

# Negative Comparative Law

PIERRE LEGRAND  
Ecole de droit de la Sorbonne\*

This Article argues the outlines of a strategy of epistemic governance that would credibilize research into foreign law and legitimize the fashioning of comparative legal studies. Importantly, this alternative approach implies the dethronement of positivism, of its technical and utilitarian obsessions, with a view to making possible ascriptions of meaning that will allow for revealing elucidations of the foreign.

I must manage to reach the negative.

Alberto Giacometti<sup>1</sup>

As I addressed three dozens of interested postgraduate students and a much smaller number of curious colleagues in Frankfurt on 24 March 2015, I recalled that it had been almost ten years since I had last spoken in the land of *Rechtswissenschaft*, of seemingly relentless legal conceptualism and systematization, of apparently incessant categorical thinking, the country where one appreciates being told one is a good dogmatician. Indeed, my last intervention in the abode of '*der Jurist als solcher*' (or is it '*der Universaljurist*'?) had taken place in October 2005 at the university of Passau, a student organization having kindly suggested a negotiation with Professor Ole Lando on the predictable theme of legal convergence within the European Union.<sup>2</sup> Except perhaps for another group of students,

\* Professor of Law and Director of Postgraduate Studies in Globalization and Legal Pluralism at the Sorbonne, Paris; Distinguished Visiting Professor, University of San Diego School of Law; Visiting Professor, Northwestern University Pritzker School of Law, Chicago. This Article is a written version of my intervention before the *Fachbereich Rechtswissenschaft* of the *Johann Wolfgang Goethe-Universität* and the *Exzellenzcluster Die Herausbildung normativer Ordnungen* in Frankfurt am Main. Professor Dr Günter Frankenberg formally invited me. Professor Dr Klaus Günther, director of the *Exzellenzcluster*, joined Professor Frankenberg in hosting me. As I prepared this text for publication, I sought to retain some of its oral flavour though I took the opportunity to expand on my argument, at times substantially. Unless otherwise indicated, I refer to original works.

<sup>1</sup> Isaku, Y *Avec Giacometti* (2014) Perrin, V (trans) Allia at 132. From 1956 to 1961, the Japanese philosopher Yanaihara Isaku posed for Giacometti at the sculptor and painter's Paris atelier on 230 occasions or so. Appearing in Japanese in 1969, the sitter's account included a narrative of his liaison with Giacometti's wife, Annette, a relationship Giacometti welcomed and encouraged. Giacometti having died in 1966, his widow undertook to administer his estate and safeguard the couple's reputation. In 1971, claiming breach of privacy, Annette succeeded in having Isaku's book withdrawn. Some 19 years after Annette's death and 23 years after Isaku's, the Perrin translation restores the initial text in full for the first time. Giacometti's words would have been spoken (in French) in November 1956.

<sup>2</sup> Windscheid, B (1904 [1884]) 'Die Aufgaben der Rechtswissenschaft' in *Gesammelte Reden und Abhandlungen* Duncker & Humblot at 111. Windscheid's 'jurist-as-such' ensures that the study of law will not be defiled by 'ethical, political, [or] economic considerations': Id at 112.

I find it hard to imagine who could have lured me back to a German law faculty but Professor Günter Frankenberg.

Though we only met in December 2014, Professor Frankenberg has long been an outstanding participant in my intellectual life by virtue of his critique of the theory and practice of 'comparative law', if I may be allowed this misnomer, a field that commits to the intellectual deterritorialization of the legal and claims the normative relevance of foreign law locally, for example, in the formulation of statutory choices, judicial opinions or doctrinal views. As I mention Professor Frankenberg's dissentience, I refer in particular to the publication of his sharp indictment of comparativism-at-law in 1985.<sup>3</sup>

Like some other comparatists who entered 'comparative law' in the 1980s or 1990s, I was drawn to fashion a critical sensitivity in response to the field's stifling epistemic orthodoxy. Specifically, I felt uneasy about my scholarly existence being constituted according to the dominating positivism — the narrow, rigid and ultimately soul-crushing ideology that, scanting interpretive opportunities, was fixated on the technical carapace of the law to the exclusion of its cultural significance. Basically taking the view that '[t]he law is only a matter of what legal institutions [...] have decided in the past', established comparatists assumed that 'questions of law [ould] always be answered by looking in the books where the records of institutional decisions are kept'.<sup>4</sup> I was unwilling to accept what was in effect a principally descriptive approach to the legal that sought to hide the cultural fact of dispersal and disjunction across laws through the promotion of an ivory-tower conceptual unity and coherence.<sup>5</sup> And I could not countenance how prominent comparatists, unwilling to enhance their viewing of foreign law and even less prepared to ameliorate their viewing of themselves viewing foreign law, blatantly ignored the constraints associated with knowledge-making and operated as if these limits were inexistent (either out of deplorable dishonesty or distressing naiveté). Professor Frankenberg's article proved crucial to me in as much as it offered that most compelling of epistemic, political and ethical spaces: a *possibility*.<sup>6</sup>

Inscribing itself in the very long shadow of the field's orthodoxy, Professor Frankenberg's text demonstrated that another brand of 'comparative law' was conceivable, a comparativism that, most significantly, could build on defensible epistemic premises and allow for a meaningful interpretive yield, for an improved understanding of foreign law — the law of the other — and ultimately for greater justice being visited on the foreign. Also, Professor Frankenberg's critique supplied important epistemic equipment for an enhanced appreciation of the interpretive dynamics governing local law, the law of the self. In the years that followed its publication, even when orthodox 'comparative law' was busily financing its shrivelled way into the law lists of major university presses or filling the pages of law journals with an unceasing output of 'black-letter' recrement, even when it was massively subsidizing research initiatives or large conferences to

<sup>3</sup> Frankenberg, G (1985) 'Critical Comparisons: Re-thinking Comparative Law' (26) *Harvard International Law Journal* 411.

<sup>4</sup> Dworkin, R (1986) *Law's Empire* Harvard University Press at 7.

<sup>5</sup> In Schauer's terms, 'the description of law' stands 'at the heart of the positivist outlook': Schauer, F (2015) *The Force of Law* Harvard University Press at 12. There is a range of positivisms, European types tending to be considerably more hermetic than their North-American counterparts.

<sup>6</sup> I recall Heidegger's observation to the effect that '[h]igher than actuality stands *possibility*': Heidegger, M (2001 [1927]) *Sein und Zeit* Niemeyer at 38 [emphasis original].

promote its ideologically cloistered view of law and of the world, its cryptonormativity (for it has preferred a commitment to tacit rather than explicitly articulated values), even when orthodox ‘comparative law’ appeared to be occupying the entire stage — though without ever being able to overcome the persistent failure of institutional tenableness that reinforced local distrust towards references to the laws of other countries —, comparatists yearning for sophisticated comparative legal studies and hoping for heightened intellectual standing could turn to Professor Frankenberg’s article. His accomplished argument provided a reminder that hope for better epistemic days, for enriched interpretive times, could reasonably stay alive, that there might yet emerge a comparativism other-wise. Such heteronomic strategy would feature research into foreign law that would be at once different from what it had been and more attuned to the place of otherness-in-the-law, to the epistemic challenges and opportunities arising from the insistent presence of the other’s law. Of course, to desire a new kind of thinking, to want to disclose a narrative space allowing for foreign law to be encountered with respect to its mode of existence (and with respect *for* its mode of existence) would be risky. To counter positivism as it sought to assert its relation to the world by propounding its estrangement from the world, and to maintain instead that a separation of the legal from the world is a separation of the legal from its effects for it is only in the world that the law can have consequences, would be perilous, so fraught with danger in fact that the critical comparatist might at any moment be confined to one kind of silence or another by any of the field’s ‘gate-keepers’ (a silence that might in turn prompt the deepest part of him also to fall silent).

It was especially meaningful for me, and for some of my colleagues, that Professor Frankenberg’s critical objection should have come from him, a German comparatist. After all, it is German comparatists (and their staunchly Germanophile friends) who, more than any others, have led ‘comparative law’’s orthodoxy into the epistemic impasse that has long plagued it.<sup>7</sup> And it is German comparatists (and their staunchly Germanophile friends again) who, more than anyone else, continue to inform the field’s orthodoxy. It was encouraging, then, that one could see such a forceful epistemic critique as Professor Frankenberg’s emerging out of the very scholarly milieu that, above all others, has been structuring established ‘comparative law’ so deficiently.

Professor Frankenberg having generously suggested a talk in Frankfurt, I was pleased to agree as a small token of gratitude for what his resistive stance has meant to me over the years after I first noticed his work as an Oxford postgraduate (though, I hasten to add, I then had no scope to apply his insights not only given the fact that I was coming to the very end of my dissertation, but because Oxford simply did not afford the critical environment that would have been needed for me to deploy Professor Frankenberg’s objection — a situation, incidentally, that still very much obtains, the condition of critique as regards ‘comparative law’ at Oxford having, if anything, deteriorated over the past thirty years as *Rechtswissenschaft* has found itself repeatedly invited to achieve Oxonian inroads).

Since I began to publish my own critical work on ‘comparative law’ in the 1995 edition of the *Modern Law Review*,<sup>8</sup> I have, in many respects, consciously been treating Professor

<sup>7</sup> For a good example of the dross I have in mind, see Basedow, J (2014) ‘Comparative Law and Its Clients’ (62) *American Journal of Comparative Law* 821 at 853.

<sup>8</sup> Legrand, P (1995) ‘Comparative Legal Studies and Commitment to Theory’ (58) *Modern Law Review* 262. Later work includes Legrand, P (2006) ‘On the Singularity of Law’ (47) *Harvard International Law Journal* 517; Legrand, P (2011) ‘Siting Foreign Law: How Derrida Can Help’ (21) *Duke Journal of Comparative and International*

Frankenberg's scholarship as exemplary. And the fact that our respective (and mostly respectful) critiques of 'comparative law's orthodoxy have been framed from different vantage points has not diminished my admiration for Professor Frankenberg's pioneering contribution. But when Frankfurt was broached, there was another reason why this destination appealed to me in the way no other German venue could have.

Early in the fall of 2014, I finally decided, after what I consider to be many years of wise reluctance, to write a book in English on the theory and practice of research into foreign law and on the elaboration of comparative legal studies. To bring my project to fruition, I had one publisher in mind and, I must say, one publisher only. Now, in order to convince that publisher to release my work under what I regard as its distinguished critical imprint, I wanted to prepare a fully-fledged book proposal that would be optimally attractive. As I undertook to organize this document, I was reminded of the advice I once received from my Oxford supervisor, the late Professor Bernard Rudden, not to attempt to prove too much. I thought it important therefore to design my project with reference to one key idea. This inclination led me to ask myself what I envisaged as the central epistemic tenet around which my critical theorization of research into foreign law, of 'comparative law', revolved. I had to say it was this specific contention leading, I think, to a number of arresting epistemic consequences: that in making sense of foreign law a subjectivist epistemology is intrinsically unable to withstand the relevance of the singularity of the foreign not only because selfhood remains the ineluctable referential frame through which the foreign must be appreciated, but also since the complexity of the foreign is simply not amenable to total understanding by its interpreter even as the foreign must nonetheless be retrieved in its infinite facticity on account of the justice that is owed to the other-in-the-law. (While it may be that aspects of my argument are also valid within strictly local interpretive situations — say, as regards an Italian lawyer researching Italian law — my claim concerns itself with foreign law only. Indeed, I take the view that the foreign, due allowance being made for this notion's intriguing ambiguity, imposes especial demands on one. For the English reader, the poetry of René Char in French or of Paul Celan in German creates an interpretive situation interrupting belongingness or familiarity and thus challenging him in a manner that differs from, say, the way in which WH Auden's or Philip Larkin's poetry interpellates him, both because of the co-presence of a different language and on account of the assertion of a different culture in the broadest sense of the term.)

The governing epistemic postulate I defend is to the effect that there cannot be a correlation between the foreign law (that is *enworlded*) and the comparatist (that is *enworlded* also though in a different world), that to interpret foreign law is immediately and necessarily to disfigure it (or, if you will, that there is the inexperienceability and unknowability of foreign law as foreign law). This epistemic (in)disposition is congruent in a number of significant respects with the philosophical critique that Theodor Adorno developed in Frankfurt starting with the delivery in 1931 of his inaugural lecture as the holder of a *venia legendi* when he claimed, scandalously to the ears of many, that 'the mind

*Law* 595; Legrand, P (2011) 'Foreign Law: Understanding Understanding' (6/2) *Journal of Comparative Law* 67; Legrand, P (2014) 'Law's Translation, Imperial Predilections and the Endurance of the Self' (20) *The Translator* 290. In parallel, in a minor key, so to speak, I sought over many years to pursue a scholarly career in my native language. For representative publications in French, see Legrand, P (2014) *Pour la relevance des droits étrangers* IRJS Editions; Legrand, P (2015) *Le Droit comparé* (5th ed) Presses Universitaires de France.

is indeed not capable of producing or grasping the totality of the real, [though] it may be possible to penetrate the detail, to explode in miniature the mass of merely existing reality'.<sup>9</sup> A Frankfurter by birth, Adorno was a university student in Frankfurt where he later taught until his forced emigration in 1934, initially to England and then to the United States. He returned to Frankfurt in 1949 to resume his teaching until his death twenty years later. Along the way, Adorno became the director of the famous *Institut für Sozialforschung* in 1958 and affirmed himself as a leading player in the so-called '*Frankfurter Schule*', or 'Frankfurt School', that eventually epitomized critical thought worldwide. He also grew into a conspicuous member of the philosophical, literary and musical scenes in post-war Germany. And this is how Frankfurt proved attractive to me a second time. In addition to being the intellectual home of Professor Frankenberg, it had long been that of Adorno. (And perhaps in the same way as Frankfurt features the '*Adorno-Ampel*', it will one day boast the '*Frankenberg-Zebrastrreifen*'!)

In contradistinction to Hegel, Adorno denies that identity between the world and thought about the world is achievable in positive fashion. Instead, any attempted identity can only occur negatively. Thought, in claiming to be able to make itself identical to the world (that is, to be in a position to account for the world absolutely) in effect octroys itself upon the world in a way that suppresses the world's singularity. For example, there takes place a dissolution of the world into concepts and categories while aspects of the world pertaining to discontinuity or unassignability, withstanding articulation or expression in conceptual and categorical forms, are discredited and ignored. This surrender to abstraction is not nearly as innocuous as it may appear. Rather, such reduction reveals an authoritarian urge to appropriate and frame the world within preset formalist arrangements. As facticity is recast to assuage the administrative compulsion to capture the world by bringing it under control through an encasing of it into concepts and categories, this strategy of epistemic domination undermines the very idea of knowledge: 'What appears to be the triumph of subjective rationality, the subjection of all reality to logical formalism [...] abandon[s] the whole claim and approach of knowledge: [...] not merely to determine the abstract spatio-temporal relations of the facts which allow them just to be grasped, but on the contrary to conceive them as the superficies [...] which come to fulfilment only in the development of their social, historical, and human significance'.<sup>10</sup> Pursuant to Adorno, conceptualization or categorization is thus an obstacle to insight rather than a source of illumination in as much as it fakes a clarity that the factual intricacy of the world effectively precludes. In significant ways, Adorno's philosophy of dissonance recalls Leibniz's principle regarding the identity of indiscernibles, the proposition that distinct entities (say, the world and the mind) cannot be perfectly alike.<sup>11</sup>

By displaying an 'intrinsic aspiration [...] to turn every alterity that is introduced to [the mind] into something like itself and in this way to draw it into its own sphere of influence',<sup>12</sup> orthodox comparatists-at-law pursue precisely the identity-logic that Adorno deemed impossible and indeed forcefully chastised. Within the field of 'comparative law',

<sup>9</sup> Adorno, TW (1970 [1931]) 'Die Aktualität der Philosophie' in *Gesammelte Schriften* Adorno, G and Tiedemann, R (eds) vol I Suhrkamp at 344.

<sup>10</sup> Horkheimer, M and Adorno, TW (1947) *Dialektik der Aufklärung* Fischer at 33.

<sup>11</sup> Leibniz, GW (1704) *Nouveaux essais sur l'entendement* in *Die philosophischen Schriften von Gottfried Wilhelm Leibniz* Gerhardt, CJ (ed) vol V Olms at 49.

<sup>12</sup> Adorno, TW (2007 [1965]) *Vorlesung über Negative Dialektik* Tiedemann, R (ed) Suhrkamp at 21.

I argue that the conceptual or categorical overlaying, whose arraignment of the world so troubled Adorno, manifests itself according to the cult of domination and after the logic of repression he castigated. As 'th[e] social, historical, and human significance' of foreign law is put under erasure,<sup>13</sup> as foreign law finds itself *unworlded*, the singularity of foreign law as it exists is sacrificed and repeated injustice is done to it.<sup>14</sup> This epistemicide is driven by (repressive) institutional forces inflicting restrictive and determinate forms on comparative modes of thought and imagination, demanding the taming through thought, without any remnant, of foreign laws that are inherently beyond thought — even on the assumption that they would be addressed in exigently fideliolous fashion rather than instrumentalized to suit the political agenda of the moment.<sup>15</sup>

Whereas Hegel's absolutization of concepts or categories, his positive dialectics, gestures towards a kind of intellectual purity seeking to cover (and to counter) the complexity and ambiguity of the world, his exercise in synthesis or reconciliation ultimately amounting to an identity between identity and non-identity (that is, to the similarization of the different, to the harmonization of world and mind), Adorno's theory emphasizes non-identity between identity and non-identity (that is, it entails the preservation of the differend across world and mind). It is to mark his opposition to Hegel's positive dialectics that Adorno calls for a 'negative dialectics' — a critique of a certain approach to the interaction between world and mind or, if you will, a rejection of subjectivism understood here as epitomizing the unproblematized idea of the subject's exorbitant self-enactability as it would exercise purportedly unalloyed authority over the world, as it would engage in world-producing, object-determinative activity. In a book boldly entitled *Negative Dialektik*, his *magnum opus* on epistemology that he released in 1966 with Suhrkamp (then based in Frankfurt) and that was posthumously published in an English translation with Routledge in 1973,<sup>16</sup> Adorno unfolds his theory of experience to the effect that non-critical philosophy misrepresents the so-called world-mind or 'object-subject' interplay.

For Adorno, then, '[n]egative dialectics is to be the dialectics of non-identity'; in his own words, '[i]n the unreconciled condition [between the world and the mind], nonidentity is experienced as negativity'.<sup>17</sup> And I, too, claim that the comparative orthodoxy has sought, in epistemically indigent fashion, to similarize the non-identity separating foreign laws from the comparative mind, suppressing the laws' facticity (again, what Adorno styles 'their social, historical, and human significance'), eliminating the fact of the comparatist's 'own' dwelling, ignoring this differend. Meanwhile, in as much as the orthodox view

<sup>13</sup> Supra text at note 10.

<sup>14</sup> For a striking illustration of injustice vis-à-vis foreign law, see Gordley, J (1995) 'Comparative Legal Research: Its Function in the Development of Harmonized Law' (43) *American Journal of Comparative Law* 555 at 563: 'There [is] nothing distinctively German, French or American about [German, French, or American judicial] decisions'.

<sup>15</sup> For a startling example of epistemic repression of foreign law, see Markesinis, BS (1997) 'Why a Code Is Not the Best Way to Advance the Cause of European Legal Unity' (5) *European Review of Private Law* 519 at 520: '[O]ur laws on tort [...] can be made to look [similar] with the help of some skilful (and well-meaning) manipulation' (the word is indeed 'manipulation'!). Other sinister illustrations, wearing their speciousness on their face, are in Zimmermann, R (1993) 'Der europäische Charakter des englischen Rechts' (1) *Zeitschrift für europäisches Privatrecht* 4; Zimmermann, R (1997) 'Statuta sunt stricte interpretanda? Statutes and the Common Law: A Continental Perspective' (56) *Cambridge Law Journal* 315.

<sup>16</sup> Adorno, TW (1966) *Negative Dialektik* Suhrkamp; Adorno, TW (1973) *Negative Dialectics* Ashton, EB (trans) Routledge. Further references are to the German text.

