudice, and without prejudice there can be no interpretation'. This appreciation iterates the work of Gadamer, H-G *Truth and Method* supra note 89 passim.

¹⁰¹ Hence, Gadamer's famous observation to the effect that 'one understands in a *different* way, if one understands at all': Gadamer, H-G *Truth and Method* supra note 89 at 296 [*Es genügt zu sagen, daß man anders versteht, wenn man überhaupt versteht*] (emphasis original). I have modified the translation.

¹⁰² One of my favorite illustrations of this aporia involves José de Acosta's sixteenth-century account of his 'discovery' of the Americas. Acosta, a Spaniard and a Jesuit, resided in Peru and Mexico from 1570 to 1587. In the entry I quote from his diary, initially published in Spanish in 1590, Acosta purports to describe a llama, an animal he has never seen before. In order to do so, he necessarily makes reference to what he already knows: to sheep, calves and camels. But the unavoidable intrusion of his pre-understanding entails that he cannot show fidelity to the llama on its own terms. See Acosta, J de (2005 [1604]) *The Natural and Moral History of the Indies* Markham, CR (ed) Grimston, E (trans) vol I Adamant bk IV ch 41 at 288-89: 'There is nothing at Peru of greater riches and profit than the cattell of the country, which our men call Indian sheep, and the Indians in their generall language call them Llama. [...] There are two kindes of these sheepe or Llamas, the one they call Pacos, or sheepe bearing wooll, and the others are bare, and have litle wooll, so are they better for burthen: they are bigger than great sheepe, and lesse than calves, they have a very long necke, like to a camel, whereof they have good neede; for being high of stature, they have need of a long necke, else should they be deformed' [*Ninguna cosa tiene el Piru de mayor riqueza y ventaja, que es el ganado de la tierra, que los nuestros llamá Carneros de las Indias: y los Indios en lengua general los llaman Llama (...). (...) Son estos Carneros, o Llamas en dos especies: unos son Pacos, o Carneros lanudos: otros son rasos, y de poca lana, y son mejores para carga: son mayores que carneros grandes, y menores que bezerros: tienen el cuello muy largo a semejança de camello, y han lo menester porque como son altos, y leuantados de cuerpo, para pacer requiere tener cuello luengo*].

operates, the fact is that a US lawyer's apprehension of French law will differ from a French jurist's interpretation thereof. It is in this sense that Humboldt could aptly claim that '[a]ll understanding is always at the same time a not-understanding'.¹⁰³

3/ *The Matter of Language*

A US lawyer purporting to apprehend French law, say, as he prepares a book or a law-review article, cannot convey his understanding of it other than through language, such that any attempt on his part to enunciate an interpretation of French law can only manifest itself within 'his' language — that is, to speak economically, in 'English'. Yet, irrespective of the meticulousness of one's effort, there are structural linguistic limitations making it impossible for one to translate a foreign law from the language in which it has been historically written into one's 'own'. While it may be that the Pythagorean theorem is numerically the same for everyone, each language offers its own mapping of the world.¹⁰⁴ Thus, the French '*compensation*' is neither the English 'compensation' nor 'set-off'. And '*contrat*' is emphatically not 'contract'. Likewise, 'law' is not a translation of '*droit*' (indeed, how could 'law', which emerges in an idiographic legal culture such as the United States's, be a translation of '*droit*', the product of a nomothetic legal culture like that governing in France?). In her *Bodum* opinion, Judge Wood remarks on this impassable hurdle by drawing on the French '*actuel*' and English 'actual'.¹⁰⁵

My claim is not that French law cannot exist in English (once more, I easily resist such essentialism). Rather, I argue that if French law purports so to exist — for example, in an English-language book or in a contribution to a US law review — it will inevitably exist differently from French-law-as-it-is-lived-in-France not only because of the reasons I have already adduced, but also on account of language's structural limitations. In this regard, law is not unlike philosophy or poetry or any other kind of discourse. Beckett's most famous play thus exists in French as *En attendant Godot* and, as *Waiting for Godot*, it exists in English also. But the play exists differently in the two languages; there are, if you will, two originals (which, in this particular instance, happen to have been written by the same playwright). For its part, the French play is readily associated with the *Nouveau roman* movement along with the works of Alain Robbe-Grillet, Nathalie Sarraute or Michel Butor, all published as of the 1950s, like Beckett's French texts, by Jérôme Lindon's Paris-based, politically-subversive and literarily-*avant-garde* Editions de Minuit. Meanwhile, the English-language play is spontaneously located within an Irish literary tradition extending

¹⁰³ Humboldt, W von (1999 [1836]) *On Language* Losonsky, M (ed) Heath, P (trans) Cambridge University Press at 63 ['*Alles Verstehen ist daher immer zugleich ein Nicht-Verstehen*']. There are many influential contemporary reformulations of this statement. Eg, see Young, IM (1997) 'Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought' (3) *Constellations* 340 at 354-55: '[T]here is [...] always a remainder, much that I do not understand about the other person's experience and perspective'.

¹⁰⁴ Indeed, 'we learn language and learn the world together': Cavell, S (2002) *Must We Mean What We Say?* (2nd ed) Cambridge University Press at 19.

¹⁰⁵ *Bodum* supra note 3 at 639. See also Spigelman, JJ (2011) 'Proof of Foreign Law by Reference to the Foreign Court' (27) *Law Quarterly Review* 208 at 211: '[T]here is a real chance of loss of meaning in translation associated with a judge determining a question of law that arises from a legal system with which he or she is unfamiliar'. The author is Chief Justice of New South Wales, Australia.

from Laurence Sterne to James Joyce (Beckett's conciseness typically being contrasted with Joyce's prolixity).¹⁰⁶

It is not therefore that one must not translate. The idea that French law should be inscribed strictly in French would be intolerably reductionist. However, the fact is that every translation performs not a restitution, but a transformation of the text being translated. Translation is inherently differential for there are simply no equivalences across languages. Through translation, one can no longer aim to say what is *as is*; rather, one finds oneself working under the auspices of performance. Translation is not simply a means, but a genuine force.¹⁰⁷ It acts upon the text being translated. To translate is to do something to the text being translated (and, often, to the language into which the text is being translated also).¹⁰⁸ Translation thus registers a change. It is a difference-generating practice, 'a practice producing difference out of incommensurability (rather than equivalence out of difference)'.¹⁰⁹ Accordingly, the very act of translating French law into English — something that a US lawyer writing on French law must do — generates French-law-as-it-is-apprehended-in-the-United-States, which inevitably exists at a distance (geographical and otherwise) from French-law-as-it-is-lived-in-France.

4/ The Differend as Resource

In important ways, the three constraints that I have identified are so many deficits. Given the impossibility for a US lawyer to fashion an objective or neutral reading of French law; because the apprehension of French law that is instituted in the United States will structurally differ from a French jurist's understanding; and since translation of French law into English cannot be achieved without a transformation of the French text being implemented, a US apprehension of French-law-as-it-is-lived-in-France has *always already* failed to capture it — the conjunction of the two adverbs meaning that it is simply

¹⁰⁶ See Fitch, BT (1988) *Beckett and Babel: An Investigation into the Status of the Bilingual Work* University of Toronto Press at 16-17.

¹⁰⁷ An excellent study on the limits of law's translatability is Glanert, S (2011) *De la traductibilité du droit* Dalloz. See also Glanert, S and Legrand, P (2013) 'Foreign Law in Translation: If Truth Be Told...' in Freeman, M and Smith, F (eds) *Law and Language* Oxford University Press at 513-32.

¹⁰⁸ For instance, translators of Heidegger into English have had to adapt the target language so that it could account for the German philosopher's numerous and demanding neologisms. See generally Groth, M (2004) *Translating Heidegger* Humanity Books.

¹⁰⁹ Morris, M (1997) 'Foreword' in Sakai, N *Translation and Subjectivity* University of Minnesota Press at xiii. Cf Biagioli, M (1993) *Galileo, Courtier* University of Chicago Press at 234: 'Bilingualism may make one aware of incommensurability, but does not solve it. Full translation remains impossible'. See also Ross, SD (1990) 'Translation as Transgression' in Schmidt, DJ (ed) *Hermeneutics and the Poetic Motion* State University of New York Press at 25-42. This (Derridean) claim is the leitmotiv in the work of leading translation theorist Lawrence Venuti. Eg, see Venuti, L (2013) *Translation Changes Everything* Routledge. For Derrida's argument, see Derrida, J (2002 [1972]) *Positions* Bass, A (trans) Continuum at 19-20: '[F]or the notion of translation, one will have to substitute a notion of *transformation*: the regulated transformation of a language by another, of a text by another'. Indeed, '[w]e will never have been and never have been involved in fact in whatever "transportation" of pure signifieds which the signifying instrument — or the "vehicle" — would leave intact and untouched, from one language to another' [*à la notion de traduction, il faudra substituer une notion de transformation: transformation réglée d'une langue par une autre, d'un texte par un autre*] 'Nous n'aurons et n'avons en fait jamais eu affaire à quelque "transport" de signifiés purs que l'instrument — ou le "véhicule" — signifiant laisserait vierge et intact, d'une langue à l'autre'] (emphasis original). I have modified the translation.

impossible to imagine the matter as anything but a defeat from its very inception. Indeed, none other than Mallarmé remarked how '[a]ny comparison is, at the outset, defective'.¹¹⁰

Fascinatingly, though, the limitations inherent to a US lawyer's research into French law very much act as a cardinal epistemological opportunity. Indeed, what use would it be for the US lawyer to replicate the French model exactly, to say one more time precisely what French jurists had already written, to duplicate French-law-as-it-is-lived-in-France? If the US lawyer's foray into French law were to be strictly mimetic, what would justify the undertaking? In effect, the US lawyer's text would contribute no added interpretive value whatsoever. And this is how the US lawyer's epistemological burden becomes a virtue. Precisely because he is unable to tell French-law-as-it-is-lived-in-France, the US lawyer's apprehension necessarily supplies a fresh perspective on French law. If his reading grid proves insightful, the US lawyer's perspicacity will allow for an ameliorated understanding of French law in the sense that his examination will offer an interpretation which, because it is correlated to a US vantage, a French jurist would not have been able to create.¹¹¹ In other words, the US lawyer's reading, as it makes French law be in a certain way, provides French law with an '*increase in being*'.¹¹² (In every case, of course, it shall remain to be seen whether the US apprehension of French law that is promoted does in fact warrant adhesion which, for instance, rogue readings — perversely under-theorized or over-theorized expositions — would not do.)

Though having to contend with structural epistemological shortcomings — a report on foreign law is 'inevitably tendentious, didactic, competitive, and prescriptive' — on closer examination it becomes clear that as a matter of principle a US standpoint on French law can easily withstand denigration.¹¹³ Indeed, it acts as a realization of French law, that is, it affords the *occasion* to enact a further interpretation of French law. And while '[a] thousand possibilities will always remain open even as one understands something of [a] sentence which makes sense',¹¹⁴ every interpretation of French-law-as-it-is-lived-in-France, no matter how distant, strikes a positive chord in as much as it achieves an asservation of it and thus enriches the stock of knowledge about it.¹¹⁵ The US lawyer's angle, then, is not

¹¹⁰ Mallarmé, [S] (2003 [1892]) 'Quelques médaillons et portraits en pied' in *Œuvres complètes* Marchal, B (ed) vol II Gallimard at 138 ['*Toute comparaison est, préalablement, défectueuse*']. This text appeared on the occasion of Tennyson's death. For a free English translation, see *Mallarmé in Prose* (2001) Caws, MA (ed) New Directions at 70.

¹¹¹ For this reason, it will be helpful to count both on US and, say, Brazilian or Finnish considerations of French-law-as-it-is-lived-in-France because each analysis will contribute a singular outlook. One can then profitably engage in a 'meta-comparison', that is, compare the US and Brazilian or Finnish readings of French-law-as-it-is-lived-in-France with a view to eliciting yet further knowledge about the French model out of this heteroglossia, the idea being that French law enjoys not an identity *tout court*, but a hermeneutic identity, that is, a kind of identity that exists only in the temporality of its recurrence, of its becoming, of its differentiation (from itself). For the location of an entity's existence in difference-from-oneself, see Derrida, J *The Other Heading* supra note 93.

¹¹² Gadamer, H-G *Truth and Method* supra note 89 at 135 ['Zuwachs an Sein'] (emphasis original).

¹¹³ Radhakrishnan, R (2009) 'Why Compare?' (40) *New Literary History* 453 at 454. This text has since been made available as Radhakrishnan, R (2013) 'Why Compare?' in Felski, R and Friedman, SS (eds) *Comparison* Johns Hopkins University Press at 16.

¹¹⁴ Derrida, J (1988 [1990]) *Limited Inc* Graff, G (ed) Weber, S (trans) Northwestern University Press at 63 ['*Mille possibilités resteront toujours ouvertes, alors même qu'on comprend quelque chose de cette phrase qui fait sens*']. I have modified the translation. Derrida's text, an instalment in his famously acrimonious debate on communication with John Searle, initially appeared in 1977 in Weber's English translation. After being reproduced in the book I mention, it was released in the original French in 1990.

¹¹⁵ For the view that there is 'occasionality' to each interpretation, this occasional meaning constantly adding

at all to be discounted as consisting in a perspective that would be inherently inadequate vis-à-vis the French jurist's. Rather, it offers a *different* outlook on French law. It thus stands as an interpretive asset.¹¹⁶

5/ In Case of Adjudication

Any idea that an institution would be an apparatus strictly external to the research being conducted into foreign law is an illusion. In fact, institutional frameworks play a key role in shaping the investigations into foreign law that take place. Given various processes of mediation — I have in mind the role of granting agencies, publishing companies or editorial boards —, there is the discernible *institutionality* of research into foreign law, which raises a serious empirical question.

Consider an academic environment. A US scholar expounding on the reception of Roman law in Germany or writing on 'corporations' in China will not seek to hide his foreign interpretive vantage.¹¹⁷ Indeed, one of the salient ideas informing such scholarly exercises is precisely the construction of interpretations destined to supplement the readings that German academics have produced about Germany's reception of Roman law or what the Chinese are saying about what Western observers tend to style their 'corporations'. Alternatively, figure a courtroom setting. I claim that the ascertainment of foreign law within this particular institutional framework with a view to its judicial application to a given case raises a different issue. Crucially, in this situation the matter of foreign law comports a normative dimension that varies from any 'normativity' pertaining to the scholarly scenario.

In *Bodum*, the litigants had acted so that their legal relationship should be governed by French law. Presumably, they expected, as they entered into their agreement, that the judge — say, the US judge — would, as the issue arose, deliver French law to them in its unvarnished state, so to speak; they assumed that the judge would apply to their contract French-law-as-it-is-lived-in-France. In other words, to the extent that they even envisaged the question, they surmised that the judge, whether from the United States or elsewhere, would keep his glossatorial impetus in check. As opposed to readers of US scholarship on German or Chinese law, who fully anticipate learning about foreign law through the eyes of the US author — who, indeed, trust the US author to organize foreign law for them, imposing his discursive modes, demonstrative protocols, rhetorical strategies and pedagogical schemes —, the parties executing their contract in France reckon that the US judge will simply relay the relevant French law without glozing it in any meaningful way. Indeed, the contracting parties have no interest in the US judge's *counter-signature*. It is French-law-as-it-is-lived-in-France that the parties to the contract have agreed ought to govern their agreement, not a US judge's local version thereof — that is, not French-law-

to the semantic content of the work, see Gadamer, H-G *Truth and Method* supra note 89 at 138 [*'Okkasionalität'*] (emphasis original in translation).

¹¹⁶ In discussion, Professor Maimon Schwarzschild reminds me that there are situations where an alternative perspective on foreign law might be especially significant. Schwarzschild's example refers to an instance where the daily life of the law in a given country is plagued by corruption.

¹¹⁷ See Whitman, JQ (1990) *The Legacy of Roman Law in the German Romantic Era* Princeton University Press; Ruskola, T (2000) 'Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective' (52) *Stanford Law Review* 1599.

as-it-is-apprehended-in-the-United-States. In the courtroom, in this specific institutional setting, the judicial task thus becomes not so much one of production of insights on foreign law as one of (optimal) reproduction of the state of the foreign. *In this particular context* (and I cannot emphasize these words enough), there intervenes a kind of hierarchical calculus favouring French-law-as-it-is-lived-in-France on account of the fact that it is *that* French law which tracks the parties' calculations most closely. It is not that I claim the correctness of one model over the other as some transcendental truth. Instead, I operate contingently and processually with a view to eliciting the most relevant interpretive yield to befit the circumstances at hand — which concern the judicial implementation of a contract pointing straightforwardly to French-law-as-it-is-lived-in-France.

The difficulty, of course, is that ultimately a foreign judge, say, a Chicago federal judge, cannot transform himself into, say, a French jurist, on account of the contract in the case before him. Literally, French law comes *before* the court, which means not only that the foreign law faces the court, but that it precedes the court in time so that any judicial intervention is necessarily subsequent to it — with all the ensuing epistemic limitations that I have already indicated. While the Chicago judge can never occupy the French jurist's place — in more philosophical parlance, the self cannot be the other — his goal, in the specific context of the effectuation of a contract, must be to come as close as possible to the French law that the parties have retained as a matter of contractual governance — that is, to French-law-as-it-is-lived-in-France. Now, this enterprise requires the Chicago judge to understand French law as much in the way of a French jurist as is feasible. It is not that the Chicago judge's reading of French law must turn into something like a non-interpretation or, if you will, reach interpretation 'degree zero': it could not do so in any event, since, again, any reading of French law is perforce an iteration or a repetition-of-French-law-with-a-difference. Yet, for the judicial interpretation of French law being deployed to aspire to become as French as possible, it must at the very least resolutely attempt to make itself, say, as non-Chicagoan as possible.

Given, however, that the Chicago judge's situation — his enculturation — cannot be prescribed away, since the judge can only operate as *that* judge in *that* place at *that* time, an ineliminable touch of foreignness will remain present in the judicial reading of French-law-as-it-is-lived-in-France to be propounded in response to the choice-of-law clause at issue. In other terms, there will remain an impassable gap — though it eventually be only a slit — between the Chicago judge's *re-presentation* of French law, his presentation anew, even as he makes every effort to access French-law-as-it-is-lived-in-France. The theoretical point is Derrida's: ultimately, the self and the other are but 'islands'.¹¹⁸ How,

¹¹⁸ Derrida, J (2011 [2002]) *The Beast and the Sovereign* Lisse, M, Mallet, M-L and Michaud, G (eds) Bennington, G (trans) vol II University of Chicago Press at 31 [*des îles*']. For an examination of the late Derrida's configuration of the dynamics between self and other, see Legrand, P (2011) 'Jacques in the Book (On Apophasis)' (23) *Law and Literature* 282. My discussion with Professor Steven Smith prompts me to add *ex abundanti cautela* that in the end, the moment it falls to be interpreted by a Chicago judge, there is no way for French-law-as-it-is-lived-in-France to avoid a Chicago inflection, no matter how minimal. Accordingly, I hold that a Chicago iteration of French-law-as-it-is-lived-in-France is structurally unable fully to overcome its location (in Chicago, there simply cannot be French law *tout court* — assuming that the existence of such 'interpretation-free' law anywhere can even be imagined). In fact, it is impossible to contemplate that the meaning (thus the existence) of any text will not ultimately depend, if only in the slightest respect, upon the singular act of reading at issue. But it behooves the Chicago interpreter to be aware of the difference between local law and foreign law and to attempt to adopt whatever reasonable epistemic measures can help minimize the knowledge gap arising on account of the Chicagoan encumbrance. Otherwise, there arises a failure of credibility as is emphatically the case in *Bodum*.

then, to mitigate the epistemic differentializations that I have reviewed such that, in the end, the Chicago judge, as he responds to the parties' contract, can secure as unobfuscated an access as possible to French-law-as-it-is-lived-in-France? How can a Chicago judge, who has assimilated the epistemological assumptions of a legal culture as actively forged and reinforced through the institutional and socialization processes within which he has been embedded on account of his legal apprenticeship, come to edge understanding closer to the experience of French-law-as-it-is-lived-in-France? Is there a reconstructive approach carrying epistemological credibility that would be available to the Chicago judge, thus allowing him to engage in such deterritorialization as could take him not to French-law-as-it-is-lived-in-France, since he cannot get *there* ('the thing itself always slips away'),¹¹⁹ but at least to the verge of it? Can epistemic *vergency* be achieved?