<sup>17</sup> [Tiedemann, R] (2003) 'Nachbemerking des Herausgebers' in Adorno, TW *Vorlesung über Negative Dialektik* supra note 12 at 343; Adorno, TW *Negative Dialektik* note 16 at 41, respectively.

negates both the radical situatednesses of foreign law and of the comparatist, one can argue that '[comparative] thought itself [...] is negativity' and that it is therefore 'the thing that is to be criticized'.<sup>18</sup> In sum, (orthodox) 'comparative law''s epistemic denegation must be revealed, and a negative comparative law deployed in order to overcome positivism's 'comparative law'. I am mindful of Kafka: while 'the positive is already given us', '[t]o do the negative is still imposed on us'.<sup>19</sup> I have therefore decided, with a nod to Adorno, to Professor Frankenberg, and to Frankfurt also, to name my book — to appear with Routledge, like Adorno's translation — *Negative Comparative Law (NCL)*.<sup>20</sup>

Under this title, I attack the epistemic distortions that the orthodoxy within 'comparative law' has been content to accommodate and has indeed actively sought to consolidate. I condemn the epistemic travesties that have long made mainstream comparativism uncreditable, that have rendered it 'crude'.<sup>21</sup> In other words, I negate the orthodoxy's negation of the foreign law-world's irreducible differentiation from the comparative legal mind and therefore of foreign law's intractable singularity vis-à-vis the comparative legal mind. In the process, I seek to rehabilitate facticity, to restore the merit of local knowledge on the understanding that there is simply no foreign law or no comparatist without a minimal colour, taste or locative twang, without a distinguishing grain tying it to a particular place. Not in the least nihilistic (I am in principle *for* foreign law and *for* the comparison of laws), not fundamentally sceptical (I emphatically advocate epistemic *realism*), arguably 'fortif[y]ing',<sup>22</sup> my negation, as it defies the logic of non-contradiction, is simultaneously deconstructive (it exposes and dismantles the epistemic refutations long perpetrated by 'comparative law''s orthodoxy) and reconstructive (it activates and releases reparative, newly confident, more rewarding epistemic possibilities). I mobilize, so to speak, 'two hands, two gazes, two hearings [,] [t]ogether at once and separately'; and I make clear, incidentally, that deconstruction intervenes as a protocol of reading that simply cannot be equated with destruction.<sup>23</sup> In effect, deconstruction pertains to vigilance, scrutiny and audacity.

Needless to add, the fact that my book should be adopting (and adapting) one of Adorno's principal insights cannot be taken to suggest that I am applying Adorno's views in their entirety. To be sure, I fashion an Adorno, my Adorno — and I adjust this Adorno to 'my' contemporary circumstances (which are emphatically not the ones that prevailed from the 1930s to the 1960s as Adorno was writing). Still, Adorno does not enter my work as mere adornment. Indeed, I ascribe a pivotal role to his central enunciation

<sup>18</sup> Adorno, TW *Vorlesung über Negative Dialektik* supra note 12 at 34.

<sup>19</sup> Kafka, F (1953 [1917]) 'Betrachtungen über Sünde, Leid, Hoffnung und den wahren Weg' in *Gesammelte Werke* Brod, M (ed) vol IX Fischer at 42.

<sup>20</sup> Routledge matters to me in other respects, not least because in 1938 it released *Murphy*, Samuel Beckett's first published novel, after the text had suffered 42 rejections. See Cohn, R (2001) *A Beckett Canon* University of Michigan Press at 72-73.

<sup>21</sup> The word is Tribe's: Tribe, LH (2004) 'Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name' (117) *Harvard Law Review* 1894 at 1931. Tribe was reacting to references to European Court of Human Rights judgments in *Lawrence v Texas*, 539 US 558 (2003), as part of the Court's reasoning in overturning a 1986 decision of its own.

<sup>22</sup> Cf Beckett, S (1999 [1946]) 'Rue de Vaugirard' in *Poèmes* Editions de Minuit at 16: '[T]hen [I] start again fortified/by an irrecusable negative'.

<sup>23</sup> Derrida, J (1972) *Marges* Editions de Minuit at 375. There are many passages in Derrida, often overlooked (not least by his detractors), to the effect that deconstruction segues into reconstruction. For example, see Derrida, J (2003 [1985]) 'Lettre à un ami japonais' in *Psyché* (2nd ed) vol II Galilée at 389.

about the self's conceptualism or its categoricity being unable to correlate with the world. At this juncture, I want to elaborate on Adorno's contention with specific reference to the dynamics between foreign law and the comparative legal mind.

Foreign law *is* accessible to thought. It is not therefore that foreign law is unthinkable by a comparative legal mind. But comparative thought cannot control or possess or know foreign law fully since — to put the matter in basic epistemic terms — the self cannot be the other. All that the interpreter can ever accomplish is to propound a transposition of foreign law into 'his' language, into 'his' thought (as if language and thought belonged). But this transfer must entail a *transformation* of foreign law because by definition, so to speak, foreign law (being *foreign*) does not exist in the interpreter's language or according to his thought. It follows that the self-same foreign law cannot be transported from (its) world to (the comparatist's) mind, identically. As it is interpreted, it finds itself instantaneously re-stated and thereby modified. This conundrum evokes translation: whether the text in translation leaves remainders or features accretions vis-à-vis the text being translated, it is never, strictly speaking, identical to it.<sup>24</sup> There is iteration (a repetition with a difference), and there is agonism (an adversarial confrontation that never gets completely resolved).

Regarding language, one fallacy that the advocates of an *adaequatio* between *res* and *intellectus* — the proponents of seamlessness across the knowable foreign law-world and the knowing comparative mind — appear frequently to indulge concerns the very place that language occupies as the mind attempts to make sense of the world. Indeed, those who assume that the knowing comparative mind can servilely duplicate the knowable foreign law-world seem to think that language comes after the fact, that it can survey facticity and from its vantage of subsequence convey the knowable world as such, *comme tel, an sich*. But this configuration misunderstands the operation of language whose working is rather one of *obsequence*. It is not, then, that language intervenes once facticity is clearly *in situ* and the only question outstanding becomes the issue of formulation. Rather, language acts at a much earlier stage as a *condition* of apprehension of the knowable world. It is always already present within world-appreciation, which means that it is impossible to imagine any understanding of the world other than through and as language. Consider Martin Heidegger's formulation: '[W]e do not say what we see, but on the contrary we see what one says about the matter'.<sup>25</sup> In other terms, language is an intrinsic part of any act of sense-making of the foreign law-world by the knowing comparative mind. Language, as it purports to be indexical and as it is effectively performative, is what opens the knowable law-world to intelligibility before all else, *thus* making possible ascription of meaning by the knowing comparative mind. It follows that the knowable foreign law-world comes to the knowing comparative mind through language and as language, a fact that must entail the need to revisit any appreciation of language as emphasizing representation over signification — or, if you will, denomination over differentiation.

I have indicated that the *res*, when it is processed into the *intellectus* through and as language, finds itself being altered there and then (the *intellectus* likewise being changed on account of its meeting with the *res*). A somewhat hackneyed analogy may perhaps

<sup>24</sup> Famously, Ortega y Gasset mentions 'deficiencies' and 'exuberances': Ortega y Gasset, J (1994 [1946]) 'La reviviscencia de los cuadros' in *Obras completas* (2nd ed) vol VIII Alianza at 493.

<sup>25</sup> Heidegger, M (1994 [1925]) *Prolegomena zur Geschichte des Zeitbegriffs* (3d ed) Jaeger, P (ed) Klostermann at 75.



be drawn, *pace* Alan Sokal, with Heisenberg's findings to the effect that the photon, as a measurement tool, alters the electron in the very act of measurement (and has its own frequency modified because of this encounter). From the standpoint of the knowing comparative mind, the knowable foreign law-world, being available to it only through and as language, is inherently heterogeneous and ambiguous — any Cartesian or neo-Cartesian idea that it would manifest itself *evidently* thus being found unsustainable. Indeed, from the moment it comes to cognizance linguistically, the knowable foreign law-world's autonomy is compromised because the linguistic input, photon-like, changes it, so that it is no longer 'itself'. In the way the word 'circle' is not the circle itself, representation is 'something' (a reality) besides the entity that it is representing (another reality). But representation in effect asserts itself rather than allowing what is being represented to do so, even though it is initially meant simply to bring the entity it is representing into presence. Instead of fading out of view, representation pushes to the fore, so to speak. In the process, representation operates an incursion (of the means of representation themselves such as words or insights) into the reality of the entity being represented that forfeits transparency vis-à-vis what is being displayed, that entails that the 'as-suchness' of what is being displayed is ultimately suppressed. Hans-Georg Gadamer thus observes how 'an intrinsic distortion-tendency' characterizes representation. Whatever its necessity, representation is inherently adulterating: it detracts.<sup>26</sup> It intervenes, in sum, as *re-representation*. And because there cannot be a degree zero of re-representation, it is the case that the knowable world 'always slips away',<sup>27</sup> that there is undeniably an agonistic dimension to the matter of reprise. Accordingly, it makes sense to refer to a *negotiation* taking place between the knowing comparative mind and the knowable foreign law-world. Because no comparatist is working on a fictitious statute or judicial decision, reports on foreign law do feature a measure of indexicality. But it remains that an account of the statute is not, and cannot be, the statute itself; though the statement points to the statute, it is inevitably at variance with it: there is a hiatus, a *heurt*, an *Anstoß*.

Given the co-presence of more than one entity (the world/the mind) or more than one text (the translated source-document/the target-document in translation), what cannot be had, I repeat, is identity. Co-presence is *differential* co-presence. Importantly, it does not follow from these observations that Italian comparatists should refrain from interpreting English law or that literary critics ought to abstain from translating Coetzee into French. It should go without saying that such intercultural motions are in fact politically or ethically indispensable in response to the other's summons — the other being *there* and his 'thereness', unbidden, intransigently and insatiably hailing one, making a claim on one, demanding one's recognition and one's respect. Yet, it must be appreciated that even as they materialize, these interventions are implementing the experience of the epistemically impossible. What is undertaken — say, the Italian comparative mind's rendition of English law or the translative mind's transcription of Coetzee into French — is the effectuation or the making-possible of what can only be experienced as the impossible.<sup>28</sup> Otherwise put,

<sup>26</sup> I draw closely on Gadamer: Gadamer, H-G (1985 [1964]) 'Dialektik und Sophistik im siebenten platonischen Brief' in *Gesammelte Werke* vol VI at 100-01. The quotation is at 100.

<sup>27</sup> Derrida, J (1967) *La Voix et le phénomène* Presses Universitaires de France at 117. With specific reference to research into foreign law, the foreignness of the law necessarily slips away in the sense that from the moment the comparatist devotes himself to what he regards as foreign law, that law is in effect no longer foreign to him.

<sup>28</sup> Derrida refers not to the impossibility of translation, but to 'the very experience of the (impossible) possibility

English law in Italian or Coetzee in French is the experience of an impossibility that the comparative or translative mind makes happen (qua impossibility), because it must.

To maintain, like Adorno, that the world (the foreign law) escapes the mind (the comparatist's thought) even as the mind presses itself on the world, invites a more detailed explanation still. Why is it, then, that foreign law cannot be exactly duplicated by a comparative legal mind aiming to report exhaustively upon it?<sup>29</sup> The two-pronged answer I offer focuses on a contestation of the metaphysical idea of 'dualism'. First, I claim that world and mind, with specific reference to foreign law and comparative thought, are *not apart enough* so that world can exist out of mind — which alone would make it theoretically possible for the mind to approach it like an object and to report on it objectively. Secondly, I argue that world and mind — again, I am thinking of foreign law and comparative thought — are *apart enough* so that there exists between the two an uneliminable gap preventing communication and denying the possibility of fully-fledged objectification.

My first contention is that 'fact' (the knowable foreign law) cannot be radically distinguished from 'value' (the knowing legal mind) in a way that would avoid any overlap whatsoever. There is simply no hope of such a definitive delineation materializing since both modes of existence belong to the same chain of reference. In other terms, there is an epistemic continuity manifesting itself between the knowable foreign law-world and the knowing comparative legal mind through the different stages of the strategy of appropriation of foreign law being (more or less sequentially) implemented by comparative thought — hence the inability of the mind to detach itself from the world (and to see it) as the practice of objectivity would require. Think of the reading of books and articles, the taking of notes, the conduct of empirical research, the taking of more notes, the interpretation of information, the reading of further books and articles, the taking of additional notes, the crafting of a thesis, the identification of authorities, the framing of a text, the formulation of sentences, the selection of words, the writing of references, the many revisions of the text, the preparation of the text for publication, the rectifications dictated by the external reviews, the submission of a final version to the publishers and the mixture of final emendations and demands for reinstatement of one's text at proof stage.

Yet — and this is my second assertion — a foreign law-world and a comparative legal mind do not have the same mode of existence, hence the inability of the mind to attach itself to the world (and to know it) as the practice of objectivity would require. Ultimately, foreign law and the comparative mind cannot relate or, if you will, they can only *disrelate* — hence, for example, the inability of the comparatist to account for the foreign law-world exhaustively. Before considering an illustration that I derive from the anthropological work of Bruno Latour, I want to emphasize the symbiotic intimacy of the assemblage between foreign law-texts and the comparative mind (*not apart enough*) even as the two entities exist differently from one another (*apart enough*). I draw on philosopher Peter Sloterdijk who, adopting and adapting certain Heideggerian motifs, offers a particularly fruitful line of

of the impossible': Derrida, J (1993) *Sauf le nom Galilée* at 32.

<sup>29</sup> Unsurprisingly, orthodox 'comparative law', bringing to bear its jejune epistemology, calls for 'scientific exactitude' in comparative accounts: Zweigert, K and Kötz, H (1996) *Einführung in die Rechtsvergleichung* (3d ed) Mohr at 44. The English version of this work — Zweigert, K and Kötz, H (1998) *Introduction to Comparative Law* (3d ed) Weir, T (trans) Oxford University Press at 45 — is much better known to comparatists than the original. Further references are accordingly to the English text only.

(metaphorical) reasoning showing how world and mind must be seen to form part of one integrated arrangement though they continue to exist differently from each other.

As the comparatist transports himself away from himself towards a foreign law-text, as he puts himself outside himself, *hors de lui, aus sich heraus*, as the law-text becomes the medium of his expansion, he creates a space of co-existence, an interior, a solidarity, a sphere of intimacy embracing the text (which then constitutes a release from selfhood's automatism). In Sloterdijk's language, the comparatist's exoteric mission stands as an act of 'sphere-formation'.<sup>30</sup> This situation has nothing to do with 'a merely dominating control by a subject over a manipulable object mass'; instead, it involves the foreign law-text being ascribed meaning through a breathing-in of inspiration, that is, there takes place an arousal of the law-text to animated life, so that it can be seen 'as a *canal* for breathing by an inspirator'.<sup>31</sup> But there is mutuality at work. In other words, 'a reciprocal, synchronously interchanging relationship between the two breath poles [the breather and the one breathed on] comes into effect as soon as the infusion of the breath of life into the [other] is complete'.<sup>32</sup> As the comparative legal mind confers an 'increase in being' to the foreign law-text, the text, too, ascribes an 'increase in being' to the comparatist as the comparatist-at-law that he is becoming.<sup>33</sup> Because the comparatist is the comparatist he is in so far as he is addressing the foreign law-world revealing itself to him, the comparatist is himself affected by the foreign law on which he is reporting. He becomes a different comparatist, a changed comparatist, for having investigated this foreign law rather than that, for having inquired about it in this manner rather than that and for having reached these interpretive conclusions rather than those.

Indeed, the foreign law-text, 'a hollow-bodied sculpture awaiting significant further use', 'only awakens to its destiny' on account of the comparatist's attribution of meaning to it.<sup>34</sup> The interpretive process thus expresses itself as 'a correlative duality from the start'; it is 'a dyadic union from the start, a union that can only last on the basis of a developed bipolarity. The primary pair floats in an atmospheric biunity, mutual referentiality and intertwined freedom from which neither of the primal partners can be removed without canceling the total relationship'.<sup>35</sup> In other terms, there exists an entity like the-foreign-law-text-and-the-comparatist, and '[t]he two are bonded'.<sup>36</sup> Because 'there cannot possibly be such a sharp ontological asymmetry between the inspirator and the inspired', it may help to think of 'a relationship of pneumatic reciprocity', to envisage a 'pneumatic pact'.<sup>37</sup>

However, the assemblage I discuss changes nothing to the fact that the foreign law-text and the comparative legal mind operate according to different modes of existence, which means that, though they are proximately gathered, they ultimately remain at an unoverpassable distance from one another. When it comes to the foreign law-text being scrutinized by the comparative legal mind, inevitable failure always already awaits 'all

<sup>30</sup> Sloterdijk, P (1998) *Sphären* vol I Suhrkamp at 14.

<sup>31</sup> Id at 40 and 39, respectively [emphasis original].

<sup>32</sup> Id at 40.

<sup>33</sup> The expression 'increase in being' (*'Zuwachs an Sein'*) is in Gadamer, H-G (1990) *Wahrheit und Methode* (6th ed) Mohr at 145.

<sup>34</sup> Sloterdijk, P *Sphären* supra note 30 at 33 and 35, respectively. Cf Gadamer H-G *Wahrheit und Methode* supra note 33 at 390, who writes of the interpretive 're-awakening of the text's meaning'.

<sup>35</sup> Sloterdijk, P *Sphären* supra note 30 at 42.

<sup>36</sup> Id at 44.

<sup>37</sup> Id at 40, 41 and 44, respectively.

the attempts at passage, at bridge, at isthmus, at communication, at translation, at trope and at transfer that [one] [...] will try to pose, to impose, to propose, to stabilize'; within the assemblage, 'there are only islands' (instead of anything like a shared horizon).<sup>38</sup> In other words, while a continuous chain of reference (the reading, the musing, the discerning, the writing) can be seen to be joining the foreign law-text and the comparatist into a Sloterdijkian assemblage, thus annulling the rigidly dualist Cartesian dichotomy, it remains that the structural gap, the disjointure, across modes of existence cannot be overcome, so that the foreign law-text incontrovertibly persists in existing as text and the comparative legal mind as mind. The analogy with translation obtains here also for the text in translation is necessarily 'maladjusted' vis-à-vis the text being translated, which means that even '[t]he excellence of the translation cannot help it'.<sup>39</sup> If you will, there takes place the shared exposure of the foreign law-text and of the comparative legal mind to the incommensurability that separates their singularities and finitudes within their *compearance*. Sloterdijk's idea of 'sharedness' thus resolves itself, in effect, as a situation of *shared-separation*, as a 'partaking' or '*partage*' (interestingly, verbs like 'to partake' or the French '*partager*' mean at once 'to share' and 'to separate').<sup>40</sup>

Latour's example, which I have been heralding, appositely captures both facets of the configuration I discuss — the linkage and the breakage.<sup>41</sup> Latour asks us to imagine a mountain and a map of the mountain. From the perspective of the cartographer, it seems undeniable that there can be discerned a continuous chain of reference joining the mountain and the map into an assemblage. Think only of the surveying, the drawing, the captioning and the printing. Any idea of straightforward dualism is therefore untenable. As the cartographer looks at his map, for instance, the fact of the mountain cannot be isolated from his evaluation of it. In other words, the drawing before the cartographer's eyes is *at once* the fact of the mountain and his evaluation of it. Fact and evaluation are entwined, there, on the map, and it would be ultimately impossible as one looks at the drawing to distinguish them from each other.<sup>42</sup> For the cartographer charting and captioning his map, the mountain is no longer strictly a brute object standing in front of him, obdurately 'out there' with an absolutely discrete existence.<sup>43</sup> No objectification, that is, no veridiction (or

<sup>38</sup> Derrida, J (2010 [2002]) *La Bête et le souverain* Lisse, M, Mallet, M-L and Michaud, G (eds) vol II Galilée at 31.

<sup>39</sup> Derrida, J (1993) *Spectres de Marx* Galilée at 43.

<sup>40</sup> For an insightful exploration of the trope of 'shared-separation', see Ricco, JP (2014) *The Decision Between Us* University of Chicago Press. Ricco draws on Nancy, who applies himself to the semantic tension inherent to the French term. For example, see Nancy, J-L (1982) *Le Partage des voix* Galilée. Derrida pithily captures this conundrum as he writes: 'We know in common that we have nothing in common': Derrida, J and Ferraris, M (1997 [1994]) '*Il gusto del segreto*' Laterza at 52. The words are Derrida's and the translation of his text from the (unpublished) French is Ferraris's.

<sup>41</sup> See Latour, B (2012) *Enquête sur les modes d'existence* La Découverte at 80-104.

<sup>42</sup> Heidegger refers to the 'essential togetherness' of world and mind: Heidegger, M (1957) *Identität und Differenz* Neske at 27.