6/ Expertise, Optimally

Introduced in 1966, rule 44.1 of the Federal Rules of Civil Procedure provides in part that '[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence'. The legislative text adds that '[t]he court's determination must be treated as a ruling on a question of law'. A judge is therefore at liberty to investigate foreign law without being restricted by the parties' tactics or indeed by the federal rules themselves. Pursuant to the Federal Rules of Civil Procedure, the courts are 'in exclusive control of shaping the applicability of foreign law', in effect 'just as they are responsible for applying domestic law independent of the actions and intentions of the parties'.¹²⁰ In the main, there have been two ways in which judges have exploited this latitude: the reception of expert testimony or the pursuit of a court-initiated documentary search. In *Bodum*, while earnestly praising the latter approach, Chief Judge Easterbrook and Judge Posner vehemently devalue the former — a move which, as I have noted, Judge Wood strongly (and wisely) resists in her own opinion.¹²¹

Expert testimony calls on the court to turn to a specialist who, on the basis of her first-hand knowledge of foreign law and foreign legal culture (not least foreign law's language), will propound an account thereof, either in person or via affidavit. Typically, the expert will be a foreigner claiming demonstrated and acknowledged cognitive authority on foreign-law-as-it-is-lived-in-the-foreign-jurisdiction. An expert can be produced by one of the parties to the dispute or appointed by the court (though a judge is under no duty to inquire into foreign law on his own initiative).¹²² To be sure, expert testimony needs to be

¹¹⁹ Derrida, J (2011 [1967]) *Voice and Phenomenon* Lawlor, L (trans) Northwestern University Press at 89 [*la chose même se dérobe toujours*]. I have modified the translation.

¹²⁰ Michalski, RM (2011) 'Pleading and Proving Foreign Law in the Age of Plausibility Pleading' (59) *Buffalo Law Review* 1207 at 1210. Traditionally, US courts had approached foreign law as fact. Accordingly, '[p]arties wishing to rely on foreign law either for defenses or claims had to plead and prove foreign law like other facts. Courts conducted no independent investigations of foreign law, just as they would not conduct independent investigations of any other fact that the parties plead': id at 1208-09. Even after the 1966 procedural reform, expert testimony however remains a fact-based procedure in significant respects. Throughout his paper, Dr Michalski offers a detailed examination of the ensuing legal tension.

¹²¹ I emphasize that I do not claim a misuse of the Federal Rules of Evidence in *Bodum*. Rather, I argue that the difficulty with the majority view concerns the *deployment* of the available judicial latitude.

¹²² For confirmation that a judge is not compelled to conduct this research, see, eg, *Baker v Booz Allen Hamilton, Inc*, 358 Fed App'x 476 (4th Cir 2009) at 481; *Bel-Ray Co v Chemrite Ltd*, 181 F3d 435 (3rd Cir 1999) at 440; *McGhee v*

evaluated and in a case where there are many testimonials on display, the court will have to engage in a relative assessment of the various statements. This exercise can admittedly prove difficult since foreign law may appear baffling from the point of view of a US judge. However, there is no reason to believe that competing expert testimonies on French law raise more complex issues than, say, conflicting testimonies on questions of engineering or cardiology.¹²³

In the case of *Mastercard International v FIFA*, decided on 7 December 2006 in the United States District Court for the Southern District of New York, Judge Loretta Preska addressed the matter of expert testimony on Swiss law, which governed the contract being litigated. Judge Preska's approach to the matter strikes me as being exemplary in more than one sense of the term. It is at once a good illustration of how things are done and a fine model of how they ought to be done. The key passage is well worth reproducing at length:

The Court's interpretation of Swiss law [...] is based on the expert declarations submitted by both parties. Upon review, the conclusions of Dr Franz HG Werro are found to be the most persuasive and informative, and it is the 'persuasive force of the opinions' expressed that is conclusive under Rule 44.1. [...] Dr Werro has published numerous articles on contract law and is a professor at the Faculté de droit, University of Fribourg, as well as a tenured professor at Georgetown University Law Center and, as demonstrated by his curriculum vitae, is eminently qualified to opine on the issues presented. His opinions and conclusions are adopted in their entirety. In addition, the opinions and conclusions of Dr Hans Caspar von der Crone are persuasive and thus are adopted in their entirety. Dr Caspar von der Crone is a professor of private, commercial, and corporate law at the University of Zurich, has numerous publications in these areas, and is similarly qualified to opine on the issues presented. [...] One of FIFA's Swiss law experts, Dr Wolfgang Wiegand, who does have a background in contract law, agrees with Professor Werro on many of the governing principles of Swiss law, even though he comes to different conclusions. To the extent that Dr Weigand agrees with Professor Werro as to the law, his conclusions are accepted. His conclusions and his plentiful advocacy — as opposed to expert opinion — are rejected as unpersuasive. [...] Another of FIFA's Swiss law experts [is] Professor [Carl] Baudenbacher (an apparent expert on competition law with little, if any, known expertise on contract law) [...]. [...]

Arabian American Oil Co, 871 F2d 1412 (9th Cir 1989) at 1424, note 10. For illustrations of a court deciding to lead its own investigation into foreign law, see *Itar-Tass Russian News Agency v Russian Kurier, Inc*, 153 F3d 82 (2nd Cir 1998) at 88; *Estate of Botvin v Islamic Republic of Iran*, 772 F Supp 2d 218 (DDC 2011) at 228, note 8.

¹²³ In discussion, Professor Donald Dripps argues that there remains a difference between experts on law and, say, experts on bridges or bloodclots. As I understand him, Dripps wants to resist the unduly formalistic view that there is such a character as 'the expert' *tout court*. Rather, he says, one finds *experts*. Dripps adds that there are assertions an engineer or a cardiologist will not be willing to make even for money because in disciplines like engineering or cardiology, falsification can be arranged relatively easily — with the unpleasant and damaging prospect of one being publicly branded a charlatan. In law, says Dripps, the range of plausible interpretive positions is wider, which entails that the spectrum of plausible expert opinions must be broader also. Accordingly, there would arise a particular need for the monitoring of expertise on foreign law, a situation which would militate, for example, in favour of the judge's direct involvement in the process either through the implementation of a concurrent evidence procedure or via the court-initiated appointment of an independent expert. On these judicial strategies, see *infra* text at note 170. Note that Judge Posner also draws, in the most cursory terms, a difference between expertise on (foreign) law and on 'a scientific or other technical issue': *Bodum supra* note 3 at 633.

Professor Baudenbacher's opinions are rejected for lack of apparent expertise in contract law and because they are not persuasive. [...] Another FIFA expert [is] Dr Alfons Burge, a professor of 'Roman law' (the historical underpinning for civil law) in Germany with no apparent credentials as an expert on Swiss contract law [...]. [...] Professor Burge's opinions are rejected for lack of apparent expertise in contract law and because they are not persuasive. [...] Another of FIFA's experts [is] Dr François Dessemontet [...]. [...] Professor Dessemontet's opinions are rejected as wholly unpersuasive.¹²⁴

In this instance, the judge was satisfied that, on the basis of some at least of the various affidavits filed with the court, she had been able to reach the requisite understanding of Swiss law. Even allowing for the fact that the various experts had been retained by the parties and that they were therefore presumably interpreting Swiss law in a way not unduly unfavorable to their clients, Judge Preska felt competent to pronounce that some interpretations offered, quite simply, a more convincing interpretive yield than others. Indeed, she claimed with confidence that one reading of Swiss law in particular, that of Professor Franz Werro, was especially helpful. Meanwhile, she did not hesitate to reject expert testimony she found inadequate — and to state her dissatisfaction expressly.¹²⁵

All along, Judge Preska is not so much engaging in dialogue with Professor Werro as she is negotiating or transacting with him. Each of the two protagonists speaks a specific *language* (I use the word in the broadest sense). Indeed, each is pursuing a monologue.¹²⁶ In fact, I am prepared to surmise that at no point does Judge Preska presume that she has eliminated the knowledge gap between Professor Werro and herself. I expect that it cannot but be clear to Judge Preska that try as she may, she can never make it such that she will somehow turn herself into a Swiss-educated, French-speaking and *Schwyzerdütsch*-speaking law professor and lawyer like Professor Werro — who, in addition to his eminence as a Swiss academic regularly cited by the Swiss supreme court ('*Tribunal fédéral*'), also enjoys an enviable reputation as a foremost comparatist both on the European and North-American scenes. Now, I postulate that Judge Preska realized that the two horizons would never merge, that any reaching of Professor Werro's position on her part would always have to be postponed or infinitely deferred. Indeed, there is the radical privacy of Professor Werro's act of mental understanding of Swiss-law-as-it-is-lived-in-Switzerland so that his appreciation can never be found as such in Judge Preska's mind.¹²⁷ Again, Judge Preska is inevitably coming to Swiss law as a comparatist, that is, as a 'second perso[n]'.¹²⁸ These interlocutors must therefore fail to make complete contact with each other: between them, 'there is initially the space and the time of an infinite difference, of an interruption incommensurable with all the attempts at passage, at bridge, at isthmus, at communication,

¹²⁴ *Mastercard International v FIFA*, 464 F Supp 2d 246 (SDNY 2006) at 303-04 (Judge Preska) [hereinafter: *Mastercard*].

¹²⁵ For another case featuring an outright judicial rejection of expert testimony, this time on Indonesian law, see *JPMorgan Chase Bank, NA v PT Indah Kiat Pulp and Paper Corp TBK*, 854 F Supp 2d 528 (ND Ill 2012) at 535.

¹²⁶ Cf Heidegger, M (1971 [1959]) *On the Way to Language* Hertz, PD (trans) Harper & Row at 134: '[L]anguage is monologue' ['*die Sprache ist Monolog*'] (emphasis original).

¹²⁷ Even allowing for extrusion of meaning, there can be no evidence that any extruded meaning would be internalized as such by the receiving mind.

¹²⁸ *Supra* text at note 97.

at translation, at trope, and at transfer'.¹²⁹ Arguably, a realization of the limits of the decoding or deciphering she could bring to bear on the matter at issue must in fact have become clearer to Judge Preska the more she delved into Swiss law.¹³⁰ As the saying goes, the more she understood the less she understood. Because there can never be interpretive closure, a gap will thus remain — an ever-so-slight misunderstanding, perhaps¹³¹ — such that the re-presentation of Swiss law Judge Preska is able to iterate will inevitably disclose a US inflection, an autobiographical touch. In other words, Judge Preska's Swiss law is ultimately *Swiss-law-as-it-is-apprehended-in-the-United-States*, a different construct from Professor Werro's *Swiss-law-as-it-is-lived-in-Switzerland*. In effect, Judge Preska's opinion offers what anthropologists might call 'accultured' Swiss law.

Precisely because, at least on my interpretation of her judgment, Judge Preska, even as she is making her living decision, is aware of the options, antinomies and paradoxes before her, she feels that she has to let *Swiss-law-as-it-is-lived-in-Switzerland* speak in the clearest voice possible, which obviously is not to be found in occasional English-language texts available on the US scholarly market. In her view, recourse to expert testimony allows her significantly to reduce the knowledge gap separating her law-world from Professor Werro's to the point where she can eventually regard herself as sufficiently competent credibly to adjudicate upon the contract at issue on the basis of what I argue she takes to be a workable approximation of *Swiss-law-as-it-is-lived-in-Switzerland*. To her credit, Judge Preska seeks to edge her way nearer to *that* Swiss law, which is the Swiss law that governed the litigants' contract. Appreciating, on my reading of her judgment, that the parties did not want a US judge to gloze Swiss law — or, at least, that they would have expected her to do so as little as possible —, Judge Preska uses Professor Werro's expert testimony to transport herself, metaphorically speaking, on the verge of *Swiss-law-as-it-is-lived-in-Switzerland* so as to put herself in a position to apply *that* law, as much as is possible from her vantage, to the contract before her. Throughout the proceedings, I consider that Judge Preska remains keenly aware how an integral feature of the Swiss law she stages in her courtroom is its relation to *absence*: the fact is that *Swiss-law-as-it-lived-in-Switzerland* is not present in New York.

7/ *The Gaze from the Loop and Its Deficiencies*

To return to Chief Judge Easterbrook and Judge Posner, their alternative course of action to Judge Preska's involves the collection by their law clerks — not, obviously, by they themselves — of whatever publications in English available in the United States can be garnered regarding the point of foreign law at hand. Problematically, however, this gathering can be expected to reveal undue circumvention of foreign law in some regards

¹²⁹ Derrida, J *The Beast and the Sovereign* supra note 118 at 31 [*'il y a d'abord l'espace et le temps d'une différence infinie, d'une interruption incommensurable à toutes les tentatives de passage, de pont, d'isthme, de communication, de traduction, de trope et de transfert'*]. I have modified the translation.

¹³⁰ It is not, of course, that there are not also limits to Professor Werro's decoding or deciphering of Swiss law — as he would no doubt be the first to accept. But his borders are not Judge Preska's.

¹³¹ Cf Spivak, GC (2012) *An Aesthetic Education in the Era of Globalization* Harvard University Press at 518, where the author underlines 'the irreducible mis-understanding in successful human communication'.

and excessive indiscriminateness in other ways. In both senses, though, the law clerks' motion 'yok[es] [foreign law] by force into a frame of reference alien to [it]'.¹³²

The first difficulty is that the assemblage of material is bound to be limited. Since Chief Judge Easterbrook and Judge Posner insist that accounts of foreign law must remain non-partisan, their law clerks will presumably have proven reluctant simply to track references from the parties' self-serving briefs, an avoidance strategy which will, in effect, have left them to conduct their own inquiry very much in the light of the research patterns familiar to them since law school (and, in particular, since their law-review years).¹³³ In sum, the clerks will have been searching the usual US databases and the habitual electronic library catalogues. For a law-review article or a book to be identified as relevant, it will therefore first have had to appear on the clerks' computer screens as the search was being conducted. Now, with the possible exception of some Canadian (or Puerto Rican?) content, all non-English material will have found itself excluded from the electronic investigation. A number of non-US publications, though available in English, will similarly have been ignored if they do not happen to be registered in leading US databases (I have in mind, for example, the London-based *Journal of Comparative Law* — this journal! — which, at the time of the *Bodum* judgment, was still more than two years away from being accessible through the retrieval systems known to US law clerks). In fact, Chief Judge Easterbrook and Judge Posner's sources on the French law of contractual interpretation confirm my assumptions. Their references include three law journals, all three published in the United States. And they feature four books, all of them released by English-language publishers with a strong commercial presence in the United States whose texts can therefore reasonably be expected to be available in US law libraries. In this sense, then, whatever research is conducted by law clerks is *constrained*. With the possible exception of an English-language publication available in the United States written by a US lawyer claiming experience in the practice of law in France, French-law-as-it-is-lived-in-France can be expected to be absent from the law clerks' databases. In other words, the bulk of the material generated out of their electronic searches is bound to qualify as French-law-as-it-is-apprehended-in-the-United-States — at best, therefore, to register as *epiphenomenal* French law. Since, on account of the normative implications I have mentioned, the court's goal must be to ascertain French-law-as-it-is-lived-in-France, these restrictions cannot but give serious cause for concern.

I have noted a second difficulty for in a manner that is at least as troublesome, the law clerks' investigations also reveal themselves as *indiscerning*. For example, in *Bodum* the clerks seem prepared to collapse all the authors they have found to have written in English regarding the matter of French law at hand who happen to be available in the United States, without any apparent willingness or ability to organize them according to what I will call 'merit', for lack of a better term. The fact is, though, that not all authors command equal intellectual authority. The same can be said regarding publishing outlets. While it would be silly to dismiss a contribution simply because it appeared in a lesser-known journal, it remains the case — as every academic must know — that the editorial bar is higher in certain venues than in others, an assertion one can easily test empirically. Now, is

¹³² Vitkin, M (1995) 'The "Fusion of Horizons" on Knowledge and Alterity' (21/1) *Philosophy & Social Criticism* 57 at 58.

¹³³ '[M]ost law clerks are alumni of their law school's law review; and it is in working on the law review that most future law clerks form their conception of good legal writing': Posner, RA (2009) *Law and Literature* (3rd ed) Harvard University Press at 378.

there not a threshold level of quality — a basic standard of credibility — that a text ought to meet before a law clerk undertakes to treat it as a source worthy of reference by the court? And what signals of reliability will the clerk retain in the course of assessment? By what yardstick will she evaluate such signals? What specific competence do law clerks bring to bear on the matter? Do they know the writers writing in English on French contract law who happen to be available in the United States? Are they familiar with the reputation these authors enjoy amongst their peers (I am thinking of other foreign specialists on French law) or possibly with the standing in which they are held in France? Do law clerks know the French writers having been translated into English? Can they vouch for the translators? And how much ‘French law’ or ‘French contract law’ content must there be to a text on ‘civil-law culture’ (I refer to Judge Posner’s fuzzy words) before it is deemed to warrant selection?¹³⁴ More significantly perhaps, how much knowledge of French-law-as-it-is-lived-in-France can the law clerks muster in order to bridge the potential gap between the law as it is described in print and as it unfolds in practice in France?¹³⁵ And then, there is the matter of dates. In *Bodum*, a 2010 case, some references were to texts published in 1986, 1992 and 1997. If the statements deemed pertinent in these publications were pitched at a certain level of generality, one can understand how they could reasonably be found to have stood the test of time. By the same token, however, such assertions would also be susceptible of proving less useful in terms of the concrete needs of the court in the case being litigated. It is simply unclear in the light of what criteria the Chicago law clerks addressed this tension.

Though this be ‘the age of the law clerk’,¹³⁶ I am prepared to accept that judges may themselves sift through the material submitted by their clerks — a parsing, however, that can only take place within limits given the size of the judicial docket.¹³⁷ Still, some at least of the questions I have just raised are bound to confront judges not unlike the way in which they will have challenged their clerks. Does a US judge know the authors writing in English on French contract law? Is a US judge familiar with the reputation these individuals enjoy amongst foreign specialists in French law or in France? Does a US judge know the standing in France of the French writers being translated into English? Is a US judge aware of French legal practice in a way that would allow for the law in print to be put into perspective? In brief, the matter of indiscriminateness that I mention cannot be underestimated. Without wanting to designate any of the English-language references in *Bodum* in particular, it is clear to me that the normative force injected into some of those texts by the court is, quite simply, unwarranted. I can make my point more forcefully through an analogy. In the course of their surveys, some of the overrated books and articles I have been discussing also address US law. Now, assume Chief Judge Easterbrook

¹³⁴ Supra text at note 46.

¹³⁵ For a thoughtful critique of the detrimental impact on one’s apprehension of foreign law of a divorce between ‘law in the books’ and ‘law in action’, see Schwarzschild, M (1986) ‘Variations on an Enigma: Law in Practice and Law in the Books in the USSR’ (99) *Harvard Law Review* 685.

¹³⁶ Posner, RA *How Judges Think* supra note 4 at 61.

¹³⁷ Indeed, there is evidence suggesting that judges may not take their involvement very far at all. Eg, see Posner, RA *How Judges Think* supra note 4 at 298-99: ‘Experienced appellate judges read the briefs in a case, discuss the case with their law clerks, listen to oral argument, perhaps dip into the record here and there, maybe do some secondary reading, briefly discuss the case at conference with the other judges, and from the information and insight gleaned from these sources filtered through preconceptions based on experience, temperament, and other personal factors, make up their minds’ [emphasis original].

and Judge Posner had been adjudicating on a matter of US rather than French law. Would it have occurred to them, or to their law clerks, to refer to any of these texts as authority on US law? The answer, it seems to me, must be that it is extremely unlikely that those texts would have recommended themselves to the two judges. Why, then, ought those self-same writings to be regarded as authoritative on French law? On what basis are they deemed adequate to the task of speaking for French law?

The process whereby law clerks agglomerate documents on French law in English as they are available in the United States comes across as adventitious and messy. At times, it looks frankly like piecemeal muddling-through.¹³⁸ But this lack of rigour is not the only pressing ethical challenge emerging from the majority decision in *Bodum*. Indeed, the substitution of French-law-as-it-is-apprehended-in-the-United-States for French-law-as-it-is-lived-in-France has far-reaching political consequences. On account of its gravity, the question calls for some further exploration. After all, it is about how we live-together in the law (even as regards the mundane matter of a court's procedure, the stakes can therefore be seen to be momentous).

8/ The Gaze from the Loop: More Deficiencies

It may bear emphasizing that I do not want to ghettoize French law within an alleged 'authenticity': I accept that there are foreigners who can have something useful to say about French law (as I mentioned, I like to think that I am one of them), and I defend the view, specifically, that French-law-as-it-is-apprehended-in-the-United-States can make a worthwhile contribution to a renewed appreciation of the French model. Once again, though, my particular concern here is with a courtroom setting and with the judges' focus on normativity.

Despite Judge Wood's timely admonishment in her opinion to the effect that '[e]xercises in comparative law are notoriously difficult',¹³⁹ Chief Judge Easterbrook and Judge Posner appear genuinely to believe that the reading of a handful of law-review texts and summaries in English — some approximately twenty years old, others not directly concerned with France — will have allowed them to understand enough French contract law to be in a

¹³⁸ In discussion, Professor Orly Lobel invites consideration of what I will style 'the foreignness of the foreign'. For example, she asks, would I be as concerned with Chief Judge Easterbrook and Judge Posner's cavalier attitude to foreign law if, instead of French law, they had been addressing Australian law? In other terms, would the judges' decision to confine their readings on Australian law to US law journals and a few books available on the US market prove less problematic than their determination to proceed in this way as regards French law? Accepting the inevitability of marginal situations or hazy borderlines, my prudent answer is that, to the extent that epistemic gaps can be measured, the divide between knowledge of US law and of Australian law can arguably be expected to be narrower on account of the historical commonality of legal tradition (both countries have inherited the common law) and of language (both countries operate in English) than that between knowledge of US law and of French law. But it hardly needs mentioning that appearances can be deceptive. Though a US judge will readily assume a doctrine of precedent to be at work in Australia, basic research will no doubt show the singularity of the Australian model in short order. And 'privacy' may well feature a semantic extension in the United States that differs from its Australian instantiation. In sum, while some foreign laws will be less foreign than others (it would indeed be unduly formalistic to refer to 'the foreign' *tout court*), there is nothing to warrant the assumption that a local judge can somehow reliably access even those not-so-foreign foreign laws. Interestingly, in order to make her point that research into foreign law differs from research into out-of-state law, including research into Louisiana law, Judge Wood brings together 'the laws of France, Australia, or Indonesia': *Bodum* supra note 3 at 639-40.