<sup>43</sup> Note that I do not deny the physicality of the mountain. Of course, if one throws oneself at the mountain, one will hurt oneself, and if one plunges into the air from the top of the mountain, one will in all likelihood kill oneself. If authority be needed, see generally Dreyfus, H and Taylor, C (2015) *Retrieving Realism* Harvard University Press. But 'physical nature does not organize itself culturally' (Harding, S [1992] 'After the Neutrality Ideal: Sciences, Politics, and "Strong Objectivity"' [59] *Social Research* 574 at 574-75), and my concern here is foreign law, that is, texts. It remains apt to assert, from this specific vantage point, that '[t]here is no out-of-text' (Derrida, J [1967] *De la grammatologie* Editions de Minuit at 227) in the sense at least that foreign law cannot meaningfully exist in a beyond of textuality: foreign law cannot meaningfully exist beyond the texts in which it is inscribed nor beyond the texts in which the comparatist inscribes it.

no truth-telling) of it *as such* is therefore possible. Incidentally, neither objectification nor veridiction as such can obtain no matter what topographical method the cartographer may have used.

Still, it seems incontrovertible that the map simply does not exist in the same way as the mountain: each entity has its own mode of existence. What one therefore does not, and cannot, have is ‘a *maintenance* of the same on the same’.<sup>44</sup> In other words, ‘however far they go, however well equipped they are, however fine the mesh, however complete their “coverage”, however competent their operators, chains of reference can never be *substituted* in any way for what they know’; indeed, ‘nothing looks less like [the mountain] than the map of [the mountain]’.<sup>45</sup> Accordingly, there arises the inevitability of differential co-presence. On reflection, the deployment of co-presence is more complicated still since there are many maps of the mountain in existence, different apprehensions of the mountain all — large-scale or small-scale, colour or black-and-white, three-dimensional-plastic or paper. Likewise, the knowing comparative legal mind, culturally embedded as it inescapably is (no comparatist exists ‘in the air’), apprehends the knowable foreign law-world according to sets of specific phenomenological assumptions and pursuant to particular articulations of analytical abstractions (which postulate exclusions). It follows that, depending on their location, different comparatists will regard a certain foreign law differently. Observe how these processes show ‘place’ not as a mere static backdrop to legal meaning, but reveal it to be acting as a dynamic constituent of law.<sup>46</sup> They also display the differentiation I discuss across modes of existence as being irreducible.

On the matter of irreducibility, I find it helpful to recollect Borges and one of his trademark one-paragraph stories. There was an empire where the art of cartography had been developed to such perfection that the map of a single province occupied a whole town, and the map of the empire covered a whole province. In time, though, even these enormous maps no longer satisfied, and the college of cartographers established a map of the empire that was the size of the empire and coincided with it point for point. Subsequent generations reflected that this inflated map was useless and abandoned it.<sup>47</sup> As I read him, Borges’s lesson is that for a representation to prove beneficial, it must be a re-presentation, a presentation anew, another presentation, a presentation at variance with that which it brings into presence. In Borges’s narrative, the difference takes the form of a necessary reductionism. The same goes for Latour’s illustration: even as it is bound to entail differentiation, the map of the mountain *must* be smaller than the mountain. In Latour’s words, ‘[i]t is through *loss* of resemblance that the formidable effectiveness of chains of reference is won’.<sup>48</sup> As I have been arguing, the interpreter of the world *cannot* claim to be representing the world; a re-presentation, that is, another presentation or a different bringing-into-presence of the world is all that can be had: ‘[I]n a certain way everything

<sup>44</sup> Latour, B *Enquête sur les modes d'existence* supra note 41 at 119 [emphasis original].

<sup>45</sup> Id at 84 and 86, respectively [emphasis original].

<sup>46</sup> In other terms, ‘place’ is not simply a physicalist conception: it is also an existential notion. Law emerges only in and through place. Law and place are thus inextricably ravelled, which implies that law can be constitutive of place in its turn. For law, any law, to be ‘as law’, it must stand forth in terms of an experience of place. It must *dwell*; there is no ungrounded law.

<sup>47</sup> Borges chose to include this essay, originally entitled ‘*Del rigor de la ciencia*’, in the critical apparatus of the French edition of his complete works: Borges, JL (1993 [1946]) ‘Histoire universelle de l’infamie’ in *Œuvres complètes* Bernès, J-P (ed) vol I Gallimard at 1509.

<sup>48</sup> Latour, B *Enquête sur les modes d'existence* supra note 41 at 88 [emphasis original].

“begins” through re-presentation’.<sup>49</sup> But this epistemic insight has to mean that the indexicality of interpretation must be relativized and allowance made for predispositions, predilections, inclinations, propensities, orientations, prejudices, blind spots, slants, biases and lapses.

With respect to the re-presentation of the foreign law-text, Latour’s and Borges’s arguments entail that as comparative thought considers the other’s law, it has to re-present it, that is, feature it, on a smaller scale, on the self’s scale, thereby resigning itself to the attendant differentiation between *interpretandum* and *interpretans*. A foreign law-text, as it manifests itself and as it is experienced through the interpretive work of the comparatist, just like Latour’s mountain as it manifests itself and as it is experienced through the interpretive work of the cartographer, falls insuperably beyond the ‘subject’ (a term which, incidentally, warrants provisional use only) even as it is the outcome of the self’s ‘own’ configuration. I claim that the comparative legal mind cannot supply concepts or categories — that it cannot draw a map — that could account identically for the foreign law-text under examination. This situation carries two crucial consequences: that the existence of foreign law for the comparatist is largely settled by what he means it to mean, and that the interpretation of foreign law by the comparatist can never correspond to foreign law as it has been existing. Just as importantly, though, in the same way as the map of the mountain, while different from the mountain in existence, can guide the trekker on his journey, the comparatist’s reading of foreign law, even as it differs from the foreign law in existence, even as it articulates knowledge of foreign law into its next iteration rather than simply record it, can guide the jurist in search of understanding. The following example purports to concretize these various assertions.

•

A young Canadian comparatist fluent in English and French, a graduate of renowned law schools in Canada, the United States and England, Imogene has been taught by her doctoral supervisor to think critically about ‘comparative law’, to adopt a discourse seeking to change the way ‘we’ read ‘our’ foreign laws, to focus on the agency of the law-texts themselves, on what they make possible. Against the background of her thorough familiarity with Jacques Derrida (whose work she strongly feels well deserves to be extracted from the horrible penumbra of gossip and worship that surrounds it), she has been trained to apply both deconstructive and reconstructive aspects of Derrida’s legacy to her research into foreign law. As she prepares to mobilize her intellectual equipment in order to ascribe meaning to the 2004 French statute prohibiting school attire whereby students ‘conspicuously’ demonstrate their religious allegiance (the French word is ‘*ostensiblement*’), Imogene is well aware that if her scholarly itinerary had differed, she would not be the comparatist-at-law she is becoming. Only the other day, in fact, she was discussing with a doctoral candidate at the University of Copenhagen whose comparative outlook is resolutely at variance with hers on account of a thoroughly different disciplinary institutionalization.

Taking some pride in having successfully disentangled herself from the bureaucratic thicket apparently designed to keep books and readers apart as much as possible, Imogene

<sup>49</sup> Derrida, *J La Voix et le phénomène* supra note 27 at 50.

makes her way to the small and dilapidated Sorbonne law library where she is extremely lucky to find a seat. In order to optimize the six weeks she has at her disposal to consult French primary materials, she has come prepared with a list of references. Disappointment soon colours Imogene's work, though, as she is told that two early XXth-century books she had very much wanted to read are missing from the stacks. One of the two texts, an unpublished doctoral dissertation, appears not to be available anywhere else in France, and Imogene resigns herself to the fact that her research will have to forego that source of information. As for the other book, she orders it from Bordeaux through the inter-library loan system. Apart from these initial difficulties, Imogene finds her weeks in the Paris library to be on the whole very productive (despite the considerable amount of time she must waste while waiting for the strictly regulated number of works that she can consult daily to be retrieved by librarians one by one from stacks firmly out of bounds to her).

Making the most of the rainy and blustery November days, Imogene manages to accumulate a not inconsiderable quantity of textbooks, handbooks and guides; many articles from leading and lesser-known journals; and, of course, an evergrowing pile of photocopies from statutes and, mostly, from judicial decisions. She is also able to collect various committee reports commissioned by diverse French governments over the years — the kind of information that, along with parliamentary debates, not even the Internet would have allowed her to consult if she had not travelled to Paris and succeeded in gaining access to the Sorbonne law library. And then, there are the microfilms and microfiches that, as irritating as they can be to access and handle, make available newspapers from decades ago.

Having been sensitized to the negative contention that there can be no correlation between the foreign law-world and the comparative legal mind, Imogene is nonetheless extremely keen to enhance her understanding of foreign law as much as is possible. She knows the best 'tool' at her disposal is *tracing*. Her supervisor taught her to trace, and she has since become a determined and sophisticated tracer in her own right. Tracing, as Imogene was telling her Parisian friend at the café (an aspiring law professor), is basically an excavation exercise. It involves the kind of archeological or genealogical work that makes it possible to reach a deep understanding of foreign law by unearthing its worldly connections, the basic assumption being that a law cannot help being connected, worldly, *cultural*, even as it remains obstinately singular. However, tracing assumes a negative view of the understanding with which orthodox comparatists have invested the word 'law'. Following upon the initial negative claim that I have sketched to the effect that there cannot be representation, this second negative argument concerns the making of law.

While for orthodox comparatists '[an] explanation must encompass the law as a whole, but nothing beyond the law',<sup>50</sup> while the orthodoxy focuses on what has been stated by relevant officials as 'what the law is' ('I am concerned with what the law [i]s',<sup>51</sup> declaims a leading orthodox comparatist), Imogene makes the negative allegation that there is no possibility for law ever to close on itself, to enclose itself within its own interiority where only or purely law, bare law, would be present. Because every law is emplaced, any idea of a 'legal' *proprium* is, in effect, out of place. But what does it mean to refer to law's

<sup>50</sup> Michaels, R (2006) 'Two Paradigms of Jurisdiction' (27) *Michigan Journal of International Law* 1003 at 1017.

<sup>51</sup> Gordley, J (2007) 'When Is the Use of Foreign Law Possible? A Hard Case: The Protection of Privacy in Europe and the United States' (67) *Louisiana Law Review* 1073 at 1081.

emplacement? Basically capturing Adorno's earlier point that 'facts [...] come to fulfilment only in the development of their social, historical, and human significance', Imogene argues that 'law is thoroughly a cultural construct'.<sup>52</sup> (A notoriously difficult term, not so familiar to jurists, 'culture' solicits explication as Imogene's café conversation readily confirmed to her.<sup>53</sup>)

Over time, Imogene has found it helpful to fashion and refine her understanding of tracing chiefly through a consideration of Derrida's insightful and influential theorization of the idea of 'trace'. As a philosopher who devoted much of his work to the dynamics between text and interpreter and between self and other, arguably the sites of 'comparative law''s two main concerns, Derrida has been a constant source of inspiration for Imogene since she embarked on her doctoral studies. As I proceed to explain Imogene's Derridean appreciation of tracing, a deconstructive troubling of legal identity, I do so bringing to bear Giorgio Agamben's characterization: 'Every culture is essentially a process of transmission and of *Nachleben*'.<sup>54</sup> '*Nachleben*' harbours a posthumous dimension, the notion of an after-life. More precisely, it combines the figures of 'survival' and 'influence' in a manner perspicuously evoking law-as-culture and, as I shall elucidate presently, culture-as-trace and trace-as-law.

It is relevant to observe at the outset that in Rome a '*textor*' was a weaver and that '*texere*' was 'to weave'. A text is indeed a fabric (consider the word 'textile'). A law-text thus exists as an interface where an array of discursive threads have come together to be absorbed and transformed in order to be made to *speak legally*. These threads operate to colligate or fasten or bind or band *as the law-text* as they amalgamate to constitute it. A thread leaves a discernible *trace* within the law-text entailing that the text exists as 'a fabric of traces',<sup>55</sup> that it is knotty. For example, traces of historical configurations enmeshed with traces of political rationalities intertwined with traces of social logics interwoven with traces of philosophical postulates plaited with traces of linguistic orders darned with traces of economic prescriptions interlaced with traces of epistemic assumptions morph into a foreign statute, that is, they become *jurimorphs*.<sup>56</sup> Crucially, the discourses therefore assembling to constitute a law-text, thus being gathered consciously or not by the author of the text (say, the legislator drafting a statute or the judge writing an opinion), are not to be regarded as external to the law-text or contextual *vis-à-vis* it or as some sort of parergon pertaining to the realm of non-law. Rather, these discourses concern the very texture of the law-text: they inform the making or fabrication of it, and they remain of it, as survivancies, once the law-text has emerged as law-text. Again, they leave a *trace* within the law-text that reveals how the text is marked, from its very inception, *ipso facto*, as the instantiation

<sup>52</sup> Tamanaha, BZ (1997) *Realistic Socio-Legal Theory* Oxford University Press at 128.

<sup>53</sup> One may want to begin with Rosen, L (2006) *Law as Culture* Princeton University Press; Kahn, PW (1999) *The Cultural Study of Law* University of Chicago Press; Bhabha, HK (1994) *The Location of Culture* Routledge; Richerson, PJ and Boyd, R (2005) *Not by Genes Alone* University of Chicago Press.

<sup>54</sup> Agamben, G (1977) *Stanze* Einaudi at 131 [emphasis original]. For detailed discussion, see Legrand, P, 'Siting Foreign Law: How Derrida Can Help' *supra* note 8.

<sup>55</sup> Derrida, J (2004 [1979]) 'Living On' Hulbert, J (trans) in Bloom, H et al *Deconstruction and Criticism* Continuum at 69.

<sup>56</sup> The term is McGee's. It is also deployed by Latour, who credits McGee. See McGee, K (2015) 'On Devices and Logics of Legal Sense: Toward Socio-Technical Legal Analysis' in McGee, K (ed) *Latour and the Passage of Law* Edinburgh University Press at 61-92; Latour, B (2015) 'The Strange Entanglement of Jurimorphs' in McGee, K (ed) *Latour and the Passage of Law* Edinburgh University Press at 331-53.



of a historical configuration, a political rationality, a social logic, a philosophical postulate, a linguistic order, an economic prescription, an epistemic assumption and so forth. On account of these ascertainable traces, a law-text thus conceals remains or vestigial presences; it retains the past. It follows that one can associate the naming of a trace to a work of mourning: the thought of the trace involves acceptance of death — the historical configuration, the political rationality and so forth that inform the law-text existed *before* the law-text's emergence into textuality, and they no longer exist in the way they once did. Death, then, is at work in the text, within what remains alive, within what *lives on* as the law-text, within the law-text as the living dead — hence, Agamben's '*Nachleben*'.

Borrowing the spectral metaphor, one of the leading tropes in Derrida's work on texts and interpretation, it can be said that the various traces *haunt* law-texts. In Derrida's terms, 'the spectral structure is the law here'.<sup>57</sup> Once more, it is not that the traces form a network constituting the law's context so that the traces would exist, if you will, besides the law. It is indeed important to emphasize that the traces are *not* contextual vis-à-vis the text. Rather, through a practice of linguistic encryption (traces are encrypted within the text as crypt), they innervate the law-text into which they have morphed ('[ghosts] are engrained in our language'),<sup>58</sup> to the point where they *are* the law-text itself and make it, in effect, a polytext. Think of seamless suturing. Since they have been '[b]uried alive' as constitutive elements of the text,<sup>59</sup> because they are 'not out-of-text' (to borrow Derrida's famous words once more), neither out of the law-text nor out of the law, the traces cannot justifiably — as a matter of the interpretive justice owed to the text — be out-lawed, for example, by the comparative legal mind. For the text's interpreters to relegate the traces to the exteriority of the text, as orthodox comparatists-at-law have reflexively been doing,<sup>60</sup> is to institute an 'artificial exteriority' through striation.<sup>61</sup> It is also to engage in a serious distortion of the law-text. Indeed, the traces are the text's *textness* itself, which means that the text exists *as its traces*. As much as orthodox comparatists-at-law wish to ignore them, textual traces exist in real space and time. A trace '*ist der Fall*'.<sup>62</sup> As Imogene stares at the French statute on religious dress at school before the library closes its doors yet again for a number of days, she acknowledges that the traces are *of* the law-text, *there*, and that it is her tracing that allows her access to the hidden architectonics of the textual construction.

To pursue the illustration of a foreign law-text, it is the comparatist who is 'that someone who holds gathered into a single field all the traces of which the text is constituted'.<sup>63</sup> It

<sup>57</sup> Derrida, J (1990) *Papier machine* Galilée at 307.

<sup>58</sup> Davies, O (2007) *The Haunted* Palgrave Macmillan at 249.

<sup>59</sup> Wigley, M (1993) *The Architecture of Deconstruction* MIT Press at 169.

<sup>60</sup> For example, see Michaels, R 'Two Paradigms of Jurisdiction' supra note 50 at 1017, who maintains that a comparative account 'must remain within the law without taking recourse to general societal culture, because culture and its relation to the legal rules and institutions are unclear'. See also Milhaupt, CJ and Pistor, K (2008) *Law and Capitalism* University of Chicago Press at 208: '[T]he open-ended concept of "culture" opens a Pandora's box of interpretive nightmares'. For further besmirching of culture, see Basedow, J 'Comparative Law and Its Clients' supra note 7 at 836 n 44, who would reject a heuristic role for culture on account of the fact that it cannot be *defined* crisply enough to assuage his craving for reassurance. How this scorched-earth epistemology reacts to the word 'democracy', one can only wonder.

<sup>61</sup> Derrida, J *De la grammatologie* supra note 43 at 52.

<sup>62</sup> I allude to the first sentence of Wittgenstein's *Tractatus*: Wittgenstein, L (1922 [1921]) *Tractatus Logico-Philosophicus* (bilingual ed) Ogden, CK (trans) Routledge and Kegan Paul at 30-31.

<sup>63</sup> Barthes, R (1967) 'The Death of the Author' Howard, R (trans) (5/6) *Aspen* [translation modified]. This three-dimensional magazine, a leading art publication that was released irregularly between 1965 and 1971, is unpaginated.

is he who pronounces on traces, who traces, through the making of singular interpretive decisions. And, yes, something different could always be said about the foreign law-text that would ignore *this* trace and insist on *that* trace, something more could always be written that would feature one more trace. In the words of Latour, 'a good account [i]s one that *traces a network*', one key question being 'how much energy, movement, and specificity our [...] reports are able to capture' as they enunciate, in performative manner rather than by means of direct indication, *what a foreign law exists as*.<sup>64</sup> In this regard, Derrida does very well to emphasize that 'the thought of the trace [...] cannot not take flair into account' (which means, at the very least, that the *modulations* informing Canadian research on French law depend on a profound knowledge of French culture and on a deep curiosity about it).<sup>65</sup> Out of the countless possible assemblages of the foreign law-text's constitutive traces that the comparative mind undertakes to display, all of them different from one another, it is crucial to observe that no aggregation can ever be complete. Because there is inevitably more tracing to be had, tracing always escapes finality. In this sense, tracing exceeds interpretive coordination — a variation on Adorno's claim regarding the unavoidable discrepancy between *interpretans* and *interpretandum*. I return to this assertion presently. Meanwhile, '[t]he more *attachments* [the text is shown to have], the more it exists'.<sup>66</sup>

Still as regards Adorno, he offers an argument about history that helps one in making sense of tracing. Adorno thus remarks that 'history does intrude on every word'.<sup>67</sup> This observation can be extended to culture generally for it is also politics, society, philosophy, language, the economy, epistemology *und so weiter* that 'intrude[s] on every word'. In other terms, '[a] text [...] is simultaneously the condensation of a scarcely delimitable history [...], of language, of the encyclopedia' — which entails that through the traces, as text, 'can be gathered the greatest potentiality of historical, theoretical, linguistic, philosophical culture'.<sup>68</sup> This fact shows that, in addition to its graphical features, a text — including a law-text — exists as an *encultured* entity, that a law-text operates as a massively incorporative cultural formation.

Imogene's tracing also pertains to enculturation in as much as it emerges out of the culture in which she herself exists. I must stress that it is the comparatist-at-law *himself* who brings the traces into interpretive existence, who makes the traces actively signify, who ascribes dynamic meaning to them, who acts as a facilitator of resonant sense. As he engages in the elevation to significance of certain traces rather than others, as he proceeds to emphasize the traces that he wishes to treat as relevant (while all traces are equally existent, not all of them will be deemed equally pertinent with reference to a given research exercise at a particular point in time), the comparatist is, strictly speaking, involved in a

<sup>64</sup> Latour, B (2005) *Reassembling the Social* Oxford University Press at 128 and 131, respectively [emphasis original].