¹³⁹ Supra text at note 78.

position to make a judicious application of it to the matter at issue. As they are deciding the case while acting on that conviction, irrespective of how much sense of rectitude they bring to bear to their theatricalization of French law, these two judges are courting, at the very least, a perception of arrogance. At their hands, it seems, French law is falling prey to a form of cultural hegemony one might style ‘anglobalization’ (the domination of a certain Anglo-American configuration of thought and technology) pursuant to which US law journals, US databases and English-language books available in the United States are anointed as the exclusive vehicles through which French law must manifest itself in order to acquire its badge of legitimacy in the eyes of the court. In other words, French law finds itself having to meet US expectations. It must become commodified, so to speak, as a US product and can only be allowed to exist pursuant to that specific design. Implemented with a panache which, as comparatists know only too well, is not untypical of the unrepentant self-assurance that accompanies the production of foreign law one knows little about, Chief Judge Easterbrook and Judge Posner’s act of representative labour governing the realization of French law shows that their judicial rendezvous is not so much taking place with French legal discourse as with its US counterpart. In effect, the court’s encounter with French law is unfolding well within the US legal episteme: it remains intracultural, the familiar language and the congenial publications being hypostatized as the canon of relevance within which the negotiation with otherness-in-the-law is to occur. But to compel French law to express itself only through English-language, US-based, materials — to force it within that regulatory structure, which becomes an exclusive framework of preponderance — is *necessarily* to engage in a *misrecognition* of it. It is *inevitably* to perpetrate an act of interpretive violence against it. In sum, it is *undeniably* to appropriate it and compel it to become a stranger to itself.¹⁴⁰

At this stage, I wish to offer a précis of the ethics that I argue ought to govern research in foreign law with a view to visiting a *lesser* violence on it. In a strong sense, this abstract is also a political statement — a manifesto, if you will.¹⁴¹ Indeed, ethics is a politicized practice (picture a hyphen conjoining the ethical and the political). Now, it is not unduly to romanticize the US interpreter’s intellectual enterprise to claim that as he decides to make sense of foreign law, it is incumbent upon him to behave charitably towards it and, specifically, to abide by protocols of recognition and respect vis-à-vis that other law. Such debt of recognition and respect is owed to the other and to the other’s law as a matter of justice (not least because the interpreter expects the other to recognize and respect him and ‘his’ law also). As one assigns oneself the task of eliciting a meaning out of foreign law, as one fashions the modalities of one’s interaction with another law, as one generates the atmosphere or mood according to which one’s undertaking of discernment will assert itself, it falls to one, above all, to act responsibly. Etymologically, the notion of ‘responsibility’ connects with that of ‘response’. Indeed, I claim that the study of foreign law, which is then

¹⁴⁰ I accept that even a French law professor’s testimony or affidavit before a US court will have to be explained through the English language and arguably via the common law’s language also. Indeed, I expect that the quality of Professor Werro’s translation — attributable in part to the fact that he is a graduate of a leading US law school and a tenured law professor at another — will have played an important part in *Mastercard* (supra note 124). Yet, the violence visited on foreign law through the rendition of a foreign expert’s affidavit in English and in common-law parlance is not at all of the same magnitude as that arising from the reduction of French law to a few survey papers and chapters in US law reviews and English-language books.

¹⁴¹ For longer versions, see Legrand, P ‘Foreign Law: Understanding Understanding’ supra note 4; Legrand, P ‘Comparative Legal Studies and the Matter of Authenticity’ supra note 4.

given over to one's responsibility, must take the form of a *response* to the other law that is there rather than a wilful imposition upon it.

As foreign law is made into a focus of examination, it interpellates its interpreter. It calls for a hearing. It asks its interpreter to listen to its experience, to audit its existence. There is a speaking-to-one at work, a '*Zuspruch*' — as the German language allows one helpfully to put the matter.¹⁴² Along with Kierkegaard, who enjoins the interpreter to listen — '[H]asten, oh! hasten to listen' —,¹⁴³ who argues that '[e]verything ends with hearing',¹⁴⁴ I find that when it comes to foreign law, 'indefatigably at issue is the ear'.¹⁴⁵ Thus, US interpreters of French law have to let it speak to them and listen to its claim. I argue that the interpretation of foreign law is therefore primordially a matter of attentiveness, of receptivity — a *hearkening*.¹⁴⁶ The responsible interpreter of foreign law, then, is one who, in the name of the recognition and respect due to the other, that debt being owed as a matter of justice, lends an ear to the other law, gives the other and the other's law the fullest possible hearing. At the very minimum, it seems to me, one must allow the other law to tell its story in the best way it can, in the clearest voice possible. In particular, this attitude must mean providing the other law with an opportunity to express itself from its lifeworld. In other words, instead of instructing the other law — 'you will only be allowed to speak through the journals I read, you will only be permitted to speak through the books I have at my disposal, *you will only be authorized to speak through what I know*' — the interpreter shows preparedness to learn from the other law *on its terms*. Rather than for one to impose one's interpretation to the other law, the goal is to allow the other law to expose itself to one's interpretation.

Unacceptably, interpretive configurations too often work to the undue advantage of the interpreter as he propels his interpretive self forward. What comes to matter in short order is the journal or book at hand, the familiar stylistic format, the usual language, all of this becomes the obligatory interpretive referent against which foreign texts will be gauged. From the (unexamined) perspective of the interpreter, accession to otherness — say, to the other's law — must involve continuity, seamlessness. The interpreter's ambition is to make his object of study (say, French law) as homogeneous with himself as possible.

¹⁴² For this translation from Heidegger's philosophical vocabulary, see Lyon, JK (2006) *Paul Celan and Martin Heidegger* Johns Hopkins University Press at 223, note 14. The reference is to Heidegger, M (1977 [1950]) *Holzwege in Gesamtausgabe* vol V Klostermann at 369.

¹⁴³ Kierkegaard, S (1990 [1843]) *Four Upbuilding Discourses in Eighteen Upbuilding Discourses* Hong, HV and Hong, EH (eds/trans) Princeton University Press at 138 ['*skynd Dig, o! skynd Dig at høre*'].

¹⁴⁴ *Søren Kierkegaard's Journals and Papers* Hong, HV and Hong, EH (eds/trans) vol V Princeton University Press at 74 ['*Alt ender med Gehør*']. The standard international reference to the *Papirer* is 'I A 235'.

¹⁴⁵ Derrida, J (1982 [1972]) *Margins of Philosophy* Bass, A (trans) University of Chicago Press at xvii ['*il s'agit inlassablement de l'oreille*']. For a thoughtful formulation of what ought to be the interpreter of foreign law's course of action vis-à-vis otherness, see Derrida, J (2003) *Rams: Uninterrupted Dialogue — Between Two Infinities, The Poem in Derrida*, J (2005) *Sovereignities in Question* Dutoit, T and Pasanen, O (eds) Dutoit, T and Romanski, P (trans) Fordham University Press at 146: '[To keep] attention forever in suspense, that is, alive, awake, vigilant, ready to embark on a wholly other path, to let come, lending an ear, listening to it faithfully, the other word, hanging on the breath of the other word and of the other's word — right there where it could still seem unintelligible, inaudible, untranslatable' ['*(Tenir) à jamais l'attention en haleine, c'est-à-dire en vie, éveillée, vigilante, prête à s'engager dans tout autre chemin, à laisser venir, tendant l'oreille, l'écoutant fidèlement, l'autre parole, suspendue au souffle de l'autre parole et de la parole de l'autre — là même où elle pourrait sembler encore inintelligible, inaudible, intraduisible*']. I have modified the translation.

¹⁴⁶ According to hear' the electronic edition of the *Oxford English Dictionary*, 'to hearken' variously means '[t]o apply the ears to hear', 'give ear', '[t]o apply the mind to what is said', 'to have regard to'.

The other law should accordingly emerge out of the very publications that the interpretive self is in the habit of reading, according to the very scholarly models with which he is acquainted, that is, in a form oh-so-easily manageable. Presumably, it can only help if the relevant texts are written by individuals who, like the interpreter himself, also operate at a distance from otherness. In all of these ways, the interpretive self remains secure in his autochthony.

As the interpreter insists that the contact with foreign law must take place well within his epistemic ‘comfort zone’, the self, intolerably, is made to occupy a foundational place and the other a resolutely subordinate position. As a result, the other is not recognized or respected as an *alter ego*. It becomes a lesser ego.¹⁴⁷ Now, from an epistemological standpoint, I claim that if there is to be produced any information worthy of being called ‘knowledge’ about the other — say, concerning another law — it must involve an obstinate form of *restlessness*, which disdains the category of ‘home’ and accepts having its habitual ways interrupted by different individuals hailing from a different legal culture where legal discourse unfolds differently, where law features a singular complexity and where legal rationality manifests itself differently. The idea is to allow for what Lorenzo Bonoli calls a ‘jolt’ or an ‘agrammaticality effect’, which can only happen if one will adopt interpretive motions specifically destined to foster the ‘foreignly’ expression of foreign law.¹⁴⁸

Thus, foreign law can only secure the recognition and respect it deserves as *alter ego* if its interpreter is willing to accept that his interpretive world, his expectations, will be *interrupted* in the sense at least that foreign law — what he calls ‘foreign law’ from his vantage — must be entitled to remain foreign. Specifically, instead of purporting to subject French law to the kind of reductionism that ultimately makes it so different from itself that it can no longer reasonably be acknowledged as French law by French jurists operating within French-law-as-it-is-lived-in-France, rather than persist in wanting to control French law by formatting it according to the accustomed US frames of reference, the interpreter needs to agree to prioritize the foreign, to acknowledge the primacy of the other law as it exists where it dwells, over any (convenient) re-arrangement of it on his part. As it allows the other’s voice to be heard — a voice that is different from the self’s interpretive voice, that is discontinuous with it — this interruption, which permits the other law to speak through its agents, in its venues and according to its practices, becomes a force for justice. Indeed, there is a commitment to justice — something to be incessantly re-inaugurated — in the US acceptance that French law cannot simply be arrayed for handling, re-designed in line with the interpreter’s own framework, *framed*.

I claim, then, that interpretation of foreign law must abide by another regime of signification than the unilateralist version on display in Chief Judge Easterbrook and Judge Posner’s opinions. Research into foreign law must renounce the coerciveness, the censorship, it exerts on the foreign, so as to allow the other law to tell *its* story through its authorized speakers, in its habitual places and according to its favoured patterns —

¹⁴⁷ Cf Blanchot, M (1982 [1955]) *The Space of Literature* Smock, A (trans) University of Nebraska Press at 198: ‘What threatens reading: the reality of the reader, his personality, his immodesty, [his] pertinacity in wanting to remain himself in the face of what he reads’ [*Ce qui menace la lecture: la réalité du lecteur, sa personnalité, son immodestie, l’acharnement à vouloir demeurer lui-même en face de ce qu’il lit*]. I have modified the translation.

¹⁴⁸ Bonoli, L (2008) *Lire les cultures* Kimé at 58-60 and 98, respectively [*heur!* / *effet d’agrammaticalité*] (emphasis omitted). ‘*Heurt!*’ is Bonoli’s French translation for the German ‘*Anstoß*’, which he tracks to the philosophy of Gadamer.

in its own *voice* — rather than confine it to having its story rehearsed by others in other places, in other ways and in *their* own voices. An intervention into foreign law — not least when it is launched from a judicial forum — must structure itself otherwise (that is, differently) from the approach followed in *Bodum* or, more accurately, *other-wise* (that is, in a manner showing enhanced attunement to the other, to the foreign, to its complexity, to its singularity). In sum, I argue that it befalls the interpreter ‘to watch over the other’s otherness’,¹⁴⁹ that this epistemic motion partakes in his *incumbency*.¹⁵⁰

My argument is not simply theoretical. On the contrary, because it concerns the very fashioning of significance, it has a direct impact on the formulation of the knowledge that will be generated about foreign law. Indeed, in the context of a judicial decision on the law governing a contract, my claim could hardly prove more practical as it bears on the parties’ legal entitlements and on the actual outcome of the case.

Consider the following scenario. It is September 2010 (again!). An appellate court in Bordeaux is adjudicating on a contract being governed by US law. In order to ascertain the contents of the relevant law, taking advantage of the latitude attributed to it by the French *Code de procédure civile*,¹⁵¹ the Bordeaux court decides not to rely on the expert testimony of three Chicago law professors having been submitted by the parties. Instead, it elects to frame its knowledge of US law on the basis of the following material:

- an article on US contract law written by a New York lawyer, translated into French, and published in the Paris-based *Revue internationale de droit comparé* in 1999;
- an article on US contract law written by a French lawyer long established in Washington, DC, also published in the Paris-based *Revue internationale de droit comparé*, this time in 1988;
- an article on the law of contract within the common-law and civil-law traditions — a few paragraphs being devoted specifically to US law — published in French in

¹⁴⁹ Derrida, J (2005 [1998]) *On Touching* — Jean-Luc Nancy Irizarry, C (trans) Stanford University Press at 191 [‘veiller à l’altérité de l’autre’]. I have modified the translation.

¹⁵⁰ How much will it cost? In discussion, Professor Christopher Wonnell suggests that to the extent that the parties would have wanted accurate French law, they would not have been willing to pay any sum of money whatsoever in order to ensure precision. In other words, what price accuracy? One, it seems, would have to be a very impractical analyst indeed not to see the merits of Wonnell’s point. After all, the hiring of expert witnesses carries obvious costs, which must be incurred in a context where any expert testimony runs the risk of being dismissed out of hand by the court — as indeed happened in *Bodum* at appellate, though not at lower-court, level. Without losing sight of these sensible considerations (but without falling for the reductionist, econocentric, view of legal issues that I have critiqued in Legrand, P [2009] ‘Econocentrism’ [59] *University of Toronto Law Journal* 215), it appears implausible to assume that the parties would fail to grant any value whatsoever to interpretive predictability — at least if the expression is taken to refer to a judicial production of French law that is in line with their expectations of what is to be understood as the ‘French law’ they elected would govern their contract. After all — to pursue the economic argument — a wayward judicial reading of French law would carry its cost too. And while the parties, as they engage in litigation, can presumably have a relatively clear idea of how much their expert witnesses will charge them and are therefore able to plan accordingly, the cost of an perverse judicial reading of French law cannot be so readily internalized.

¹⁵¹ For example, Articles 10 and 232 of the *Code de procédure civile* read as follows: ‘The judge has the power to order of his own motion all legally admissible investigation measures’/‘The judge may commission any person of his choice to enlighten him through findings, consultation, or expertise on a question of fact that requires the insight of an expert’ [‘Le juge a le pouvoir d’ordonner d’office toutes les mesures d’instruction légalement admissibles’/‘Le juge peut commettre toute personne de son choix pour l’éclairer par des constatations, par une consultation ou par une expertise sur une question de fait qui requiert les lumières d’un technicien’]. In France, foreign law is proven as a question of fact.

the *Revue de la recherche juridique*, a journal based in Aix-en-Provence, and written by a law professor from Cameroon dividing his time between a government position and an international practice in Yaoundé;

- two chapters, both of them written in French, both of them general surveys of the law of contract across legal traditions — one published as part of a Belgian encyclopedia on comparative law, the other released within a collection of essays on the interpretation of contracts by a leading French academic press, Presses Universitaires de France;
- two chapters, both of them written in French by US law professors, being part of a general introduction to US law published in Paris by Lexis Nexis;
- a student introduction to US contract law written in French by a Swiss professor of law and published in Paris by Presses Universitaires de France in 1995.

As will have been apparent, I have sought to transpose as accurately as possible the constellation of references that Chief Judge Easterbrook and Judge Posner devised in *Bodum* in the context of their investigation into French law. But is there any sense in which either Chief Judge Easterbrook or Judge Posner themselves — or indeed any other US judge — would regard the Bordeaux court's assessment of US law on the basis of the sketchy and dated material I have mentioned as being at all credible? I take the view that both judges would in fact hold that the French court had failed somewhat abysmally to recognize the complexity and singularity of US law, that it had fallen far short of doing justice to US law, that it had refused to pay US law the recognition and respect to which it is entitled as French law's *alter ego*. I am, in fact, willing to hazard a more dramatic formulation: if either Chief Judge Easterbrook or Judge Posner were to be told of the Bordeaux court's strategy, they would promptly dismiss it as ridiculous, mocking it as yet another example of French law's legendary *awkwardness* towards matters foreign. The two judges would argue that one is certainly entitled to claim more textual-historical fidelity for US law than the motley array of references I have listed can ever allow, these having to do, in various guises, inadequately at any rate, with aspects of 'common-law culture' (to adopt and adapt Judge Posner's form of words).¹⁵² In the name of the comparative ethics I (attempt to) practice, I would be first to agree with the judges' stance.

9/ *The Stronger Yield*

Whether epistemologically or ethically, that is, whether as a matter of (optimally) accessing French law or of affording it a voice, one of the two strategies debated in *Bodum* emphatically carries over the other.¹⁵³ Given that the goal of the court must be, in my view, to decide the case based on French-contract-law-as-it-is-lived-in-France, timely accounts from French experts familiar with French law's current detail, conversant with its ongoing cultural configuration, are bound to provide a more sophisticated interpretive yield, or

¹⁵² Supra text at note 46.

¹⁵³ As I make my claims, I do not purport to stigmatize derivativeness as such. I accept that every discourse about law is ultimately derivative. But it remains that some are more derivative — and therefore normatively less reliable — than others.

afford the US judge a more reliable interpretive grasp, than a loose collection of cursory texts published in English and available in the United States, often written by authors foreign to French practice, at times released many, many years earlier. The suggestion that expert testimony is structurally inefficient — that it is ultimately emitting poor signals to the judge on account of its parasitical character — is wrong. *Mastercard* shows how an experienced judge is able to dismiss information it deems unhelpful. From Judge Preska's standpoint, the fact that Professor Werro had been hired by one of the parties did not detract from his ability to describe Swiss-law-as-it-is-lived-in-Switzerland in a way she found persuasive. The judge felt able confidently to extract trustworthy information from Professor Werro's testimony even though it had been introduced on behalf of one of the litigants. To return to an earlier point of mine, it must be clear that, irrespective of the fact of his retainer, Professor Werro would not have been willing to say anything whatsoever as a matter of Swiss law.

A further advantage of expert testimony is that it relates immediately to the facts of the case. In other words, when Professor Werro was explaining Swiss law to the court, he was doing so with specific reference to the dispute being litigated. Contrariwise, if a US judge has to consider English-language publications available in the United States that aim to summarize foreign law at one or other level of generality, the judge is then left to apply that foreign law, such as he has understood it, to the question at hand. Given that the judge is reputed not to know foreign law, this cannot be the better adjudicative strategy. It is hard to see, in fact, how the judicial decision would fail to benefit from expert guidance regarding the application of foreign law to the specific issue before the court. As Judge Wood observes, '[i]t will often be most efficient and useful for the judge to have before her an expert who can provide the needed precision on the spot, rather than have the judge wade through a number of secondary sources'.¹⁵⁴

To avoid the trap of essentialism,¹⁵⁵ I have resisted the view that it is an inherent property of a text by a French jurist to be 'better' at doing French law than, say, a contribution by a US (or Argentine) law professor to a US law journal. As I indicated, a distinction along the lines of 'insiders' and 'outsiders' is too sharp.¹⁵⁶ For example, I can accept that a US lawyer having practiced law in Paris for many years would have something meaningful to say about French-law-as-it-is-lived-in-France. If such lawyer were to publish a thorough examination of French law in the United States that remained current at the time of trial, this text might well warrant consideration by a US court having to make sense of French-law-as-it-is-lived-in-France. Clearly, though, these circumstances will remain exceptional. There is a structural propensity, if you will, for French jurists who partake in the life of French law in France, who embody and enact French legal culture, to be more adept at telling French-law-as-it-is-lived-in-France when normativity is at stake (it bears recalling that the Chicago court must *apply* French law to the case being litigated). *In this particular context* (again, I cannot emphasize these words enough), such structural propensity must carry significant epistemological and ethical value.

For Chief Judge Easterbrook and Judge Posner to suggest, as they do, that signals from expert witnesses on French law are weaker as a matter of course than those emanating

¹⁵⁴ *Bodum* supra note 3 at 639.

¹⁵⁵ For my understanding of the term, see supra note 11.