<sup>65</sup> Derrida, J *De la grammatologie* supra note 43 at 233.

<sup>66</sup> Latour, B *Reassembling the Social* supra note 64 at 217 [emphasis original]. This is why Latour holds that '[a] good [account] should trigger in a good reader this reaction: "Please, more details, I want more detail[s]"': Id at 137. Nabokov, a foremost comparatist in the field of literary studies, was a tireless advocate of the significance of details. See Nabokov, V (1990 [1971]) *Strong Opinions* Vintage at 168: '[D]etail is everything'. As regards research into foreign law, the principal claim is that there cannot be over-singularization.

<sup>67</sup> Adorno, TW (1964) *Jargon der Eigentlichkeit* Suhrkamp at 11.

<sup>68</sup> Derrida, J (1992 [1989]) *Acts of Literature* Attridge, D (ed) Routledge at 43.

process of *iteration*.<sup>69</sup> This fact raises a further argument about his *invention* of foreign law, the term aiming to convey the tension between archive and narrative within the act of reading: through the fact of its affirmation as the saved text, the archive (say, the foreign law) makes itself vulnerable to the saving text (say, the comparatist's report) that risks distorting it on account of the interpretive displacement it necessarily operates.

As Imogene comes to the Sorbonne law library, the statutes, the judicial decisions and the other documents are there, waiting for her. These law-texts exist, materially. They are there before her and regardless of her. She is making her way to them, she is coming to find them, there. Etymologically, the word 'invention' captures this motion since in one key sense, it signifies 'to find'. 'To invent' is 'to find', thus the reputed finding of the Holy Cross by Helena, mother of Emperor Constantine, in 326 CE, known to Christians as the 'Invention of the Cross'. To be sure, the comparatist is unable to construct foreign law irrespective of the law-texts in front of him, there. And he cannot deliberately transgress them. As a matter of justice, he owes fidelity to them: there is the law of the text (and of the law-text), its injunction. If you will, Imogene must concede an element of recalcitrance to textuality. There is the force of the text, its retortion: *there is what the French statute on religious dress at school wants*. This ineluctable submission, a being-made-hostage to the materiality of the foreign law-text, saves the comparatist from connecting only and endlessly with his own thought, which would then become, unhelpfully, the exclusive focus of his (solipsistic) theorization. To be blunt, the materiality of the law-text preserves the comparatist from uncreditably saying of the 2004 French statute on religious dress at school that it concerns, for instance, ratemaking in international air transport.

But, crucially, tracing binds existential and performative claims together: as Imogene abides by the law-text before her, that she cannot forsake, she simultaneously proffers a rhetorical performance in the course of which the foreign law that there is, there, takes shape. It follows that Imogene's work — any comparatist's work — is *not* representational though, like Latour's map of the mountain, it retains a link with representation, no matter how tenuous (something like threshold indexicality, if you will), which is in fact indispensable for the comparatist to be able to act responsibly and *response-ably* vis-à-vis the foreign law-text: '[His] reading [...] cannot legitimately transgress the text towards something other than itself'.<sup>70</sup> This contention raises another crucial etymological signification of the word 'invention'. In this more familiar key, 'to invent' is 'to create' (as in 'to invent gunpowder' or 'to invent the iPad'). While the comparatist, out of fidelity to the foreign law-text, accounts for the traces that he finds, there, he inevitably proceeds in his 'own' interpretive key, that is, he enacts his 'own' interpretive resolutions drawing on his 'own' interpretive resources, not least because of the surfeit of available meaning that the traces carry between them, a situation forcing him into a prioritization of the information he wishes to convey about the foreign law-text.

Given that a full understanding of a text is literally unstateable, that it must always be deferred, because any narrative about a law-text has necessarily to be partial and provisional, there will persist, at the very least, as the comparatist secures his interpretive

<sup>69</sup> As I have observed, the term combines repeatability and differentiability, the primordial contention being that repetition can never eschew difference. For example, see Derrida, *J Marges* supra note 23 at 375; Derrida, *J* (1990) *Limited Inc.* Galilée at 105.

<sup>70</sup> Derrida, *J De la grammatologie* supra note 43 at 227. Cf Spivak, GC (2014) 'Book Review' (27) *Cambridge Review of International Affairs* 184 at 186: 'Interpretation is a responsible task'.

'level', something of the law-text being read that will remain untraced, something other still at issue, yet to come, another trace to be ascertained or interpreted. Any interpretation — and, specifically, any reading of foreign law's traces — can thus be said to be structurally subtractive in that it necessarily operates as 't-1'. The omissions will depend on the comparatist's goals, on his needs, not to mention the various limits with which he must contend, say, physiologically — I have in mind distraction, wariness or exhaustion — or materially — I am thinking of finite resources, a deadline or a word limit. Inevitably, however, an interpreter of foreign law, irrespective of how he assesses the 'right' amount of meaning he must deploy, will be at the minimum one trace short of the foreign law-text's full presence, which means that there is a feature of foreign law, no matter how meticulous the interpretation of that law on offer, that will remain unconcealed and unmarshalled (once more, this is Adorno's central claim). In other terms, any interpretation of a law-text will always feature less than the whole of the traces that there are, than the fullness of the meaning of the foreign law that there is. Unavoidably, because the law-text at issue is structurally unmasterable in as much as its complete interpretive potential, its density, cannot be coerced into a total presence, there is an aspect of foreign law that will stay inaccessible, intractable, inexpressible, indescribable, *secret*, both for the comparatist himself and for his readership.<sup>71</sup> Again, the comparative mind cannot *duplicate* the foreign law-world as *foreign* law-world. Note that while the comparatist selects the traces to omit from elucidation, he confirms the fact that to interpret a text is to engage in an activity, that to interpret is to do something to the text, to *slant* the text this way or that (interpretation is a deed). And, in as much as tracing implies a reduction of foreign law, a tearing or extraction from the fullness of foreignness, it necessarily gives expression to a theme, a vision, a stance.

As she interprets the French statute that interests her, Imogene, who draws on an excellent appreciation of French culture, is aware that the 2004 legislative text can be traced to the 2003 report of a government-appointed commission and to various 1980s decisions of the *Conseil d'état*, France's highest administrative 'court'. Further afield, she appreciates that the 2004 law-text can be traced to the famous 1905 statute on the separation between the state and the churches. But Imogene, keen to avoid the predicament of premature interpretive closure, strongly feels that the thick meaning of the 2004 statute can only emerge if it is traced further back still. She thus resolves to engage in serious burrowing work in order to trace the sources of the 1905 statute, an initiative that leads her to research the Dreyfus affair that shook France from 1894 to 1899; and then to trace that conflict to the rise of ultramontanism throughout the XIXth century; and further to explain how this movement emerged in reaction to the 1789 Revolution. Still, Imogene wishes to show how revolutionary ideas drew on the Enlightenment, for example, on Rousseau's conception of 'freedom' whereby freedom is achieved through the state rather than against it, an idea that finds a famous pre-Rousseauian application by way of the 1598 Edict of Nantes, a well-documented example of French state interventionism in religious affairs. Indeed, Imogene finds herself able to trace the French state's anti-clericalism to an argument between the king and the pope as far back as 1302. No doubt she could also trace this fourteenth-century dispute to anterior facts that could themselves be traced to earlier facts

<sup>71</sup> '[W]e risk not doing justice to the "world" by treating it as a "known thing": Latour, B *Enquête sur les modes d'existence* supra note 41 at 91.

still. Strictly speaking, Imogene's tracing could continue *ad infinitum* for any trace is at once fissiparous and rhizomatic.<sup>72</sup> (Observe that one is not addressing infinite regress so much as the movement of temporalization that undermines the very idea of an authoritative origin or end.)

However, even as she opts determinedly in favour of tracing so as not to sanction a letting-go of the foreign law's world and even as she accepts that her critical task is to name and assemble the strands within textuality beseeching illumination, Imogene realizes that there is only so much time to be had. And the documents Imogene requires to do creditable research work on the tracing of the French statute involve readings from anthropologists, sociologists and politists. And this research cannot all be done at the Sorbonne law library. Fortunately, Imogene has secured access to the *Bibliothèque nationale de France* where she is able to order and read a number of texts by leading writers on '*laïcité*' (a term the French prefer to '*sécularité*'). Still, the range of available books and articles is staggering ('*laïcité*' in France is a 'gold-mine' for authors and publishers), and Imogene soon finds that she must organize her readings by giving pride of place to the writers whom she decides to regard as local experts, as influential analysts — although it is not always clear to her how she ought to assess, say, a specific individual to be a reliable source of knowledge in an area in which she herself, being from elsewhere both geographically and disciplinarily, is hardly in a position to express confident views. Be that as it may, Imogene cannot afford to pursue the chain of authority very far. Like most comparatists-at-law, she is more inclined to *use* information rather than verify it. On the whole, she is content to proceed without a 'first knower', that is, she is prepared to *satisfice*. As she proves willing to express *trust* (a key motif within comparativism), she accepts the peculiar and perhaps painful mixture of freedom and coercion involved in accepting that she has no reasonable choice about her burden of choice. Meanwhile, the fact that so much information is personally uninvestigated compels one to ask to what extent one ought not to be talking about Imogene holding *beliefs* about French law rather than knowledge of it.

As Imogene intervenes on the materials she has elected to retain for her work, she decides to quote this treatise rather than that article and this article rather than that 'nutshell'; to refer to the passage at page 345 of this book in a footnote rather than incorporate it in the body of her text; to give pride of place to Noiriel's critique on account of its idiosyncratic character — indeed to quote Noiriel — but to ignore Verdier's because it was published in what is obviously an insignificant journal; to accentuate the 2007 *Conseil d'état's* decision in *Ghazal* (she deems it key); to discuss at some length Rambaud's critique rather than Jasmin's, which she finds shallow and cavalier, and so forth.

It should be obvious from my narrative featuring Imogene in the library that information about foreign law is acquired in an adventitious and messy agglomeration of ways, the distinction between worthless shards and precious tessons depending on strategies of selection (not all of them conscious), themselves having much to do with

<sup>72</sup> 'There is no atom', that is, there is no indivisible entity (etymologically, *a-tomos* refers to the absence of cutting): Derrida, J (1992 [1983]) *Points de suspension* Weber, E (ed) Galilée at 147. Derrida's formulation wants to indicate that there is no trace that cannot be traced to a further trace. Elsewhere, he writes: 'Everything begins before it begins' (Derrida, J *Spectres de Marx* supra note 39 at 255-56). For a remarkable short story about a text without a beginning or an end consisting of innumerable pages that grow from the very book without ever repeating themselves — not unlike a law-text as it is harnessed to disclose an infinity of different traces —, cf Borges, JL (2008 [1975]) 'El libro de arena' in *El libro de arena* Alianza at 130-37.

the processes having articulated socialization into law and into 'comparative law'. If one adds the fact that Imogene will later polish her writing by choosing this argumentative sequence over that, this formulation instead of that and this word rather than that; if one recalls that she will eventually decide to italicize this passage, insert this sub-heading and indent this quotation (but not that other...), one must appreciate that Imogene is indeed crafting 'the French law of religious dress at school', that she is *inventing* it not only in the sense of finding it, but also according to the creative inflexion of the term, that she is *confecting* it. In the process, all the discursive strategies she marshals — not to mention her very manner of writing, her style — are designed to optimize her text's signal-to-noise ratio with a view to exercising interpretive leverage vis-à-vis her readership. Would, then, 'My Very Best Interpretation of the French Law of Religious Dress at School as I Sit in Paris Libraries at this Stage in My Early Career and at this Juncture in My Life; in the Light of my Overall Education Including My Institutionalization into "Law" and into "Comparative Law", My Linguistic Competence in French and My Cultural Familiarity with France; on the Basis of My Experience as a Comparatist-at-Law and of My Acquaintance With French Law in Particular; Given What I Wanted to Establish; and by Reference to the Materials I Came Across in Paris, the Texts I Decided to Use, the Arguments I Chose to Mobilize, the Evidence I Elected to Retain, the Quotations I Opted to Feature and the Words I Preferred to Deploy in Order to Account for What Inevitably Remains Less Than the Whole' not prove a more honest title to herald Imogene's *bricolage*, the development of her specific terrain of articulation, as she frames the French statute's economy of singularity? After all, no matter how expansive foreign law's interpretability, when Imogene engages in the inscriptive process, when her inscriptive instrument punctures a surface of blankness, she only has 'her' words to say the words of foreignness.

Significantly — to return to my earlier claim regarding invention as finding — even as her report involves from beginning to end a strategy of fabrication of 'the French law of religious dress at school', Imogene is giving effect to those texts and to those traces that exist, there. The Dreyfus affair is not a figment of Imogene's imagination nor is its connection to the 1905 statute. Likewise, though not at all mentioned in the 2004 legislative text, the 1905 statute obviously haunts it — and Imogene has nothing to do with this fact. Rather, once again, Imogene comes *to* such fact: she finds it, there; it is *before* her. But she then proceeds to awaken it to interpretive sense as she elicits the 2004 statute's deep meaning. Instead of being content with the orthodox approach to comparative research and simply conclude that the statute means what the judges say it means and to add some thoughts on what academics say judges mean, and rather than treat texts as data on which she would simply be reporting (such assumptions showing how positivism is so very poor in world), Imogene is determined to break free of that vicious circle and produce a virtuous one through her textual interventions on materials pertaining to deep knowledge: law exists as traces, that exist as culture, that exists as law. To return to another law, the law of the text, its injunction, '[n]ot to evade this law is thus to do everything not to betray, not to betray either the law or the other'.<sup>73</sup> And this commitment compels the invention of an account of the foreign law's world that is thorough enough to do it justice and, specifically, to do justice to the fact that *there is* 'the non legal or pre-legal origin of the legal'.<sup>74</sup>

<sup>73</sup> Derrida, J (2004) 'Countersignature' Hanrahan, M (trans) (27/2) *Paragraph* 7 at 29.

<sup>74</sup> Derrida, J (1994) *Politiques de l'amitié* Galilée at 176.

Strolling along the Seine early one Saturday morning as she contemplates her Canadian doctoral examining committee, Imogene realizes that individuals hailing from a multicultural society are likely to harbour a certain number of preconceptions regarding the way in which France is handling the matter of religious diversity in the public sphere. To be sure, Imogene's Canadian readers would in all likelihood not deliberately display xenophobic or Francophobic attitudes. However, their understanding of the significance of freedom of religion and of freedom of speech turns, at some level of consciousness or other, on their exclusion of the French practice from the range of legal behaviour they deem normatively acceptable.<sup>75</sup> According to the Canadian perspective, the French ban from public classrooms of young headscarf-clad Muslim women partakes of an otherness that they are required to impugn in order for them to sustain their own sense of their cultural selves.<sup>76</sup> In other words, for Canadians to be the sensible multiculturalists that they want to be, they must form an unreceptive view of the French practice. Imogene, being the reasonable comparatist-at-law that she is, has long appreciated that it would hardly help to dispel Canadian presuppositions for her to confine her analysis to what French courts have stated the French statute to mean. Though she will, of course, mention the relevant cases — she is a jurist after all — what she knows she must do if her interpretation is to have any impact, to make any sense from the estimation of her Canadian readers, is to offer a *hyper-reading* of the French statute informed by French history, French politics, French republicanism, the French configuration of the dynamics between the state and the churches, the French conception of the school, the French faith in legislation and, yes, perhaps a measure of French anxiety or even Islamophobia on account of the growing Muslim presence on French territory (including extremist movements) — though she readily accepts that she can hardly undertake to trace the 2004 statute to all these constitutive threads. Only if she undertakes some of that tracing, though, is there a possibility that some of her Canadian readers at least will begin to question their assumptions and make space for a new interpretation of the French exclusion that they had readily excluded from their appreciation of normative permissibility. Perhaps a smaller cluster of readers still might even find that their intellectual and moral lives are permanently changed on account of their new awareness of another way to approach the matter of religious dress at school.

In the process, because tracing allows it to be recognized and respected, the French practice ceases to be unacceptable — or, if you will, becomes unacceptable otherwise/otherwise, that is, in a different guise (it is no longer that it must be condemned, but that it must be regarded, say, as incongruous). The French practice's otherness is not of the kind that must be deemed inadmissible anymore, but of the type that deserves to be understood. It has been made *plausible*. To be sure, Imogene is not deluding herself, and she knows that no matter how far-reaching her tracing, Canadian readers are unlikely to *agree* with the French model. But the tracing that she will have introduced to them will prohibit any ready and reductive appropriation of the French statute to the local, Canadian, idea of discrimination, an achievement that strikes Imogene as a hugely significant interpretive

<sup>75</sup> Connolly, WE (2002) *Identity/Difference* (2nd ed) University of Minnesota Press at 64: 'Identity [...] converts difference into otherness in order to secure its own self-certainty'.

<sup>76</sup> Headscarves are not the only issue. The French newspaper *Le Monde* reports that a 15-year-old female Muslim student was denied access to her public secondary school on two occasions on account of the fact that she wore a black skirt deemed to qualify as 'conspicuous' religious dress because of its length: Chambraud, C and Graveleau, S (30 April 2015) 'Crispation à l'école sur les jupes longues' *Le Monde* at 8.

gain. Because Imogene will have given the differend a hearing, the French model will possibly no longer be so haughtily dismissed in Canada. Again, Imogene would be first to resist the claim that on account of her work her Canadian readers will now *know* French law for they will not, at least not in the strong sense of the verb 'to know' — if only because what they 'know' is very much indebted to her re-presentation that had to be different (other comparatists would have focused on other traces); that had to be singular (other comparatists would have elicited other information out of the traces Imogene considered); and that had to be interrupted before all traces could be examined, various practical considerations needing to be addressed (for example, Imogene had to confine her time in Paris, was able to read and collect limited material in the course of her visit and had in any event to content herself with what documents were available on site).

Note that every one of Imogene's countless micro-decisions (this reference rather than that, this quotation instead of that, this word in lieu of that...) is ultimately explainable as choice — as a political choice (according to the rich meaning of the term '*polis*'), if as an institutionally conditioned one (no 'subjectivity' can release itself fully from its institutional ties). More specifically, each micro-decision exists against the background of ideological-theoretical postulates and stands as the joint application, in varying parts, of a taught syntax of articulation of the law and of a personal experience that affect one another. This 'background' is highly significant, so much so in fact that it shows the very idea of 'subject' to be unsatisfactory — hence Derrida's contention: 'The "subject" of [interpretation] does not exist if one means by that some sovereign solitude of the [interpreter]. The subject of [interpretation] is a *system* of relations between layers: [...] mental, society, world'.<sup>77</sup> (As is his wont, Beckett is more succinct: '[T]he subject dies before it comes to the verb'.<sup>78</sup>) Consider Gilles Deleuze's observation: 'In the depths of subjectivity, there is no self but a singular composition, an idiosyncrasy'.<sup>79</sup> This 'singular composition', this 'idiosyncrasy', consists of 'units' such as one's family, one's teachers, one's interlocutors, one's favourite authors, one's preferred speakers, one's cherished words or turns of phrase and so forth. In effect, Imogene's self consists in that particular assemblage, that exceptional arrangement. Her self, then, is many people, and to talk of Imogene's interpretation as 'hers' or as her 'own' is, in effect, to speak economically,

Writing of Rousseau and his work, Derrida perspicuously remarks that '[t]here is not, strictly speaking, a text whose author or subject is Jean-Jacques Rousseau'.<sup>80</sup> Observe that though modern philosophy refers to the self being envisaged as a conscious agent in the sense of the thinker, the knower, the perceiver, one must not forget how etymologically the word 'subject' evokes the ideas of 'allegiance' and 'obedience'. In sum, 'what one calls the [interpreting] subject is no longer he who himself or he who alone [interprets]'; rather, the interpreter must 'com[e] to understand himself in an irreducible secondarity'.<sup>81</sup> The epistemic fact of the matter, then, is that research in foreign law or the elaboration of a

<sup>77</sup> Derrida, J (1967) *L'Écriture et la différence* Editions du Seuil at 335 [emphasis original].

<sup>78</sup> Beckett, S (2010 [1974]) *Texts for Nothing in Texts for Nothing and Other Short Prose, 1950-1976* Nixon, M (ed) Faber and Faber at 6.

<sup>79</sup> Deleuze, G (1993) *Critique et clinique* Editions de Minuit at 150. The issue of how much continuing institutional overdetermination structures any measure of epistemic distinction comparatists-at-law may apply to their work calls for further inquiry. One may wish to begin by pondering Beckett, S (2010 [1958]) *The Unnamable* Connor, S (ed) Faber and Faber at 38: 'I have no language but theirs'.