¹⁵⁶ *Supra* text at note 13.

from, say, trade publications in English or marginal US law reviews, is an assumption that cannot be sustained. This lay faith in local scriptures indicates an underweighting of expert evidence and a correlative overweighting of English-language publications available in the United States. Even allowing for the possibility (indeed, for the plausibility) of weak signalling from certain expert witnesses, it remains that the recognition of a low-quality signal is much easier to achieve in the context of expert testimony than through a more or less solitary judicial perusal of publications happening to be at hand written by authors likely to be unfamiliar, whose largely unverifiable treatment of foreign material is readily susceptible to lead one astray. A juxtaposition of the *Mastercard* opinion on the identification of Swiss law through the sophisticated counsel of a renowned Swiss expert with the two passages in *Bodum* where the court, basing itself on French-law-as-it-is-apprehended-in-the-United-States, suggests a reading of the French *Code civil* that the text cannot grammatically bear, confirms my argument.¹⁵⁷

10/ *Ethnocentrism, Ultimately*

Even more so than Chief Judge Easterbrook, Judge Posner projects the impression that he is hard at work researching French contract law. With a view to generating something like ‘uncontaminated’ French law, he contends that for a court to opt for expert testimony is expedient. Accordingly, he roundly dismisses ‘judges relying on paid witnesses to spoon feed them foreign law’ and chastises the judiciary’s ‘intellectual provincialism’.¹⁵⁸ Dissatisfied with what he regards as the counterfeit French law being produced on cue by tendentious experts, Judge Posner appears to be assertively in pursuit of *genuine* French law. To be sure, he takes the view that the lack of references to French jurists exercising demonstrated and acknowledged authority on French-law-as-it-is-lived-in-France does not hinder his acquisition of knowledge of French law, that the matter of competence on French-law-as-it-is-lived-in-France is but incidental to his quest for reliable information. From his standpoint, the experience of French-law-as-it-is-lived-in-France can be eschewed without the integrity of his understanding of French law being compromised. But, problematic as it is, even this judicial relegation of French-law-as-it-is-lived-in-France to such a peripheral role does not detract from the judge’s steadfast commitment to the revelation of French-law-beyond-partisanship.

Yet, while Judge Posner appears keen to show his concern for French law, for the quality of the French law on display in his courtroom, he is, in effect, treating that law with assiduous condescension. For him, an understanding of French law is simply not worth any effort beyond the usual reach. Indeed, his apparent hospitality vis-à-vis French law is haunted by a form of opposition or antagonism — a hostility — which one typically associates with an ethnocentric practice. There is, if you will, hospitality’s hostility on display.¹⁵⁹ No matter how anti-ethnocentric the judge’s reasoning purports to be, it is but a demonstration of ethnocentric bias. Judge Posner’s (and Chief Judge Easterbrook’s) view in *Bodum* shows how ‘[o]ne [is] *apparently* avoiding ethnocentrism at the very moment

¹⁵⁷ For the court’s misreadings in *Bodum*, see *supra* texts at notes 26 and 58.

¹⁵⁸ *Supra* text at note 5. Judge Posner also stigmatizes ‘spoon feed[ing]’ in *Sunstar* *supra* note 33 at 496.

¹⁵⁹ For an influential essay on this interlacing, see Derrida, J (2000) ‘Hostipitality’ (5/3) *Angelaki: Journal of the Theoretical Humanities* 3. Derrida’s well-known neologism is meant to attest to the profound imbrication of the two processes.

when it will have already operated *in depth*, silently imposing its ongoing concepts of speech and writing'.¹⁶⁰ In other words, though seemingly taking French law seriously to the point of wanting to ensure its integrity, the two judges are effectively demeaning it.

In particular, Chief Judge Easterbrook and Judge Posner's opinions convey the message that French law does not justify the intellectual cost — the *risk* — of expert testimony and that it will be well served by getting law clerks to gather some English-language documentation readily available to them in the United States, more or less irrespective of author, venue, date or specificity of contents. Indeed, French law is so easily understandable (is it not?), that nothing more complicated than 'research-at-hand' need be done — or so the assumptions undergirding Chief Judge Easterbrook and Judge Posner's pronouncements appear to suggest. The idea that French contract law might be at least as complex as its US counterpart; that it might require a detailed examination and cross-examination involving more than one expert in a position to claim a technical and indeed a cultural competence in French-law-as-it-is-lived-in-France which is at once current and thorough; and that it might need expert guidance as it is applied to the facts of the case being litigated, such a thought, then, does not appear to have detained the two judges at any length.

Even if, *concessio non dato*, I were to accept that Chief Judge Easterbrook and Judge Posner are entitled to exercise their freedom to narrativize French law as they see fit, I would still hold the view that French law (if the anthropomorphization be allowed) can legitimately insist that, as part of their interpretation of it, the two judges ought to take into account its own recognition of itself. Such is my earlier point about hearkening.¹⁶¹ It is not, of course, that French law's view of itself boasts anything like intrinsic infallibility; again, I am not at all celebrating any 'inside as such' which would act as the mystic *arche* or *telos* of a truth, which would then indict any interpretive intervention from elsewhere as an aggression. My claim is rather that French law's perspective can legitimately demand of another perspective, like the two Chicago judges', that it honours how it exists unto itself. In other words, Chief Judge Easterbrook and Judge Posner can hardly assert, without surrendering to hypocrisy, that they recognize and respect French law while simultaneously revealing a wilful lack of awareness of its self-knowledge. Meanwhile, it is difficult to read the judicial preemption and silencing of French-law-as-it-is-lived-in-France as anything other than an act of strong interpretive violence prompting a devitalization — indeed, a deracination — of French law.¹⁶²

¹⁶⁰ Derrida, J (1997 [1967]) *Of Grammatology* Spivak, GC (trans) Johns Hopkins University Press at 121 [*'on évitera en apparence l'ethnocentrisme au moment même où il aura déjà opéré en profondeur, imposant silencieusement ses concepts courants de la parole et de l'écriture'*] (my emphasis). I have modified the translation.

¹⁶¹ *Supra* note 146.

¹⁶² As I hear him, Professor Larry Alexander asks: What is there, there? To frame this ontological question in another way, one could say, Heidegger-style: What is called 'French law'? (I have in mind Heidegger, M [1968 (1954)] *What Is Called Thinking* Gray, JG [trans] Harper & Row.) Alexander offers me an opportunity to restate my case from a slightly different angle. Perhaps I can begin by excluding that the expression 'French law' would refer only to the words that, taken together, constitute the extant body of French legislative or other regulatory texts and French judicial decisions. Words that are bereft of interpretation are literally meaning-less. For a word to be meaning-ful, it needs its meaning to have been awakened by an interpreter or to have had an interpreter ascribe meaning to it (arguably, interpretation involves the simultaneous activities, the double gesture, of awakening and ascription in the sense that one gives meaning to the pre-existing word). What the word unfolds as, or what it amounts to, is therefore a constitutive part of the word, of what it is for the word to exist as word (the word achieves its being only in so far as it is interpreted). To return to Alexander's question,

Upon close analysis, the judicial hospitality towards French law is thus seen to be so equivocal that, in the end, Chief Judge Easterbrook and Judge Posner can be said not to be welcoming French law in their courtroom except, of course, on their exacerbated nationalistic terms (French-law-as-it-is-apprehended-in-the-United-States only!) — a gesture which hardly qualifies as a fully-fledged reception. Reflecting upon the US Supreme Court's references to foreign law in *Lawrence v Texas* — another example of the ready 'Americanization' or 'saming' of foreign law —, a friendly critic called it 'crude'.¹⁶³ So is the foreign law on display in *Bodum*, which in a significant sense connotes closure (*to* French-law-as-it-is-lived-in-France) and erasure (*of* French-law-as-it-is-lived-in-France). This brand of research into foreign law wishes to take its leave from the otherness of foreign law and find spontaneous refuge in well-trodden Americana. Reading only English-language material in publications available in the United States, Chief Judge Easterbrook and Judge Posner are led — unsurprisingly, I should think — to divine all manner of unexamined resemblances between the contract laws of France and of the United States.¹⁶⁴ But one is unaccountably reminded of Beckett referring to 'the simple and necessary and yet so unattainable proposition that their way of being we, [is] not our way and that our way of

I claim that 'French law' is 'what exists as French law in the world' — or, if you will, I argue that 'French law' includes 'the worlding of French law'. Now, inevitably I should think, French law's existence or French law's worlding largely manifests itself in France if only because this is where French law mostly attracts interpretive attention, no doubt on account of the fact that France is where French law largely carries normative weight, where French law primordially *matters*. This existential/territorial configuration is what I try to capture by resorting to the expression 'French-law-as-it-is-lived-in-France'. It is *that* which I say Chief Judge Easterbrook and Judge Posner cannot credibly approximate from their US vantage — which is, notably, a common-law-tradition vantage and an English-language vantage — without the insights of French lawyers who, unlike the authors of US law-review articles or of English-language books available on the US market, are themselves involved in the interactive structure that governs the existence or the worlding of French law. None of this is to suggest that only French lawyers are in a position to understand 'French-law-as-it-is-lived-in-France'. Rather, I argue that French lawyers' understanding of 'French-law-as-it-is-lived-in-France' can reasonably be expected to *differ* from Chicago judges' understanding of 'French-law-as-it-is-lived-in-France' — in the way in which, say, close reading can reasonably be expected to differ from distant reading. And when it comes to the issue of making sense of 'French law', the fact is that French lawyers occupy a place allowing them to deliver an interpretive yield that accounts more reliably for that which exists in France as 'French law' than Chicago judges can ever hope to achieve if they choose to limit their reservoir of sources to English-language, US-based texts.

¹⁶³ Tribe, LH (2004) 'Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name' (117) *Harvard Law Review* 1894 at 1931. Just as aspects of the flawed use of history in US legal doctrine may be captured by the notion of 'history lite' — the expression is in Flaherty, MS (1995) 'History "Lite" in Modern American Constitutionalism' (95) *Columbia Law Review* 523 — one can resort to the idea of 'foreignness lite' to underline the inadequacy of the research into foreign law in cases like *Lawrence* and *Bodum*. The issue is particularly significant since the US judicial practice of making reference to foreign law as persuasive authority has deep historical roots. For a thorough demonstration of this longstanding pattern with specific reference to the US Supreme Court, see Calabresi, SG and Zimdahl, SD (2005) 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision' *supra* note 2. The establishment of a practice of reference to foreign law leaves open the question, however, whether this course of action must be approved. For example, Professor Calabresi, the lead author of the study I just mentioned, defends the view that as regards the role of foreign law in constitutional adjudication, judicial deference must be paid to the wishes of the vast majority of US citizens (many of them immigrants) who regard the United States as an exceptional country whose singularity makes the relevance of foreign law less than obvious: Calabresi, SG (2006) 'A Shining City on a Hill': American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law' (86) *Boston University Law Review* 1335. But see now Calabresi, SG and Silverman, BG (2014) 'Hayek and the Citation of Foreign Law' *Michigan State Law Review* ___. I have indicated my position on judicial advertence to foreign law at *supra* note 4.

¹⁶⁴ *Supra* text at notes 48-50 and 54-55.

being they, [is] not their way'.¹⁶⁵ Yes, *pace* Chief Judge Easterbrook and Judge Posner, the fact remains that the French way of doing what is done in the United States — interpreting contractual relationships — is not done in the US way and that the US way of doing what is done in France — interpreting contractual relationships — is not done in the French way.

•

No signal is perfect, and there can be no perfect communication. Noise is inevitable. Fortunately, the judge who is keen to offer a compelling interpretation of foreign law with a view to normative use in his courtroom has a tool at his disposal that can readily be deployed to reduce the extent of the misunderstanding. Indeed, the good judge can resort to expert testimony. In issuing his decision on the basis of current and thorough expert testimony from individuals who enjoy demonstrated and acknowledged first-hand cognitive authority in foreign law and in foreign law's culture as it is lived, *through this modality of representation*, then, the judge is in a position to show that he is prepared to take foreign law seriously. If, instead of relying on expert testimony, the judge elects to confine himself simply to researching documents that are available to him in his own language and in his own country, the danger that his opinion will be informed by hasty conflation is heightened. *Bodum* is a case in point. In sum, expert testimony allows for a significant enhancement of the quality of the signal judges are receiving and in turn improves the signal they themselves are sending both to the parties in their courtroom and to future judges.

To be sure, all signals are only relatively informative. Some signals, though, can boast a structural propensity to be more reliably informative than others. In *Bodum*, the court's goal had to be, in my opinion, to unconceal French-law-as-it-is-lived-in-France, to disclose it, to reveal it — and simultaneously to ascribe meaning to it. Accordingly, its aim had to be the promotion of as much understanding as possible of French-contract-law-as-it-is-lived-in-France. I find it deeply worrisome that two out of the three appellate judges took the view that such could be better accomplished through a small handful of analyses by a few foreigners writing on French law well away from its lifeworld — at times, in fact, writing on 'civil-law culture' (Judge Posner's awkward expression) rather than on French law specifically.¹⁶⁶ That the two judges did not advert to the fact that their enterprise might entail the unintelligibility of French law is perhaps even more unsettling. In fact, research into foreign law is simply not as facile as Chief Judge Easterbrook and Judge Posner assume — *and must not be*. Thankfully, Judge Wood, in an opinion strongly urging her fellow judges to avoid the avoidance of French-law-as-it-is-lived-in-France, to abjure the kind of 'insiderism' that prompts a meretricious adjudication of foreign law, argues the case for ameliorated listening *to* the foreign and improved justice *towards* the foreign.

To return to the Rules of Federal Civil Procedure, the relevant provision emphasizes that a judge is at liberty to conduct his own inquiry into foreign law. This text means, for example, that a US court can 'allow for certification of questions of foreign law to a

¹⁶⁵ Beckett, S (1995 [1946]) 'The Capital of the Ruins' in *The Complete Short Prose* Gontarski, SE (ed) Grove Press at 277.

¹⁶⁶ For Judge Posner's words, see *supra* text at note 46.

national institute' — such as the Swiss Institute of Comparative Law in Lausanne.¹⁶⁷ It also suggests that a US judge can 'certify questions to a foreign court for an advisory opinion'.¹⁶⁸ Yet another approach, more demanding from an institutional standpoint, would involve the adoption of a memorandum of understanding between a US court and a foreign counterpart with a view to establishing 'reciprocal cooperation and consultation between their respective judicial systems'.¹⁶⁹ Any one of these three strategies makes infinitely more sense in terms of research into foreign law other-wise — of an epistemologically reliable, ethically justifiable and indeed efficient brand of research into foreign law — than the easy credo of regional finitude being offered in *Bodum* by Chief Judge Easterbrook and, with especial earnestness, by Judge Posner. In addition to these scenarios (which, I accept, raise important practical challenges), another option would be for the court to implement a concurrent evidence procedure (colloquially known as the 'hot tub' technique). Pursuant to this scheme, the judge would administer an oath to the parties' experts (thus reminding them of their paramount duty to the court over and above any advocacy on behalf of their clients) and then engage in informal discussion with them (without the parties' lawyers being present) until he was satisfied that he had properly ascertained foreign law. Note that Article 611 of the Federal Rules of Evidence allows a judge to mandate concurrent evidence, that is, to proceed without the parties' consent.¹⁷⁰ Yet another possibility is for the court to appoint its own expert, which it can do under Article 706 of the Federal Rules of Evidence. Instead of simply condemning expert evidence, why, for example, did Chief Judge Easterbrook and Judge Posner not encourage lower-court judges to name their own experts? Why, indeed, is court-appointment of experts not more common? It can hardly be that courts would refrain on account of the costs they would be incurring since, pursuant

¹⁶⁷ Michalski, RM (2011) 'Pleading and Proving Foreign Law in the Age of Plausibility Pleading' supra note 120 at 1264.

¹⁶⁸ Ibid. For extensive discussion, see Wilson, MJ (2011) 'Demystifying the Determination of Foreign Law in US Courts: Opening the Door to a Greater Global Understanding' (46) *Wake Forest Law Review* 887 at 914-19 and 924-27.

¹⁶⁹ Wilson, MJ (2011) 'Demystifying the Determination of Foreign Law in US Courts: Opening the Door to a Greater Global Understanding' supra note 168 at 919. Professor Wilson expressly refers to two instances where such a memorandum has been agreed, one involving the New York State Court of Appeals and the Supreme Court of New South Wales in October 2010 and the other concerning the same Australian court and the Supreme Court of Singapore in June 2010: id at 919-20. The author observes that from the point of view of the New York court, the memorandum remains informal on account of constitutional constraints: id at 925. See Spigelman, JJ 'Proof of Foreign Law by Reference to the Foreign Court' supra note 105 at 214-16. Along analogous lines, it is well worth noting the European Convention on Information of Foreign Law (the so-called 'London Convention'), a Council of Europe initiative which was agreed in June 1968 and came into force in December 1969. On 1 January 2014, the Convention had been ratified by forty countries within the Council of Europe and by three non-member states (Costa Rica, Belarus and Mexico). Pursuant to the Convention, a country undertakes to institute a specialized agency entrusted with the reception and treatment of requests for information as regards its 'civil and commercial fields', whether as a matter of substance or procedure, or as concerns its 'judicial organization'. The request must be made by a 'judicial authority', address litigation already under way and be based on the facts of the case. The information, which must be given 'in an objective and impartial manner', is not binding on the body having requested it. For all relevant official information regarding the Convention, see <<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=062&CM=1&CLENG>>.

¹⁷⁰ I am grateful to Professor Michael Devitt for contributing valuable insights. For a spirited argument promoting expert concurrent evidence with specific reference to taxation trials bearing on valuation issues (but of more general application), see Devitt, MR (October 2012) 'A Dip in the Hot Tub: Concurrent Evidence Techniques for Expert Witnesses in Tax Court Cases' (118) *Journal of Taxation* 213. One specific difficulty pertaining to concurrent evidence is that it assumes the physical presence of the experts. Now, in cases involving foreign law expert witnesses tend to be foreigners, which immediately raises the matters of feasibility and cost.

to Article 706(c) of the Federal Rules of Evidence, they can allocate these to the parties as they see fit. One explanation is that judges are simply too busy to engage in court-initiated appointments. Another justification would be that they remain unwilling to interfere with the (cherished) dynamics of the adversarial system.

•

I return to where I began. It almost seems a truism to observe that the ever-developing interconnectedness of the world's societies, cultures and economies can be expected to generate more situations like *Bodum* where US judges find themselves having to ascertain foreign law. In this context, it is disingenuous for Judge Posner to suggest without further ado that all will be fine without expert testimony since, well, 'judges are experts on law'.¹⁷¹ Judge Posner is in effect reasoning along the following lines: 'I know about "law" (I am a judge, after all)'. And, though allowing for little local variations, 'law' would be 'law' (irrespective of the fact, for example, that France does not know of 'law' but of '*droit*' and '*loi*'). In the end, when it comes to 'French law', it is only the word 'law' that matters for Judge Posner and not at all the word 'French'. But the epistemic fact is that across the world there are *laws*, indeed a multitude of laws. And since there are laws, because there is more than one law, each law is inevitably different from the others (beyond oneness, there is unsurpassably the differend). The further epistemic fact, then, is that each law is irreducibly singular.¹⁷²

Bearing in mind Judge Posner's observations in some of his publications to the effect that the personality of the judge matters,¹⁷³ I cannot but refrain from adding that the lack of credibility on display in *Bodum* seems to have to do, in one significant respect, with the personality of one of the majority judges, an individual who, at some point in his distinguished academic and judicial career, appears to have decided that he could transform himself into an authority on whatever topic happened to catch his fancy. On this occasion, rather than expound on sex,¹⁷⁴ literature,¹⁷⁵ aging,¹⁷⁶ plagiarism¹⁷⁷ or democratic capitalism,¹⁷⁸ he chose to write on French law — although he himself accepts that '[m]ost [judges] know little about foreign countries, foreign law, or the institutional, procedural, and cultural aspects of foreign legal systems'.¹⁷⁹ In effect, *Bodum* thus offers a textbook illustration of judicial hubris. It is simply not good enough for Judge Posner to warrant his substitutive act of saying of French law by claiming that judges would be 'experts on law'.¹⁸⁰ *What law? Whose law? Who can vouch for it? When? Where? In what place?*

¹⁷¹ *Sunstar* supra note 33 at 496 (Judge Posner).

¹⁷² See Legrand, P (2006) 'On the Singularity of Law (47) *Harvard International Law Journal* 517.

¹⁷³ Eg, see supra note 92.

¹⁷⁴ Posner, RA (1992) *Sex and Reason* Harvard University Press.

¹⁷⁵ Posner, RA *Law and Literature* supra note 133.

¹⁷⁶ Posner, RA (1995) *Aging and Old Age* University of Chicago Press.

¹⁷⁷ Posner, RA (2007) *The Little Book of Plagiarism* Pantheon.

¹⁷⁸ Posner, RA (2010) *The Crisis of Capitalist Democracy* Harvard University Press. See also Posner, RA (2009) *A Failure of Capitalism* Harvard University Press.

¹⁷⁹ Posner, RA (2013) *Reflections on Judging* Harvard University Press at 84.

¹⁸⁰ Supra text at note 171.