<sup>80</sup> Derrida, J *De la grammatologie* supra note 43 at 350.

<sup>81</sup> Derrida, J *L'Écriture et la différence* supra note 77 at 265.



comparison neither features an 'object', that is, an entity (say, French law) that would stand there, inertly, facing the comparatist, and that the comparatist would transport as such from the statute book or the law report to his account, nor does it involve a 'subject' in the sense in which a fully autonomous and fully aware individual would be coming to the matter.

Let me emphasize that the singular meaning of foreign law on which Imogene will eventually have settled as she prepares to leave Paris is not — and cannot be — 'the' meaning of 'the French law of religious dress at school'. Instead, it will be 'her' preferred meaning of it, featuring 'her' chosen references, 'her' favourite quotations, 'her' selected words and so forth. It is a meaning that she will have generated through the specific interpretive strategy of invention that she will have elected to display. Discreetly, in silence even, no matter how seemingly self-effacing or external vis-à-vis the law-texts under her scrutiny, despite any claimed withdrawal, *Imogene will have invented foreign law*.

Through the process of hyper-reading that I have outlined, which stands diametrically opposed to positivism's hypomnesis, Imogene has been actively at work in terms of the very structuration or montage of the foreign. She has been relying on the trace, on what is the case, to make her own case. (Again, it is the case that another comparatist would be making another case — which cannot be taken to mean that all statements about a foreign law-text are equally valid or invalid.) Along the way, Imogene's comparativism is shown to be a comparativism that thinks, a comparativism that reveals itself to be susceptible to qualitative enrichment also. (Regrettably, Imogene will have had to forego the book she ordered from Bordeaux through the inter-library loan system as it never reached Paris. Given what she learned of French university libraries in the course of the few conversations she struck with other scholars during her weeks at the Sorbonne, this outcome only mildly surprises her, though she deplors the fact that her research cannot now comprise this work.)

•

A significant implication resulting from the understanding of textuality that I have sketched — 'the elaboration of a concept of the text that does not leave "reality" outside and does not reduce itself to the graphy on the page and in the book', that does not confine itself to the 'graphosphere', that is not reductively logocentric<sup>82</sup> — is the appreciation that, contrary to what orthodox 'comparative law' holds, the exclusively and exclusionary 'legal' text *never was*. Indeed, on account of its traces, every foreign law-text always already exists as a singularly plural entity. It exists, to borrow from Jean-Luc Nancy's, as a plural singularity.<sup>83</sup> What orthodox 'comparative law' has classically understood as other-than-law (history, politics, society, philosophy, language, economics, epistemology and so forth... culture!) is, through the law-text's structuring spectral principle, revealed to be very much present *as* the law-text: the selfness of the law-text exists as an assemblage of 'othernesses' (history, politics and so forth... culture!) — a situation that implies, in Derrida's more challenging philosophical language, that 'the same is the same only in

<sup>82</sup> Derrida, J (2011 [1993]) *Politique et amitié* Springer, M (ed) Galilée at 106; Derrida, J *Papier machine* supra note 57 at 248, respectively.

<sup>83</sup> See Nancy, J-L (2013) *Etre singulier pluriel* (2nd ed) Galilée.

affecting itself of the other, by becoming the other of the same'.<sup>84</sup> Once again, Derrida's claim is that the foreign law-text exists as the foreign law-text that it exists as on account of its being imbued or infused by otherness — specifically, by other discourses such as history, politics and so forth (... culture!). In other words, the foreign law-text's authentic self exists as something other than a pure self. It is a more complicated self than the pure self that it has been said to be by orthodox comparatists, who continue to envisage legal knowledge and other disciplinary knowledges as so many silos. And it is precisely because of the fact that the trace attenuates the opposition between the self and the other, given that the trace is 'where the relation to the other inscribes itself',<sup>85</sup> or because the trace 'strikes the opposition between the inside and the outside' of the law (and of the law-text),<sup>86</sup> that the idea of law being fully present as something that would be only the 'legal' *stricto sensu* (whatever this may have been held or may still be held to mean) is shown to be fatally flawed.

As '[a] fabric of differences, [the text] is always heterogeneous'.<sup>87</sup> Otherwise put, the text, as it reveals traces of history, politics and so forth (... culture!), thus exists as an intertextuality, that is, as an intrinsically differential entity: 'Textuality [is] constituted by differences and by differences from differences'.<sup>88</sup> Only an undisciplined comparatist-at-law can therefore purport to do any form of justice to a foreign law-text as he applies his interpretive equipment to the task of elicitation/ascription — that is, invention — of meaning.<sup>89</sup>

Imogene well appreciates, then, that tracing and invention underwrite the negative claim that there is no pure law. The trace blocks the forgetting of law's enculturation, the very stupor that 'comparative law's orthodoxy so readily indulges. It exhorts the comparatist-at-law to make narratives that will act against cultural amnesia, de-silence the past and mobilize it again with a view to an enhanced understanding of the present for future reference. Note that this harnessing takes place in the present. In effect, the past is not past; it lives on as it becomes a present and a presence (recall Agamben's '*Nachleben*'). While 'comparative law' has classically focused on space, tracing allows for the meaningful introduction of time into the investigation of the foreign: not to trace would be to exempt a law-text from temporal finitude. Tracing thus acknowledges that the life of a text is a matter of survival. Instead of grounding textuality in a fully-fledged presence of the text that would be completely and indivisibly there, a text that would repose in itself, the trace offers a temporal synthesis: the textuality that is before the interpreter, now, exists as the past, as a memory that is left for the future that may preserve or erase it (through validating or invalidating discourses). In this sense, as it reveals a time-space configuration, the trace

<sup>84</sup> Derrida, J *La Voix et le phénomène* supra note 27 at 95. See also Sloterdijk, P (2007) *Derrida ein Ägypter* Suhrkamp at 27: 'The trace of the other ha[s] imprinted itself indelibly within the innermost part of the own, no matter how it might be disguised and covered up by new programmes'. As the (textual) self is seen to exist as otherness, one irrepressibly thinks of Rimbaud's exclamation.

<sup>85</sup> Derrida, J *De la grammatologie* supra note 43 at 69.

<sup>86</sup> Kofman, S (1984) *Lectures de Derrida* Galilée at 39. The use of the verb 'to strike' ('*raturer*', in French) alludes to Heidegger, who would write words under erasure (using a strikethrough) to indicate that even as he felt he had to employ them he remained dissatisfied with their semantic extension.

<sup>87</sup> Id at 16.

<sup>88</sup> Derrida, J (1972) *La Dissémination* Editions du Seuil at 111.

<sup>89</sup> For an intriguing case in favour of interdisciplinarity, see Graff, HJ (2015) *Undisciplining Knowledge* Johns Hopkins University Press. An alternative view is in Jacobs, JA (2013) *In Defense of Disciplines* University of Chicago Press.

can be said to evoke a Bakhtinian ‘chronotope’. A focus on chronotopicity prompts the comparatist-at-law to observe, for instance, that the chronotopic frame of the French statute on religious dress at school differs from that of the 2006 Supreme Court of Canada decision in the *Multani* case.<sup>90</sup> Meanwhile, as with photography if you will, the trace is the negative of the text. When the traces are processed and exposed to light, that is, when their combinations and intensifications are developed, they generate a bright image of the text optimizing percipience.

So, what difference do ‘culture’ and ‘tracing’ *effectively* make to work on foreign law and to comparative analysis? Keeping in mind Imogene’s presence in Paris, consider article 1184 (3) of the 1804 French civil code and its injunction to the effect that ‘termination’, or ‘résolution’, of contract must be requested in a court of law. Positivists would reflexively confine their examination of this article to its exegetical features and try to ascertain how the courts (and, possibly, the leading writers of textbooks or law-review articles) have interpreted the relevant keywords. This interpretive exercise would soon find itself trapped within a circular and superficial understanding of the provision’s significance. In effect, it would embrace the view that the law (the civil code) means this or that because the law (the judge) says that it means this or that. For a culturalist, however, the law-text proves traceable, by way of supplement to judicial decisions, textbooks and law-review articles — and much more rewardingly, if one is in search of *explication* —, to constitutive ideas (all of them manifestations of French culture and, in particular, of French legal culture), such as a strongly assertive state, a well-honed social demand for state interventionism, the deep distrust into which the individual is readily held, a time-honoured aversion for the unfettered play of the market and the related assumption that only the state can bring to bear the appropriate dose of *solidarité* that must feature within a French contractual relationship.

A view of law-as-culture indicates these various aspects of the law-text as being relevant features of the civil-code provision compelling the need for judicial authorization before a contract can be ‘terminated’ rather than allowing a party unilaterally to declare the contract at an end subject to the payment of damages in case of subsequent retaliatory litigation — which is, in a nutshell, the position obtaining in the common-law tradition. (Observe that at times, French courts appear willing to ignore the civil code’s demand for a judicial pronouncement and show themselves prepared to validate a unilateral ‘termination’ of contract. The presence of dissenters, a feature of every legal culture, can help, as is the case here, to confirm the strength of the governing pattern.) But in order to generate the sort of interpretive yield that, alone, can permit a deep or thick understanding of the law-text, a comparatist must be prepared to approach law *as culture* (that is, to treat law as law-as-culture) and to trace the law-text to its constitutive features on the understanding that the traces deemed relevant are an integral part of the text, that these traces exist *as* the text (one

<sup>90</sup> For the notion of ‘chronotope’, see Bakhtin, MM (1981 [1937]) *The Dialogic Imagination* Holquist, M (ed) Emerson, C and Holquist, M (trans) University of Texas Press at 84. On 2 March 2006, the Supreme Court of Canada voted unanimously in *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, to allow a twelve-year-old orthodox Sikh boy to wear a *kirpan* at school in conformity with the dictates of his faith compelling him to have this 20-cm metal dagger on him at all times. The Court, which imposed certain practical conditions relating to the wearing of the *kirpan*, held that the absolute prohibition by the school board infringed the boy’s freedom of religion, that the interference effectively deprived him of his right to attend a public school and that even though the board’s decision was motivated by a desire to ensure safety at school, it could not be warranted pursuant to the Canadian *Charter of Rights and Freedoms*.

is back to Agamben's idea of '*Nachleben*'), that they exist *as* the text that therefore exists *as* culture. In other terms, the comparatist-at-law writing on article 1184 (3) of the 1804 French civil code must be disposed to be *writing culture*. For positivists, the ideas of state activism, suspicion of the individual, market-aversion, *solidarité* and so forth ought perhaps to concern political theorists or sociologists or economists but certainly not lawyers — a familiarly conservative or disciplinary reaction. I claim that from the perspective of the interpreter of a legal culture, such as a comparatist-at-law, there can be nothing that is quintessentially 'legal' or automatically outside the 'legal'. Because there is no algorithm to determine the vectors of cultural extension, the quality of 'legality' (if this be the apt word) is thus conferred to the *interpretandum* on the basis of the heterogeneous elements that the comparatist-at-law himself connects or assembles, that he understands as pertaining to the 'legal' and that he names 'the French law of "termination" of contract' (I leave to one side, as one should *not* do, the fact that the French civil code refers to '*résolution*').

To return to the vignette featuring Imogene in the library, my narrative readily discloses two further negative claims at work to the effect that comparative thought cannot be objective vis-à-vis foreign law and cannot be true to it.<sup>91</sup> (Incidentally, the illustration from French contract law I just sketched also makes both arguments compellingly.) Perhaps any statement in favour of objectivity may be addressed in short order by way of reference to a noted literary critic: '[A]ll interpretation proceeds from prejudice, and without prejudice there can be no interpretation'.<sup>92</sup> As she sat in the Sorbonne law library researching French law, Imogene, try as she may, could not *not* have previously studied law in Canada, the United States and England and could not *not* have gained an understanding of law at variance with the one she would have acquired if she had learned law in Vienna and Berlin instead.<sup>93</sup> *One cannot unknow*.

"'[O]bjectivity" is culturally constituted', which ultimately must mean that it cannot be had: 'objectivity' and 'culture' are antithetical.<sup>94</sup> Now, if one accepts that 'the general idea of objectivity [...] can never be dissociated from an overpowering determination to silence or eradicate [...] inadequately credentialed claimants to knowledge',<sup>95</sup> the assumed epistemic loss arguably becomes a gain. And there is value, too, in dispensing with an unwarranted epistemic disingenuousness suggesting that foreign law can be *arraigned*, that the knowledge of it can be acquired and can exist outside of the comparative mind without being coloured by the comparatist's neural and sensory equipment. Counter-intuitively perhaps, I claim that, in fact, comparatists do not gain 'better' access to foreign law by eliminating or subtracting mediators along the chain of understanding, but rather by increasing them: the more readings are garnered, the more interpretations are fabricated,

<sup>91</sup> For detailed discussion, see Legrand, P 'Foreign Law: Understanding Understanding' supra note 8. But see Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 29 at 43 ('reports [...] should be objective, that is, free from any critical evaluation'), 3 ('[s]cholars [...] have [...] only the ultimate goal of discovering the truth') and 15 ('[c]omparative law is an "école de vérité"').

<sup>92</sup> Kermode, F (1979) *The Genesis of Secrecy* Harvard University Press at 68. See also Gadamer, H-G *Wahrheit und Methode* supra note 33 at 274: '[A]ll understanding inevitably involves some prejudice'. Adde: Derrida, J (1990 [1982]) *Du droit à la philosophie* Galilée at 560: 'The absolute neutralization of all pre-interpretation would be in the end inaccessible and absurd'.

<sup>93</sup> Cf Derrida, J [1984] *Du droit à la philosophie* supra note 92 at 424: 'An institution is not only walls and exterior structures that enclose, protect, guarantee or constrain the freedom of our work, [but] it is also and already the structure of our interpretation'.

<sup>94</sup> Sahlins, M (1995) *How 'Natives' Think* University of Chicago Press at 169.

<sup>95</sup> Stengers, I (2011) 'Comparison as a Matter of Concern' (17) *Common Knowledge* 48 at 57-58.

the more writings are produced — in sum, the more the singularity of the foreign finds itself being elicited from various angles — the more insightful understanding of foreign law is likely to prove.

Meanwhile, the fact that research into the meaning of a foreign statute or judicial decision is not what Bernard Williams calls a ‘truth-acquiring’ type of inquiry must mean that any truth claim, because it evokes authority and fails to account for the vulnerability that inherently befalls any interpretation, has to be envisaged as so much ‘transcendental contraband’.<sup>96</sup> All that a comparatist can hope to muster with respect to foreign law is an interpretation of it, and such an interpretation can only emerge out of a tripartite negotiation between a law-text, an interpreter and a reader — a situation entailing that every interpretation is defeasible, at least to the extent that a counter-argument can purport to resist or neutralize even an ingenious reading’s disclosures (perhaps an ingenious reading’s disclosures especially...). I have already addressed the fact that foreign law-texts and comparatists are culturally constituted. Observe that the audience’s own cultural embeddedness can also be expected to have an impact on any tractation: thus, a French and an Australian reader are unlikely to have the same idea of what counts as a ‘good’ analysis of foreign law or as a ‘persuasive’ comparison. Note more generally that truth and interpretation are mutually exclusive terms so that when Gianni Vattimo writes how ‘[t]here is no experience of truth that is not interpretive’, I understand him not only to be prioritizing interpretation over truth, but to be excluding truth altogether.<sup>97</sup> If there is truth, there is no further role for interpretation (*in claris non fit interpretatio*); and if there is interpretation, there cannot be any scope for truth. While ‘[i]t is inconceivable that France would follow Ptolemy and Italy would adopt Copernicus’, in contrast to planetary orbits ‘law is culture-specific’.<sup>98</sup>

As she generates information about the French statute on religious dress at school and as she brings to bear the conception of law that she has fashioned through the

<sup>96</sup> Williams, B (2002) *Truth and Truthfulness* Princeton University Press at 127 [emphasis omitted]; Derrida, J (1974) *Glas* Galilée at 272a, respectively.

<sup>97</sup> Vattimo, G (2009) *Addio alla verità* Meltemi at 73. According to Dworkin, ‘a scholar who labors for years over a new reading of *Hamlet* cannot believe that his various interpretive conclusions are no more valid than the contradictory conclusions of other scholars [...]. [...] [I]f [interpreters] have come to think that one interpretation of something is best, they can also sensibly think that that interpretation meets the test of what defines success in the enterprise, even if they cannot articulate that test in much or any detail. So they can think there is objective truth in interpretation’: Dworkin, R (2011) *Justice for Hedgehogs* Harvard University Press at 151 [emphasis original]. I cannot see how Dworkin’s scholar is legitimately — and creditably — able to move from ‘sensibly think[ing] that [his] interpretation meets the test of what defines success in the enterprise’ to ‘think[ing] [that] there is objective truth in interpretation’. Consider a Canadian comparatist-at-law inscribing an interpretation of the 2004 French statute on religious dress at school. Assume further that this comparatist is acting seriously and is wishing to be taken seriously. Of course, one can expect this comparatist to deem his interpretation of French law to offer a more compelling reading than, say, other extant interpretations to be found in various books or journals. But this sense of achievement does not mean, need not mean and must not mean that this comparatist-at-law should hold his interpretation to be ‘true’. What this comparatist requires to assume, and what his readership needs to accept about his work, is that his interpretation carries a higher interpretive yield than others. Those who suppose there are no criteria for such judgment other than ‘truth’ merely expose their own incapacity. Be that as it may, the idea of ‘truth’ is superfluous as regards any expression of conviction in the supremacy of one interpretation over others. And there is no sense in talking about ‘truth for me’, since if one adds this codicil the word ‘truth’ ultimately finds itself devoid of semantic import.

<sup>98</sup> Fletcher, GP (1997) ‘What Law Is Like’ (50) *Southern Methodist University Law Review* 1599 at 1610. Meanwhile, orthodox comparatists are unwilling to draw Fletcher’s distinction and persist in analogizing ‘comparative law’ with, say, ‘physics’, ‘microbiology’ and ‘geology’: Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 29 at 15.

institutionalization processes to which she has been subjected (and that she has now *incorporated*, that she carries within her, that she transports within her lived-body, in the most immanent of manners), the best Imogene can do while ascribing meaning to the foreign law-text is to offer a scrupulous and convincing interpretation of it. Are there traces of Islamophobia haunting the French statute? No matter how inquisitive she proves herself to be, irrespective of how much documentation she surveys and regardless of how insightful her analysis, Imogene will never be able creditably to affirm that Islamophobia haunts the French statute as a matter of truth. While she can defend an interpretation, possibly a highly sophisticated reading displaying what are commonly understood as optimal scholarly qualities (but these would vary depending on whether one is in Los Angeles or Heidelberg), her explication will be contestable and will in all likelihood be contested (unlike the enunciation of truth whose *raison d'être* would be precisely to bring interpretive challenges to an end).

Moreover, Imogene is aware that her interpretation is necessarily provisional (such is my point about defeasibility). She is reaching her interpretive conclusions on the basis of the materials at her disposal now, in the light of her appreciation of French legal culture now, as the expression of her scholarly sensitivity to French law as it deploys itself now, as a result of who she is now, here. But French legal culture, her legal competence, herself, the fragile articulations of the three, are constantly on the move. All is ever in a state of becoming. There is fluidity, liquidity. Because Imogene's interpretation inherently remains susceptible of improvement, a formulation that would stand as the *correct* or *exact* account of the French statute is not within her reach. At best, it is always deferred. If you will, what is being said about foreign law and what is being written regarding the comparison between laws is structurally *partial*. I use this word advisedly in order to evoke not only the idea of 'perspective', but also to repeat the claim I have made about 'incompleteness'. Again, properly speaking, the interpretive 'cup' is never full; it is, in fact, unsaturable. Imogene could have written more about the French statute. Indeed, even if she were now to devote an entire book to the matter, there would *still* be more to write for every foreign law-text conceals a (maddening — or is it anxiogenic?) surfeit of meaning.

Arguably, '[t]he first step toward a new [comparative] legal stud[ies] is the bracketing of any truth claims [or, for that matter, objectivity claims] for or about law'.<sup>99</sup> At the end of his jurisprudential analysis devoted specifically to the pertinence of truth in law, Dennis Patterson indeed underlines the futility of any statement to the effect that a proposition of law would be true as he reaches the conclusion that 'a return to the local' is advisable; in his words, 'meaning arises from human practices and [...] no practice or discourse enjoys a privileged position vis-à-vis others'.<sup>100</sup> Hence, linguist Fritz Mauthner's firm location of 'objective truth' within 'the common use of language'.<sup>101</sup> Importantly, however, to maintain, as I do, that whatever information is accessible regarding foreign law can only be obtained through interpretation is *not* to argue that foreign law's existence is wholly subordinated to the arrangement of interpretive resources by the comparatist aiming to know it. Nor, incidentally, does my deflationary or fallibilist rendition of 'objectivity' or 'truth' somehow

<sup>99</sup> Kahn, PW *The Cultural Study of Law* supra note 53 at 34.

<sup>100</sup> Patterson, D (1996) *Law and Truth* Oxford University Press at 181 and 182, respectively.

<sup>101</sup> Mauthner, F (1923) *Beiträge zu einer Kritik der Sprache* (3d ed) vol I *Meiner* at 695. Mauthner's posthumous influence extends to Beckett, Wittgenstein and Borges.

cancel the need for comparatists to behave honestly and to act with integrity as regards the foreign law they study. While Imogene can suggest just an interpretation of the 2004 French statute, she must aim for it to be a just interpretation — in the way a translator must seek to achieve a just translation.<sup>102</sup> This is the best she can do, but she must do her best as a matter of justice to the text she is interpreting.

Observe that method cannot help — which, after the lack of representative correlation between foreign law and the comparative mind, the absence of legal ‘purity’ and the failures of objectivity and truth, means a fifth negative claim. To be sure, method, ‘the most effective and most durable anxiety reducing device’,<sup>103</sup> is the last refuge of the pervasive ‘theo-technical thought’.<sup>104</sup> Now, this *dispositif* of control and discipline still informing orthodox comparative legal studies, largely under the influence of the seemingly insatiable (German) homiletic yearning for a dystopian world where epistemic certainty would reign, simply cannot ensure the passage from world to thought, from foreign law to the comparative mind. Far from consisting of some sort of transcendental device that could somehow tame the comparative mind’s pre-understanding — its predispositions, predilections or prejudices — and make it possible for thought to surpass its limited existential condition, a method, any interpreter’s preferred method, will have been inevitably devised by someone with a view to achieving something. One thus finds oneself ensconced once more within the finitude of the comparative dynamics where knowledge-making cannot render itself immune to the sensible intuitions by which comparatists endowed with cognitive capability apprehend foreign law-worlds. Indeed, Adorno regarded method, like mathematics, as ‘a gigantic tautology’ in as much as it ‘exerts a total dominance over what it has itself prepared and formed’.<sup>105</sup> Aptly, Adorno saw method as ‘[being] always concerned with [itself], with the flimsiest, most abstract vestige of what [it] has reduced the world to by treating anything and everything only in terms of general concepts, while declining to engage with the object itself’; he thus decried how method posited that ‘each thing is like this and not otherwise and [how] it is subject to the rule of subjectivity to which it has owed its very existence from the outset’.<sup>106</sup> As I read this repudiation, as I observe how method ‘divests itself of any relation to things’,<sup>107</sup> I am immediately reminded, of course, of ‘comparative law’'s orthodoxy positing that ‘the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function’ and, for good measure, adding that ‘solutions must be freed from the context of [their] own system’ (where they are imprisoned?).<sup>108</sup>

<sup>102</sup> For the idea of ‘just translation’ with specific reference to ‘comparative law’, see 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.

<sup>103</sup> Devereux, G (1967) *From Anxiety to Method* Mouton at 97.

<sup>104</sup> Sloterdijk, P *Sphären* supra note 30 at 38.

<sup>105</sup> [Tiedemann, R] ‘Nachbemerkung des Herausgebers’ supra note 17 at 339; Adorno, TW (1970 [1956]) *Zur Metakritik der Erkenntnistheorie* Suhrkamp at 19, respectively.

<sup>106</sup> [Tiedemann, R] ‘Nachbemerkung des Herausgebers’ supra note 17 at 339.

<sup>107</sup> Adorno, TW *Zur Metakritik der Erkenntnistheorie* supra note 105 at 19.

<sup>108</sup> Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 29 at 44 [my emphasis]. Without much of an explanation and without any consideration of alternatives, ‘functionalism’ is chosen as ‘[t]he basic methodological principle of all comparative law’ so that ‘[t]he question to which any comparative study is devoted must be posed in purely functional terms’: Id at 34. Percipiently, a critic notes that despite the orthodoxy’s dogmatic statements, ‘[f]unctionalism has generally proven to be incompatible with comparison’:

In effect implementing the view that ‘the ideal of every express method has always been mathematics’,<sup>109</sup> orthodox comparatists-at-law persistently abide by the shibboleth of neutrality.<sup>110</sup> It remains that ‘any method [...] implies a kind of historicity’, which in turn must eschew any possible neutralization of the interpretive process.<sup>111</sup> On account of the asymmetrical dependence of knowledge-acquisition upon pre-understanding, no regulatory tool purporting to harness the significance of foreign law can avoid error, oblivion or inertia of beliefs — if not the unconscious desire not to see something or not to speak of it. Because any appreciation of foreign law-texts turns on an always already constituted understanding of them that closes the situation epistemically speaking, investment into ‘method’ must be seen as an obstacle to an intellectually rewarding comparative study.<sup>112</sup> Rather, it is for the comparatist himself, in every case, in each new instance, to frame the comparable at hand despite the incommensurability across laws that he faces. What ‘commonality’ is then asserted in order to allow for an articulation of the comparison within a ‘third space’, which is neither the space of one law nor that of the other, remains the speculative outcome of the comparatist’s specific translations, tractations or transactions. Instead of being in thrall to a method, the comparatist unveils ‘his’ agency (though he remains acutely aware that he cannot turn all his background into foreground, all his unthought into thought). Along the way, he assumes epistemic *responsibility/response-ability* for his tracing, for ‘his’ invention of foreign law, for ‘his’ comparative work. If one accepts the constructedness of foreign law-texts, ‘[b]y definition, there can be no prior answer or method or technique. Each time it is necessary to invent the singular law of what remains and must remain a singular event’; in other words, ‘[t]here is no empirical methodology for learning how to disclose a world’.<sup>113</sup>

The epistemic dynamics between the foreign law and the comparative legal mind invites a sixth negative claim. Understanding of an ‘other’ law simply *cannot* be had, ever — an aporia that the comparative legal mind has to accept even though this fact must inevitably make readings of foreign law-texts inherently precarious. In the final analysis, this argument concerns the impassable gap between self and other, the fact that first-person experience cannot be reduced to third-person experience (I can never know what you think for, in the end, I cannot know what it is like for you to be you). Gadamer concisely captures the claim thus: ‘It is enough to say that we understand in a *different* way, *if we understand at all*’.<sup>114</sup> Even as the comparatist seeks to account for foreign law itself, for

Hyland, R (2009) *Gifts* Oxford University Press at 101.

<sup>109</sup> [Tiedemann, R] ‘Nachbemerkung des Herausgebers’ supra note 17 at 338. From the standpoint of ‘comparative law’, it has indeed been claimed that ‘[t]he method of the comparatist [is] somewhat similar to that of a mathematician’: Schlesinger, R (1961) ‘The Common Core of Legal Systems: An Emerging Subject of Comparative Study’ in Nadelmann, KH, von Mehren, AT and Hazard, JN (eds) *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema* Sijthoff at 75.

<sup>110</sup> Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 29 at 10.

<sup>111</sup> Derrida, J (1983) ‘La langue et le discours de la méthode’ (3) *Recherches sur la philosophie et le langage* 35 at 36.

<sup>112</sup> For a critique of method’s enlistment as epistemic alibi by orthodox comparatists-at-law, see Glanert, S (2012) ‘Method?’ in Monateri, PG (ed) *Methods of Comparative Law* Elgar at 61-81. See also Frankenberg, G (2014) ‘The Innocence of Method — Unveiled: Comparison as an Ethical and Political Act’ (9/2) *Journal of Comparative Law* 222.

<sup>113</sup> Derrida, J ‘Countersignature’ supra note 73 at 30; Kompridis, N (2006) *Critique and Disclosure* MIT Press at 108, respectively. For detailed discussion, see Legrand, P (2012) ‘Foreign Law in the Third Space’ (4) *Juridikum* 32.

<sup>114</sup> Gadamer, H-G *Wahrheit und Methode* supra note 33 at 302. Cf Spivak, GC (2012) *An Aesthetic Education in the Era of Globalization* Harvard University Press at 518, who underlines ‘the irreducible mis-understanding in



all of the foreign law-text's traces, even if, to adopt Gayatri Spivak's felicitous paraphrase, he is to 'attemp[t] to write the [legal] self *at its othermost*',<sup>115</sup> to report on all those discourses that constitute the foreign law-text, it is clear that the other's law, the other law, like the other *tout court*, ultimately withdraws from assertion. It remains inaccessible, which is another way of saying that the comparatist's thought is disabled vis-à-vis it, that it cannot exercise fully-fledged authority over it. In the end, the comparatist's undertaking has always already failed. The comparatist cannot get *there*, beyond the self's enclosure, from the self all the way to the other, which means that he can never unfold or unflatten foreign law's enigma completely, that there is a residual element within the singularity of foreign law that is destined to remain a mystery for him. Since no correlation can be total, the best that the comparatist can do is to position himself on the *verge* of foreign law.

There is more. As the comparatist encounters foreign law, he directs himself towards a goal that is understanding. Now, this directedness stays primordialially self-relating. For example, even as he addresses the other-in-the-law, the comparatist aims at ends that obstinately remain 'his'. The fact is that from the moment the comparatist identifies something as foreign law, he is always already involved with his self-finding,<sup>116</sup> and it is therefore this quest for an enhanced self that primarily sustains his projection towards foreign law and his ascription of meaning to it. Not only, then, does the comparatist necessarily approach foreign law through his own, pre-existing, spatio-temporal experience — a background that inescapably colours his interpretation —, but his act of interpretation is also unavoidably first-personal in the way in which it relates, for instance, to the desire to be perceived as a good comparatist by his peers or the wish to meet professional standards in the eyes of colleagues staffing promotion or grant panels. Intervening as comparatist-at-law, Imogene is thus seeking to achieve her commitment to herself. Her examination of foreign law, like every investigation of the other's law, is, perforce, autobiographical (note that autobiography implies a detour through the otherness whence one's *αὐτός* was constituted). Consider Adorno's observation to the effect that '[n]othing can be interpreted out of something that is not interpreted into it at the same time'<sup>117</sup> — which is to say that even if, *concessio non dato*, the world 'as such' were to be in existence, we, as human beings, could not access it and would therefore be unable to relay it without it becoming a 'for us' along the way. To transcribe this contention with specific reference to 'comparative law', the epistemic fact of the matter is that one can only ever write *towards* foreign law.

There are other negative claims to behold.

successful human communication'.

<sup>115</sup> Spivak, GC (2003) *Death of a Discipline* Columbia University Press at 91 [my emphasis].

<sup>116</sup> Cf Heidegger, M *Sein und Zeit* supra note 6 at 339: 'Understanding is never free-floating but always self-finding'; Gadamer, H-G *Wahrheit und Methode* supra note 33 at 265: '[A]ll [...] understanding is ultimately self-understanding' [emphasis omitted]. Adde: Rorty, R (18 October 1982) 'The Fate of Philosophy' *The New Republic* at 33: '[There is] no rigorous argument that is not obedience to our own convictions'. Cf O'Doherty, B (1988) 'Hopper's Voice' in *American Masters: The Voice and the Myth* (2nd ed) Universe Books at 26: 'What are you after in [your painting]? I'm after ME' [emphasis original]. The interview was conducted in 1963 and 1964 with Edward Hopper. The answer is Hopper's.

<sup>117</sup> Adorno, TW (1974 [1958]) 'Der Essay als Form' in *Noten zur Literatur* Tiedemann, R (ed) Suhrkamp at 11. Cf Strand, M (25 June 2015) 'On Edward Hopper' *The New York Review of Books* at 40: '[W]hen we look at the painting of a building or an office or a gas station, we say it's a Hopper. We don't say it's a gas station. By the time the gas station appears on canvas in its final form it has ceased being just a gas station. It has become Hopperized. It possesses something it never had before Hopper saw it as a possible subject for his painting. And for the artist, the painting exists, in part, as a mode of encountering himself'.

Contrary to the orthodoxy's argument that laws are similar ('even as to detail', to quote an influential statement) and that research into foreign law must accept the 'immaterial[ity] of differences' across laws to the extent that an elicitation of important differences should act as a 'warn[ing]' that one must 'go back to check again' the articulation of one's research,<sup>118</sup> I make the negative claim that an argument maintaining similarity across laws *cannot* be credently sustained. The contention in favour of similarity is indeed as empirically fictitious as it is theoretically violent. The epistemic fact of the matter is that any assertion of similarity forcibly reduces foreign law, in the end, to the comparatist's own categorical categories. In Adorno's terms, 'contradiction cannot be brought under unity without manipulation, without the insertion of some wretched cover concepts that will make the crucial differences vanish'.<sup>119</sup> No matter how effortlessly 'comparative law''s orthodoxy seems to be gliding over the issue in its attempt to dislocate the inevitably-located law and ensure that 'a complex, unique, specific, varied, multiple, and original expression is replaced by a simple, banal, homogeneous, multipurpose term under the pretext that the latter may explain the former',<sup>120</sup> what there is, implacably, is the differend, that is, difference across laws speaking different languages (both metaphorically and literally). 'In the beginning, difference; there is what happens, there is what has already taken place, *there*'.<sup>121</sup> Along with sociologist and philosopher Gabriel Tarde, I hold that '[t]o exist is to differ'.<sup>122</sup> In effect, one is back to Leibniz: more than one law implies a differend (which is why even the assertion that two laws are similar is effectively a statement that they are different).<sup>123</sup> And instead of relegating differences to the *Index expurgatorius*, I contend that research into foreign law must recognize and respect the other law's difference as a matter of the justice that otherness is due. As for so-called 'similarities', the best one can do as one mobilizes the principle of charitable interpretation is to assert that '[t]he way in which they [are made to] constitute or stabilize [themselves] is relative, provisional, precarious'.<sup>124</sup> When a student pretends to have ascertained a similarity across laws, I suggest *more work* with a view to overcoming this deception (not unlike the way in which when someone intimates that the various Starbucks 'cafés' on rue de Rivoli in Paris are 'similar' to their Chicago counterparts, I recommend an examination at closer range fully confident in the fact that the more meticulous the investigation the more French singularity will be disclosed).

As opposed to the orthodoxy's claim that there are 'legal transplants' — laws that would re-emerge as the self-same laws elsewhere than in their original location, very much mimicking my friend's repotted hortensia —, I make the negative claim that this is *not* the case as laws do *not* travel or at least they do not travel *as such*. While ideas are freely borrowed across frontiers, when it comes to law acculturation ensures that the law

<sup>118</sup> Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 29 at 39, 62, 40 and 40, respectively.

<sup>119</sup> Adorno, TW *Negative Dialektik* supra note 16 at 155.

<sup>120</sup> Latour, B *Reassembling the Social* supra note 64 at 100.

<sup>121</sup> Derrida, J (1987 [1984]) 'Deux mots pour Joyce' in *Ulysse gramophone* Galilée at 44 [emphasis original]. Even '[i]dentity requires difference in order to be': Connolly, WE *Identity/Difference* supra note 75 at 64.

<sup>122</sup> Tarde, G (1999 [1893]) *Monadologie et sociologie* in *Œuvres* Alliez, E (ed) vol I Institut Synthélabo at 72. For an analogous statement by a leading art historian, see Didi-Huberman, G (2004) 'L'image-sillage' (10) *L'Inactuel* 111 at 111: 'What appears appears singularly'.

<sup>123</sup> For detailed discussion, see Legrand, P (2003) 'The Same and the Different' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press at 240-311.

<sup>124</sup> Derrida, J *Politique et amitié* supra note 82 at 112.

there is 'on arrival' is never the self-same law as the law there was 'on departure': beyond any dissemination, the imported law always carries the form of its appropriation rather than the form it had exhibited 'at home'. This fact can easily be explained because the very constitution of law is as 'law-in-situation'. No law exists 'in the air', and every law is located, grounded — which must mean that the imported law, too, has to be adjusted to fit local knowledge lest it fail to take root in its new environment. It follows that the imported law, any imported law, as it is attuned to local concerns and preoccupations, as it is operationalized, finds itself transformed or reconfigured. The view that there would take place undistorted communication within a common language so that the foreign law would carry its foreign meaning along and implement it *as such* elsewhere is untenable. Even as the imported law evokes or connotes the foreign, no matter how suggestively, it will no longer be that self-same foreign law. Its foreignness will have been disrupted or interrupted. There will now be more than one law, and there will therefore be difference. Consider Derrida: 'We 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'.<sup>125</sup> In an important sense, this argument is again a claim for a politics of place (understood as an existential notion) — which is precisely what tracing promotes.

As opposed to the orthodoxy's assumption that there are universals-at-law (for example, reference has been made to the existence of a 'unitary sense of justice' and to 'comparative law' as 'universal legal science',<sup>126</sup> while Rudolf Schlesinger's express goal was to formulate 'universally understandable terms' that 'carry the same meaning to lawyers brought up in various legal systems'),<sup>127</sup> I enter the negative claim that there is *no* universalism. Far from being a disinterested contention, any alleged universalism is in effect someone's universalism that is inevitably filtered through one's cultural grid. Indeed, '[i]t is folly to think that an unmarked universalism can be produced in politics or philosophy' (or in law, for that matter).<sup>128</sup> Universalism is an illusion arising from (interested) superficialism. Laws exist, and can only exist, as so many singularities, each of them revealing an epistemically contingent and nominalist conceptual apparatus. While legal culture reaches beyond the individual, it refers to features that are inherently, so to speak, not universal; thus, '[t]he difference of cultures cannot be something that can be accommodated within a universalist framework'.<sup>129</sup> As he apprehends a foreign law, a comparatist is, perforce, studying a unique legal configuration — no matter how small the unit (labour law before the labour 'courts' in Marseille between 1950 and 2000) or no matter how large (French labour law).

I maintain, then, that the notion of 'universal law' is a contradiction in terms, an oxymoron. (Incidentally, in what non-universal language would this so-called 'universal law' be stated?) Moreover, the use of 'universalism' as a symbolic stratagem hides one of the most invidious forms of essentialism, the compression of the intractable difference characterizing humankind to a narrow set of features said to pertain to all human

<sup>125</sup> Derrida, J (1972) *Positions* Editions de Minuit at 31.

<sup>126</sup> Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 29 at 3 and 46, respectively.

<sup>127</sup> Schlesinger, R 'The Common Core of Legal Systems: An Emerging Subject of Comparative Study' supra note 109 at 78.

<sup>128</sup> Spivak, GC (2008) *Other Asias* Blackwell at 312 n 62.

<sup>129</sup> Bhabha, H (1990) 'The Third Space' in Rutherford, J (ed) *Identity* Lawrence and Wishart at 209.

beings at some fundamental level. Here, 'common humanity is a trap since it defines divergence as secondary'.<sup>130</sup> It follows that there is no 'universal human-rights law', another overreaching and overburdened idea (not unlike 'global human rights' or 'global justice') except, as WVO Quine would have put the matter, qua assignment of reference to words by their speaker.<sup>131</sup> Specifically, '[t]he question about the universality of human rights is a Western cultural question'.<sup>132</sup> To be more precise still, this issue concerns 'the historical continuum of the European colonial project in which whites pose as the saviors of a benighted and savage non-European world', '[t]he white human rights zealot join[ing] the unbroken chain that connects him to the colonial administrator, the Bible-wielding missionary, and the merchant of free enterprise'.<sup>133</sup> In fact, '[f]rom the beginning human rights are something Euro-Americans take to others'.<sup>134</sup> For example, the practices that are used as yardstick by human-rights movements in Sudan or Indonesia are effectively those of the United States or France that are somehow cast as 'other than' structures of domination, deemed to be disseminable and claimed to be worthy of export with a view to correcting or replacing local ways.<sup>135</sup> As a result, curiously, the prevailing 'universal' human-rights discourse is speech in which 'one readily perceives [...] the face of bourgeois liberal feminism, American constitutionalism as interpreted by [the US] Supreme Court, or middle-class Judeo-Christian family life in North America or Western Europe today'.<sup>136</sup>

Any alleged universalism is but a dilated particularism whose specificity consists in important ways in defining/downgrading its rival knowledges as particularistic — which suggests that appeal to universal values is tarnished with the idea of 'totalization' or even 'totalitarianism'.<sup>137</sup> In this regard, it seems fair to say that 'the rhetoric we Westerners use

<sup>130</sup> Stengers, I 'Comparison as a Matter of Concern' supra note 95 at 62-63. When Waldron takes the view that references to foreign law in the US Supreme Court can rest on the so-called 'law of nations' or '*ius gentium*', an argument that irresistibly evokes natural law (at least in one of its secular renditions), he is falling prey to Stengers's critique: Waldron, J (2012) *Partly Laws Common to All Mankind* Yale University Press. I agree with Choudhry that the tropism towards universalism 'represents more than just an empirical claim that legal principles tend to be shared by many legal systems'. As Choudhry observes, references to foreign law stand as 'the premise of an argument for a normative conclusion: that the presence of a legal principle in many legal systems is evidence of its truth or correctness. Empirical convergence, in other words, is proof of moral truth': Choudhry, S (1999) 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (74) *Indiana Law Journal* 819 at 890. As Waldron gestures towards the ideas of 'truth' and 'better law', he sends one back to 'comparative law''s orthodoxy and its epistemic credulity.

<sup>131</sup> See generally Quine, WVO (1960) *Word and Object* MIT Press at 26-79. I trust it is unnecessary to add that to position oneself against the way in which human rights are understood and re-presented in terms universal, transcendental or eternal is *not* to be against human rights. My contention is not, then, that human-rights work should be discontinued, but that it should be pursued in the name of a presently-located and presently-ascertainable ideology asserting itself through an honest inscription in power, a decisive integrity.

<sup>132</sup> De Sousa Santos, B (2007) 'Human Rights as an Emancipatory Script? Cultural and Political Conditions' in de Sousa Santos, B (ed) *Another Knowledge Is Possible* Verso (2007) at 12. For a converging critique, see, for example, Abu-Lughod, L (2013) *Do Muslim Women Need Saving?* Harvard University Press. See also Woodiwiss, AB (2002) 'Human Rights and the Challenge of Cosmopolitanism' (19) *Theory, Culture & Society* 139.

<sup>133</sup> Mutua, M (2002) *Human Rights: A Political and Cultural Critique* University of Pennsylvania Press at 155. See also Chakrabarty, D (2008) *Provincializing Europe* (2nd ed) Princeton University Press at 5, who notes how 'European imperialism [...] reduced th[e] [Enlightenment] idea [of the human] to the figure of the settler-colonial white man'.

<sup>134</sup> Nader, L (September 2006) 'Human Rights and Moral Imperialism' *Anthropology News* 6 at 6.

<sup>135</sup> For a demonstration of this argument, see Goodale, M (2009) *Surrendering to Utopia: An Anthropology of Human Rights* Stanford University Press.

<sup>136</sup> Shweder, RA (2008) '[Comment]' (49) *Current Anthropology* 377 at 377.

<sup>137</sup> See de Sousa Santos, B, Nunes, JA, and Meneses, MP (2007) 'Opening Up the Canon of Knowledge and Recognition of Difference' in de Sousa Santos, B (ed) *Another Knowledge Is Possible* Verso at xl-xli. Although only

in trying to get everyone to be more like us would be improved if we were more frankly ethnocentric, and less professedly universalist' — which is not at all the same as asserting that all rights claims are indistinguishably weak.<sup>138</sup> It remains that the differend is what there is; in other words, there is more than one human-rights law-as-culture, each instance being singular and none being in a position to assert an objective entitlement to being the true one. The Venn diagram of universal human rights is an empty set. Now, it seems difficult to frame the argument against universalism more acutely than Apollinaire as he spoke at the *Théâtre du Vieux-Colombier* in Paris in November 1917: 'Art will cease being national only on the day when the entire universe, living under the same climate, in houses built on the same model, will speak the same language with the same accent, that is to say, never'.<sup>139</sup> It is, then, a matter of substituting the word 'law' for the word 'art' perhaps bearing in mind how Shelley would refer to poets as 'unacknowledged legislators'.<sup>140</sup> There seems little useful to add.

As regards the view that some laws are better than others at least in the sense in which they would be more efficient — this position being upheld by the 'legal origins' movement on the basis of various (self-selected) econometric indicators —, I make the negative claim that such a 'raw' interpretive grid *cannot* carry worthy epistemic value. The idea that law could unproblematically be converted into economics so as to generate 'objective' data allowing for a comparative appreciation of the legal mercifully free of the semantic ambiguity — the *play* — that otherwise characterizes life in the (texts of the) law is a delusion that simply cannot be endorsed.

Those who claim to have elicited a common denominator transcending laws and the places of laws, allowing for a mathematization of the legal partaking of some sort of epistemic bilingualism and ultimately permitting a rigorous Archimedean assessment (and ranking) of laws in terms of 'efficiency' only are, in effect, positing a range of unwarranted postulates. They argue that they can ascertain, understand and formulate 'the law' governing, say, the sale of real estate in France, both accurately and exhaustively (without their enunciation's being coloured by any pre-understanding of French law that they might carry as a result of their own prior socialization into 'their' English or Japanese law); that there exists a 'referential' language called 'economics'; that 'the law' governing the sale of real estate in France is translatable into 'economics'; that 'the law' concerning the sale of real estate in France can be translated into 'economics' by economists in a manner involving no distortion of it; that economists can reiterate precisely the same sequence (ascertainment, understanding, formulation, translation into a 'referential' language) with respect to, say, the law of real estate in Singapore; that economists can then engage assiduously in *wertfrei* comparison and reach *wertfrei* conclusions with respect to the relative 'efficiency' of each law at stake; and that economists can therefore ground their identification of the 'better' law on unassailable (economic) foundations. The general

tangentially related to the human-rights agenda, the 'rule of law', a conservative 'law-and-order' discourse closely connected to the state and envisaged as a 'technical, legal, and apolitical' template, has been subjected to an analogous process of diffusion while also having to acculturate itself locally: Rajagopal, B (2008) 'Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination' (49) *William and Mary Law Review* 1347 at 1349.

<sup>138</sup> Rorty, R (2007 [1997]) *Philosophy as Cultural Politics* Cambridge University Press at 55.

<sup>139</sup> Apollinaire, [G] (1991 [1918]) *L'Esprit nouveau et les poètes* in *Œuvres en prose complètes* Caizergues, P and Décaudin, M (eds) vol II Gallimard at 946.

<sup>140</sup> [Shelley, PB] (1988 [1840]) *A Defence of Poetry in Shelley's Prose* Clark, DL (ed) Fourth Estate at 297.

idea underwriting these various heuristic motions is an apprehension of comparativism as dialectical resolution favouring the progression, through immersion in a utility-maximizing framework of calculation, towards a position of knowledge of law-as-price that would enclose local epistemologies — their assumed irrationality and their perceived anachronism — within a fixed system withstanding ‘contamination’ by culture, offering technically guaranteed meaning and resting knowledge on secure rational ground not unlike the way in which gold once validated banknotes.

Even if one accepts that ‘[e]conomics is not only descriptive; [that] it is not only evaluative; [that] it is at the same time constructive — [that] economists seek to fashion a world in the image of economic theory’ (*their* economic theory!),<sup>141</sup> it remains that the mobilization of ‘legal origins’ and the attendant articulation of laws into a strictly computational language assumes a disparagement of the legal so serious as ultimately to disqualify this approach as an epistemic operator for comparative purposes. More generally, I argue that it makes no sense to suggest that ‘one of the aims of comparative law is to discover which solution of a problem is the best’ or to assert that ‘a textbook of comparative law should [...] indicate which is the best solution here and now’.<sup>142</sup> Any idea of a ‘better’ law must uncompromisingly yield to that of a ‘preferred’ law — the comparatist’s ‘preferred law’ as identified on the basis of the comparatist’s ‘preferred’ criteria of evaluation, no matter how ‘econometrically’ restated.

Observe that irrespective of any dogmatic self-assertion, economics cannot exempt itself from contingency. It is saturated with culture, both in terms of its specific language and as regards any particular use of that language by any economist, a fact suggesting something like a double bind, that is, embeddedness *squared*. In effect, the enculturation of economics has always already begun — the Heideggerian temporal metaphor indicating that economics is simply unenvisageable otherwise than as culturally-informed discourse. Indeed, the fact that even economic models vary with ideological affiliation shows how economics is unsurpassably woven into the cultural fabric. Structurally, so to speak, economics is therefore but a language, a theoretical matrix, an epistemic construct. A politics is always implied, and economics cannot therefore exist as an independent test of value.

Each of the postulates I have outlined in my illustration regarding the sale of real estate in France is inevitably predicated on hidden predispositions and predilections, including a specific conception of ‘the law’, of ‘understanding’, of ‘enunciation’, of ‘referentiality’, of ‘economics’, of ‘translation’ and of ‘comparison’. These conceptualizations can aptly be termed ‘metaphysical’ at least in the sense that they entail surreptitious appeals to unsustainable — and, in my view, unsustainable — assumptions, for instance, the possibility of the law’s being fully present on the graphical or scriptural level of law-texts (without, then, any need for tracing); the possibility of the interpreter’s fully ascertaining the meaning of the law; the possibility of a referential language; the possibility of identifying a full correspondence between the languages of law and economics; the possibility of comparison between French ‘real estate’ (*‘bien immeuble’* seems to come closest to the English-language designation) and Singaporean ‘real estate’, between a French ‘sale’ (or,

<sup>141</sup> Marglin, SA (2008) *The Dismal Science* Harvard University Press at 3.

<sup>142</sup> Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 29 at 8 and 23, respectively.

rather, 'vente') and a Singaporean 'sale'; and the possibility of reaching conclusions about law's 'efficiency' that would be *sans* interpretive slant.

In sum, there is no economic reading of the law that can materialize outside of the scholarly 'discoveries' that have punctuated technical advances in mathematics. Nor can any economic reading of the law escape the specific institutional structures and social formations that have legitimated the articulation of arguments imbricating the rationalization of society and the maximization of wealth. As much as economics would have one forget about the conditions under which it necessarily engages in a compromising relationship with rhetoric — albeit in disguised, displaced or policed form — when it claims to be speaking expertly on behalf of 'what there is', it cannot occlude the *mise en scène* characteristic of every discourse and of every fiction, of even an authoritarian fiction. In economics, too, '[m]odel-making is a creative activity'.<sup>143</sup> Accordingly, it matters whether one is adopting Hayek or Harcourt.<sup>144</sup>

Penultimately, I want to consider the orthodoxy's assumption that foreign law is translatable (a postulate that would explain the thirty-year silence of the most influential comparative-law text — why indeed theorize translation if there is translatability?).<sup>145</sup> In this regard, I make the negative claim that *no* foreign term is translatable as such. To borrow Derrida's words, '[w]hat guides me is always untranslatability'.<sup>146</sup> This is not to say that laws are not translated: they are, all the time; and they must be. Indeed, 'I *must* translate, transfer, transport (*übertragen*) the untranslatable'.<sup>147</sup> In effect, though, what I then do — translation — is something that, strictly speaking, I experience as that which cannot be done — translation. Even as I produce a translation of the English word 'estoppel' in Spanish or a translation of the German term '*Abstraktionsprinzip*' in Italian, I accept that the word 'estoppel' is untranslatable in Spanish and that the German term '*Abstraktionsprinzip*' is untranslatable in Italian. Consider a further illustration. Even as 'law' habitually translates '*droit*', how could I experience 'law', which emerges in an idiographic legal culture such as the common law's, to act as a translation of '*droit*', which is the product of a nomothetic legal culture like that governing in France or in Germany? Two different paradigms are at stake — which entails that 'X is translatable as Y' cannot relate to the idea of sameness or synonymy of meaning. The abyss across languages is unbridgeable.<sup>148</sup> It follows that

<sup>143</sup> Morgan, MS (2012) *The World in the Model* Cambridge University Press at 158. For a noted argument to the effect that economics is largely a narrative discipline, see McCloskey, DN (1990) *If You're So Smart: The Narrative of Economic Expertise* University of Chicago Press; McCloskey, DN (1998) *The Rhetoric of Economics* (2nd ed) University of Wisconsin Press.

<sup>144</sup> For example, compare Hayek, F (1973, 1976 and 1979) *Law, Legislation and Liberty* 3 vol University of Chicago Press and Harcourt, BE (2012) *The Illusion of Free Markets* Harvard University Press.

<sup>145</sup> I refer, of course, to Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 29.

<sup>146</sup> Derrida, J (April 2004) in Armel, A (ed) 'Du mot à la vie: un dialogue entre Jacques Derrida et Hélène Cixous' *Magazine littéraire* at 26. The words are Derrida's. Beckett's musings on his experience of self-translation attest to analogous (and characteristic) lucidity: [Beckett, S] (2014 [1957]) *The Letters of Samuel Beckett* Craig, G et al (eds) vol III Cambridge University Press at 26: 'I feel more and more strongly that it is a hopeless undertaking. I cannot even translate "vieux linge"'. I ask: who indeed could translate '*vieux linge*' in English?

<sup>147</sup> Derrida, J (2003) *Béliers* Galilée at 77 [emphasis original].

<sup>148</sup> The word 'abyss' ('*Abgrund*') appears in Rilke's correspondence with specific reference to the separation between languages: [Rilke, RM] (1950 [1902]) *Rilke Briefe* Rilke-Archiv in Weimar (ed) vol I Insel at 41. This word is likewise in Celan's letters, where it also points to the gap across languages: Lyon, JK (2006) *Paul Celan and Martin Heidegger* Johns Hopkins University Press at 37. Cf Derrida, J *La Bête et le souverain* supra note 38 at 31, who refers to the 'infinite difference' separating languages (this 'infinite difference' being constitutive of one's very finitude in as much as one cannot overcome it).

the idea that there would exist a common semantic interface allowing for unalloyed inter-linguistic correspondence remains but a speculative, metaphysical composition: '[N]o two ever meet'.<sup>149</sup>

To argue, with Derrida, that because languages resist complete identification and appropriation 'translation is another name for the impossible',<sup>150</sup> is reminiscent of Quine's indeterminacy argument. For Quine, it is not that no translation can ever be achieved, but that no translation can ever be (said to be) correct — and one reason for this conclusion has to do with the fact of inscrutability of reference, another Quinean thesis.<sup>151</sup> Note that as it evokes instability or flux, contingency or indeterminacy, as it takes one away from the permanence intimated by adequation and correspondence, from the disease of transcendentalism also, the semantic play of the text 'takes issue with the Western philosophical tradition and its central belief in the subject/object dichotomy'.<sup>152</sup> This observation effectively restates Adorno's principal claim.

Because translation cannot surpass iterability, that is, repetition with a difference,<sup>153</sup> it thus registers a change. It is a difference-generating practice, 'a practice producing difference out of incommensurability (rather than equivalence out of difference)'.<sup>154</sup> Indeed, the *ference* in 'transference' is also the *ference* in 'difference' — or, to apply one of the many possibilities offered by the German language, any (local) *Wort* will either contract or expand any (foreign) *Ort*.<sup>155</sup> Derrida pithily captures translation's predicament — 'the cruel law of difference'<sup>156</sup> — as he writes that the very word 'translation' ought to be replaced by 'transformation': '[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'.<sup>157</sup> Transformation, according to Derrida, captures untranslatability as the negative moment necessary to the recognition and to the survival of the idiomatic that exceeds one's grasp and to which one's response can therefore be neither passive reproduction nor meaning transfer. It refers to another *economy*, to an economy of *negotiation*.<sup>158</sup> Given the

<sup>149</sup> Beckett, S (2010 [1976]) 'Closed Place' in *Fizzles in Texts for Nothing and Other Short Prose, 1950-1976* Nixon, M (ed) Faber and Faber at 147. It follows that the Gadamerian idea of 'fusion of horizons' ('*Horizontverschmelzung*'), of Hegelian inspiration, cannot hold.

<sup>150</sup> Derrida, J (1996) *Le Monolinguisme de l'autre* Galilée at 103.

<sup>151</sup> According to Quine, there is no principled way of adjudicating between alternative interpretations of language so that one of them could be said to be referentially true. For detailed discussion, see Glanert, S and Legrand, P 'Foreign Law in Translation: If Truth Be Told...' supra note 102 at 513-32.

<sup>152</sup> Mootz, FJ (1988) 'The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricœur' (68) *Boston University Law Review* 523 at 531.

<sup>153</sup> Supra note 69.

<sup>154</sup> Morris, M (1997) 'Foreword' in Sakai, N *Translation and Subjectivity* University of Minnesota Press at xiii. See also Blanchot, M (September 1990 [1961]) 'Cours des choses' in 'Textes préparatoires, lignes, définitions de la "Revue internationale"' (11) *Lignes* 179 at 187: 'The translator is the secret master of difference across languages, not to abolish this difference, but to use it in order to awaken, in his own [language], through the changes that he carries [to it], the presence of what differences there are in the original work'. Adde: Barnstone, W (1993) *The Poetics of Translation* Yale University Press at 18: 'Translation [...] creates a difference'. This claim is the leitmotiv in the work of Venuti, a leading translation theorist: Venuti, L (2013) *Translation Changes Everything* Routledge. 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'.

<sup>155</sup> Cf Derrida, J *Sauf le nom* supra note 28 at 61 and 60, respectively.

<sup>156</sup> Derrida, J *L'Écriture et la différence* supra note 77 at 291 [emphasis original].

<sup>157</sup> Derrida, J *Positions* supra note 125 at 31 [emphasis original].

<sup>158</sup> For another formulation of the dynamics of untranslatability, see Derrida, J (1986 [1984]) *Schibboleth* Galilée at 12: '[T]he crossing of ordinary translation takes place every day without the least ambivalence, each time the semantics of the everyday imposes its conventions. Each time that it effaces the idiom'. An apposite



recalcitrance of language to full replication in another language, translation can be said to unfold, at best, as an agonistic process. In the end, to quote Heidegger, 'language *is* monologue'; it speaks 'lonesomely'.<sup>159</sup>

Although I have refrained from numbering my objections lest the sequence appear too *disciplined*, I have now reached the twelfth negative argument I wish to defend. For present purposes, the claim that there is *no* globalization, as against the conventional assumptions being held by the *Leitkultur* within 'comparative law', is also the last contrapuntal contention that I want to introduce.

I find it important to emphasize at the outset that I (obviously!) do not deny the existence of transnational forms of governance, whether political or economic, of the kind that have prompted a vast re-arrangement of production, labour, distribution and markets since the 1980s. These restructured configurations have characteristically been featuring the implementation of neo-liberal prescriptions (either at the behest of the International Monetary Fund or of the World Bank or through United-States-initiated free-trade agreements) that have led to more privatization, the shrinkage of public employment and the devaluation of public services like health care or unemployment insurance. Nor do I want to deny (just as obviously!) the emergence of forms of homogenization, now long familiar, affecting consumer products or services (there *are* Starbucks 'cafés' on rue de Rivoli in Paris!) and typically relayed through commercial media having themselves undergone the kind of massive change that technological progress, including the advent of the Internet, has facilitated.

What I do maintain, however, is that the vehicles of transnational structure and hegemony, no matter how powerful, have *not* overcome the radical contingency of the world and have *not* tamed the significant centrifugal forces that continue, specifically, to inform life-in-the-law, whether these vectors manifest themselves out of old models like national sovereignty or new ones such as multinational corporations, trade agreements or regional integration. The fact is that '[t]here exists no place that can be said to be "non-local"'.<sup>160</sup> As regards law in particular, the idea of non-location in space is untenable. Any manifestation of the legal — even the most allegedly 'global' — must ultimately be located in space, somewhere. No matter how cosmopolitan the transnational legal institution or practice, any *effectuation* of it must manifest itself at some spatial juncture, that is, in the end, singularly. Even in the age of globalization, *no law is nowhere*.

Whatever persuasive or binding character a decision of the World Trade Organization Appellate Panel may hold, it will thus hold as it is implemented in *this* way by *this* country with respect to *this* trade dispute in *this* location. Whatever persuasive or binding character a clause of the Apparel Industry Partnership may hold, it will therefore hold as it is implemented in *this* way by *this* clothing manufacturer in *this* instance in *this* location. And whatever persuasive or binding character a clause of the International Federation of Consulting Engineers Model Contract may hold, it will accordingly hold as it is implemented in *this* way by *this* building contractor as regards *this* construction site in *this*

understanding of the word 'economy' as Derrida uses it in his work would be 'dynamic interplay': Johnson, C (1993) *System and Writing in the Philosophy of Jacques Derrida* Cambridge University Press at 20. For the idea of 'negotiation', see Derrida, J (1986) *Altérités* Labarrière, P-J (ed) Osiris at 85.

<sup>159</sup> Heidegger, M (1959) *Unterwegs zur Sprache* Neske at 265 [emphasis original].

<sup>160</sup> Latour, B *Reassembling the Social* supra note 64 at 179. For a demonstration of localism *partout*, see Harrison, S, Pile, S and Thrift, N (eds) (2004) *Patterned Ground* Reaktion Books.

location. Between any transnational legal configuration, any meta-law — no matter how compelling — and its instantiation, there is inevitably a hiatus.<sup>161</sup> It is in this *entre-deux*, through this process of perhaps ever-so-fleeting but ever-so-crucial re-territorialization, that the singularity of law irresistibly emerges: '[H]omogeneity [...] is still the local kind'.<sup>162</sup> No matter how much one would want to see legal artifacts 'as hovering nonemergently in some special epistemic heaven and controlling practice from without',<sup>163</sup> the 'global's very being ultimately depends on the 'local' *making it happen*. In the process, as the 'local' implements the 'global', it transforms it and compels it to 'localize' itself.<sup>164</sup> There is a process of translation/transformation taking place.

The notion of 'glocalization' helpfully attests to the hybrid and complex assemblage between global dissemination and local knowledges.<sup>165</sup> Crucially, 'glocalization' entails differentialization. In particular, it accentuates the fact of the existence of local forms of knowledge that no 'meta-law' can circumvent as it requires to effectuate itself locally. It insists on the being-in-space of the law, on law's *dwelling*. Think of autochthonous epistemic 'markers' such as the fact that a judicial decision is written enthymematically rather than as the quashing of an error in logic, as disclosing a commitment to facticity rather than a striving for apodicticity, in English rather than in French. Irrespective of the transnational arrangements at work, one is continuing to operate in significant ways within the realm of localism. This contention brings to mind other instances where terms are mobilized that cannot mean other than locally. How often has it been claimed that uniformization of law would lower transaction costs? But 'transaction costs' can only signify when analyzed locally: what matters is what is understood as 'transaction costs' here, as distinguished from what is configured as 'transaction costs' there. It is particulars that count, and these can hardly be understood or determined under some pre-given rule of identification.

Consider constitutional law. A typical commentary refers to 'the current trend of constitutional convergence'.<sup>166</sup> According to another formulation, '[i]t is undisputed that a considerable convergence of constitutional structures, institutions, texts, and interpretive methods has taken place over the past few decades'.<sup>167</sup> And then, there are enunciations to the effect that 'the combination of theory, methodology, and doctrine amounts to nothing less than generic constitutional law'.<sup>168</sup> In other words, constitutional laws would have become so readily interchangeable that they would no longer deserve to be named. Even leaving to one side the science envy they betray, these statements reveal a profound misapprehension of the agonistic processes that have been developing over the last decades.

<sup>161</sup> Cf Ricœur, P (1950) *Philosophie de la volonté* vol I Aubier at 165: '[B]etween the least contradicted rule and its application, there always remains a hiatus'.

<sup>162</sup> Appiah, KA (2006) *Cosmopolitanism* Norton at 102.

<sup>163</sup> Pickering, A (1995) *The Mangle of Practice* University of Chicago Press at 200.

<sup>164</sup> I accept that there is nothing that obviously exists as 'local' and that the notion of the 'local' therefore requires to be problematized, if only to avoid the traps of romanticization or over-exoticization. Thus, Whitehead refers to 'the fallacy of simple location': Whitehead, AN (1978 [1929]) *Process and Reality* Griffin, DR and Sherburne, DW (eds) Free Press at 137.

<sup>165</sup> Robertson, R (1995) 'Glocalization: Time-Space and Homogeneity-Heterogeneity' in Featherstone, M, Lash, S and Robertson, R (eds) *Global Modernities* Sage at 25-44.

<sup>166</sup> Hirschl, R (2014) *Comparative Matters* Oxford University Press at 11.

<sup>167</sup> Id at 205.

<sup>168</sup> Law, DS (2005) 'Generic Constitutional Law' (89) *Minnesota Law Review* 652 at 661.

The case of French constitutional law, that the defenders of the convergence thesis within comparative constitutional law are prone to harness in support of their position (though conveniently dispensing with detailed argumentation),<sup>169</sup> offers a useful illustration of the refutation I want to register. In 2010, France introduced fully-fledged '*contrôle de constitutionnalité*'. It had had a form of '*contrôle de constitutionnalité*' before, but the previous model had not allowed the constitutionality of a statute to be contested after it had come into force (how could the Rousseauian 'general will', or '*volonté générale*', be challenged once it had most officially expressed itself through the enactment of a statute by the people's duly elected representatives?). Since the 2010 reform, such post-enactment '*contrôle de constitutionnalité*' has become possible, though within noteworthy strictures. As I just indicated, some scholars of comparative constitutional law promptly seized on the French reform to claim a further example of transnational constitutionalism or of transnational convergence of constitutional laws. But this conclusion is not doing justice to the singularity of the French model.

The demonstrable fact of the matter is that French '*contrôle de constitutionnalité*' remains at considerable variance with, say, US judicial review in a number of highly significant respects. Because the list of salient differences is indeed a long one, suffice it to say that '[f]or better or for worse, the reform does not erase French exceptionalism or "anomalies"', that '[t]he reform [...] follows neither [the US nor the German] models of *ex post* constitutional review'.<sup>170</sup> In terms of comparative constitutional law, the difficulty arising in this instance, as so often, is that 'the comparatist presumes similarities between different jurisdictions in the very act of searching for them',<sup>171</sup> that there takes place yet another attempt to fit the square peg of similarity into the round hole of singularity.

Despite the ascertainable migration, circulation or dissemination of legal ideas (this diffusion being arguably more prevalent than was the case one hundred years ago when national laws were not nearly as porous as many of them have become), difference across constitutional laws holds. No matter how organizational forms or rhetorical configurations have been spreading worldwide, each legal situation inevitably features an adaptation to local knowledge that consists in an assemblage with indigeneity. Specifically, despite the 2010 reform, French '*contrôle de constitutionnalité*' remains different in important respects from other models of judicial review — a difference comparatists-at-law must recognize and respect as they trace French law to its cultural fabric with a view to yielding an optimal interpretation of it.

To return to the notion of 'glocalization', what the discerning comparatist can see happening in France on account of the new '*contrôle de constitutionnalité*' is a singular assemblage bringing together an idea in all likelihood historically emerging from the United States (say, the notion that there should be an institution entrusted with the task of keeping statutes in line with the constitution) and French 'local knowledge' (say, the deeply-ingrained distrust of the judge) — no doubt the trammelling of the constitutive parts of the assemblage (its texture) being in effect even more complicated. To reframe

<sup>169</sup> For example, see Jackson, VC (2010) *Constitutional Engagement in a Transnational Era* Oxford University Press at 1.

<sup>170</sup> Hunter-Hénin, M (2011) 'Constitutional Developments and Human Rights in France: One Step Forward, Two Steps Back' (60) *International and Comparative Law Quarterly* 167 at 172 [emphasis original]. For a discussion of key differences, see Legrand, P 'Foreign Law: Understanding Understanding' supra note 8 at 99-103.

<sup>171</sup> Vining, J (1986) *The Authoritative and the Authoritarian* University of Chicago Press at 65.

the matter philosophically, what the sensitive comparatist can see happening in France is the French self-in-the-law re-signifying itself/its self through the incorporation into its 'body legal' of an infusion of otherness-in-the-law. The self thus becomes a revised self on account of the other. But though it is now affected by the other, it is still a self, it is still itself/its self — which is to say that it continues as itself/its self and that it emphatically does not become the other. In sum, the outcome remains a French constitutional self that it would be intolerably reductionist to dilute into a universal configuration called (in English!) 'judicial review' that would now obtain everywhere, if with slight variations rapidly to be deemed 'immaterial'.<sup>172</sup> Instead of a convergence around a single (US?) pattern of institutions and a standardized legal/cultural understanding of it,<sup>173</sup> there exists an irreducible multiplicity of irreducibly singular institutional patterns and legal/cultural interpretive models — some of which actually stand as fully-fledged expressions of resistance to uniformization processes.

In sum, there is not globalization, but *glocalization* — a result that ought not to prove surprising if one reminds oneself of Leibniz's principle: if there is more than one entity, there is difference. Gunther Teubner thus cogently maintains that '[i]f one wishes to conceive at all of a "global constitution", the only possible blueprint is that of particular constitutions for each of these global fragments — nations, transnational regimes, regional cultures — connected to each other in a constitutional conflict of laws'.<sup>174</sup> I find the use of the term 'conflict' significant for it adverts to the fact that constitutional views will be disjunctive and that there will be strife — or cultural misunderstanding — across these disjunctive views, the circulation or dissemination of local models not being in a position to eliminate such fissures. It cannot be globophobic therefore to assert the fact of diversity across constitutional narratives, a differend easily ascertainable empirically for all who care to take a close interest (again, the theme of 'human rights' offering a prominent case in point).<sup>175</sup>



The French poet Mallarmé was firmly of the opinion that '[a]ny comparison is defective at the outset'.<sup>176</sup> Confirming the view of 'comparative law' as a deficient mode of perception abusively concluding to an originary continuity between foreign law and the comparatist,

<sup>172</sup> For an example of differences across laws being termed 'immaterial', see Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 29 at 62.

<sup>173</sup> The ethnocentrism — the 'our-size-fits-all' approach — of those who advocate the advent of a global constitutionalism can be blatant. For example, see Law, DS 'Generic Constitutional Law' supra note 168 at 661: '[C]onstitutional courts experience a common theoretical need to justify the sometimes countermajoritarian institution of judicial review'. With words like 'courts' or 'countermajoritarian' and expressions such as 'judicial review', it seems hard to imagine a statement more characteristic of a specifically US perspective on constitutionalism. I am reminded of Derrida's observation to the effect that 'one will apparently avoid ethnocentrism at the very moment when it will have operated in depth': Derrida, J *De la grammatologie* supra note 43 at 178.

<sup>174</sup> Teubner, G (2012) *Constitutional Fragments* Oxford University Press at 14.

<sup>175</sup> For example, see Baxi, U (2008) *The Future of Human Rights* (3d ed) Oxford University Press at xi n 5 and xi, who emphasizes 'the irreducible plurality of human rights talk' and claims to identify 'as many as six distinct languages of contemporary human rights'.

<sup>176</sup> Mallarmé, [S] (2003 [1892]) *Quelques médailles et portraits en pied* in *Œuvres complètes* Marchal, B (ed) vol II Gallimard at 138.

an approach radically misconstruing what is effectively the *disrelation* between foreign law and the comparatist — the strained idea being that the comparatist could come to foreign law and, by way of a mobilization of concepts and categories, through the harnessing of a method also, place himself in a position to capture it fully, without any accretion or loss, without any distortion —, *NCL* stands as the theoretical formulation of a resounding ‘no’ to the orthodoxy that has long been occupying the field. If you will, *NCL*’s leitmotiv is that the articulation of foreignness is to be envisaged as a motion which, while purporting to negotiate meaning away from the self, to register a discontinuity from one’s ‘own’ law that would evoke Brecht’s ‘*Verfremdungseffekt*’, never manages fully to implement the distantiating from the comparatist’s performative role in a manner that would avoid the foreign unsurpassably finding itself reinscribed within selfness. After Adorno, *NCL* thus refutes the assumption of a possible identity between the law-world and the comparative mind (the orthodoxy’s claim to totalization) and maintains that this non-identity cannot be overcome (there will always be a gap between the law-world and what the comparative mind perceives or says of it). For Derrida, this ‘eviden[ce]’ is ‘essential, absolute and definitive’.<sup>177</sup> I agree.

As it holds that the thesis of the comparatist as quiescent collector of information pertaining to the realm of the given, as sheer receptacle, is a fallacious claim dissimulating his active engagement in the invention of the foreign law under consideration, and as it seeks to fashion itself qua rigorous thought liberating ‘comparative law’ from an unexamined faith in the assumption that perception would inform comparative interventions, *NCL* also purports, reconstructively, to resignify ‘comparative law’, that is, to develop an alternative approach towards comparative analysis that will move away from positivism’s technocratic hypostatization of the graphy, prove more plausible epistemically and offer greater interpretive reward than the orthodoxy’s. Operating not only on the basis of mental analyses but also in the light of lived experience, *NCL* aims to articulate what is effectively a phenomenology of being-a-comparatist-in-the-world acknowledging the finitude of interpretation, that is, the intrinsic confinement of a vision condemned to see according to itself and to remain in itself, a powerlessness to leave oneself to go among the foreign laws, an impotency as regards oneself — an epistemic sensibility that could hardly be further away from the positivist idea of the (full) presence and (total) supremacy of the sophisticated cognizing self.

Noting how the matters of genuine epistemic interest at this juncture are precisely those in which the comparative orthodoxy registers its disinterest, *NCL* wants to fashion an appropriate interpretive matrix allowing for the development of the relevant knowledge that has been suppressed or neglected by traditional ‘comparative law’. In this sense, *NCL* purports to *relevate* ‘comparative law’, to hoist it onto a higher epistemic plane and make it into a worthier, richer intellectual pursuit. It seeks to produce a stronger interpretive yield with a view to achieving greater justice for the foreign law under examination, as

<sup>177</sup> Derrida, *J L’Ecriture et la différence* supra note 77 at 182. Observe that for Derrida this ‘necessity’ ‘confirms and respects the separation [between otherness and selfhood]’, which stands as ‘the opposite of a victorious assimilation’ of the other by the self (of the kind that ‘comparative law’’s orthodoxy so readily favours through such unexamined constructions as the ‘*præsumptio similitudinis*’): Ibid. For the ‘*præsumptio similitudinis*’ — the claim that laws are similar ‘even [as regards] countries of different social structures or different stages of development’ —, see Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 29 at 40 and 46, respectively.

the other's law issues its ethical call to the comparatist for recognition and respect. And NCL aims to foster an apprehension of foreign law featuring enhanced epistemic acuity so that the comparatist's research will ultimately tell us more about the foreign and, as it is made to interact with the foreign through comparative analysis, about 'our' own law. Accordingly, NCL's ultimate challenge is eminently vivifying: it is 'on the side [...] of the affirmation of life', of the life-of-the-law in its infinitely traceable ramifications.<sup>178</sup> Metaphorically, the task at hand can be framed thus: how to get the comparatist, when his already encoded eye sees a unicorn, to avoid asking if by any chance he is not perceiving a gazelle. I am reminded of Barthes who would approach otherness through the motif of the 'not-to-want-to-grasp' ('*non-vouloir-saisir*'), another figure of the negative.<sup>179</sup> But in order to reconstruct an improved analytical grid, one must first make space for it by deconstructing the current, disingenuous, tentacular one.

NCL therefore stands to intervene as a de-position or a dis-position of the orthodoxy, a distrust in its positing and in its positivity and in its positivists and in the positivistic *Zeitgeist* that must be *ex-posed* as the extraordinary epistemic failure that it continues to be — a shortcoming that, literally, prevents comparative studies from a meaningful unfolding and, along the way, gives 'comparative law' either a bad or an indifferent name. At a time when the co-presence of the foreign has become a fact of life for every law and for so many lawyers, 'comparative law''s disreputation cannot but give cause for particular concern. In this sense, negativity epitomizes the transformative role that theory must play as counter-discourse. It effectuates a politics of (good) resistance. It is transgressive in as much as it is critically promoting a radical intellectual transformation or re-signification of the field of 'comparative law' operating as what Adorno's aesthetics of negativity styles a '*Nicht-Mitmachen*' (a not-playing-along or a non-participation).<sup>180</sup> It is an *undisciplined* gesture. It is *contrarian*.

Yet, what can one do if there is no correlation between foreign law and the comparative mind and therefore no representation, no law that would be purely 'legal', no objectivity, no truth in interpretation, no method, no understanding of another law, no sameness across laws, no 'legal transplants', no legal universal, no law that would be better than another, no translatability across laws and no legal globalization? How does negative comparative law *work*? How can one compare negatively and yet *compare on*? Importantly, NCL wants to exemplify negative comparative law in action, so to speak. It purports to deploy the alternative model I defend in order to demonstrate its salient advantages. My ambition is to show that out of the epistemic disaster that has befallen orthodox 'comparative law' and the widespread disciplinary mimesis it has fostered (I follow, therefore I am — in French, '*je suis, donc je suis*'), an opportunity for thoughtful reflection has arisen if only one is willing to move away from objectivity, truth, method and the rest of the rattling epistemic caravanserai. Such a displacement can prompt a comparison that is not only more sophisticated epistemically, but that is also more energizing politically and more

<sup>178</sup> Derrida, J (2005) *Apprendre à vivre enfin* Galilée at 54.

<sup>179</sup> Barthes, R (2002 [1977]) *Fragments d'un discours amoureux* in *Œuvres complètes* (2nd ed) Marty, E (ed) vol V Editions du Seuil at 285-87.

<sup>180</sup> For instance, see Adorno, TW (1997 [1969]) 'Resignation' in *Gesammelte Schriften* Tiedemann, R (ed) vol X/2 Suhrkamp at 794-99. According to Adorno, such attitude '[i]s absolutely necessary in order to keep alive the capacity for experience of the nonidentical': Buck-Morss, S (1977) *The Origin of Negative Dialectics* Free Press at 189.

suggestive ethically (in the end, the epistemic seems inseparable from the political and the ethical).

Notwithstanding the structural inexhaustibility of the other law, of the other's law, despite its contumacy, the comparatist, armed with the constant appreciation that no law can be reprised except through the inadequate mediation of (his) indicative signifiers, must persevere in his aporetic commitment to the constitution of meaning. Even in the face of *communicatio interrupta*, that is also *communio interrupta*, despite the fact that the other exists, at least partly, in a beyond of the self and therefore in a beyond of encountering — which implies that there is no form of intentionality whatsoever, no matter how empathetically dedicated, that can allow the self to *meet* the other as other (in the full sense of the verb) — fine comparative studies show the illuminating cognitive advances that can be reached, the (polemical) gains that can be made.<sup>181</sup>

All along, my goal is not so much to make the study of foreign law or the comparison of laws right or correct over against the orthodoxy. I am not saying that if one engages in *NCL*, one will 'get' foreign law rightly or correctly. Indeed, I regard any reading of foreign law as being constitutively or necessarily a potential misreading. I therefore ask when will comparisons-at-law, finally mocking the idea of referential fixity of meaning as so much frippery, defend the cause of another textuality by beginning their research on, say, the English law of consideration with a sentence that could appear as follows: 'This essay relating to the English law of consideration is honestly not an attempt to lead to an exact reading of it'. When will comparatists-at-law finally admit that there cannot be inscription of law irrespective of them *even as* they themselves, while they purport to exercise control over the foreign law-world, must face the recalcitrance of otherness-in-the-law?<sup>182</sup> And when will comparatists-at-law accept that since they themselves inscribe foreign law, they must forego objectivity, truth and other illusory warrants? Though comparatists cannot make what they like of foreign law, they can only make what *they* like of foreign law — which must entail that the matter of truth in interpretation is epistemically irrelevant and that it is structurally impossible for an interpreter of foreign law, regardless of how powerful his thought, objectively to grasp the legal as such. Again, what I aim to do — and what I regard in fact as a huge epistemic heave — is to make the comparatist's investigation of foreign law and the framing of his comparative analysis more epistemically sound and therefore more intellectually rewarding and more likely to lend itself to a brand of exploitation liable to lead to progressive social transformation. Through this strategic positioning within the field of 'comparative law', *NCL* can demonstrate that a critique of orthodox comparativism is at once necessary and beneficial, and it can indeed epitomize the critical attitude by rejecting a paradigm that so obviously fails to pass epistemic muster.

•

I understand *NCL* as purposefully featuring a series of essays, the essay being a form that 'quietly puts an end to the illusion that thought could break out of the sphere of [...]

<sup>181</sup> For example, see Damaška, MR (1986) *The Faces of Justice and State Authority* Yale University Press; Ruskola, T (2013) *Legal Orientalism* Harvard University Press.

<sup>182</sup> In a text devoted to Virginia Woolf's *To the Lighthouse*, Spivak writes at the outset that '[her] essay is not necessarily an attempt to [...] lead us to a correct reading': Spivak, GC (2006 [1987]) *In Other Worlds* Routledge at 41.

culture’;<sup>183</sup> that ‘incorporates the antisystematic impulse into its own way of proceeding’;<sup>184</sup> that ‘annul[s] theoretically outdated claims to completeness and continuity’;<sup>185</sup> that ‘suspends the traditional concept of method’;<sup>186</sup> that ‘challenges the ideal of [...] indubitable certainty’;<sup>187</sup> that ‘divests itself of the traditional idea of truth’;<sup>188</sup> and that ‘allows for the consciousness of nonidentity’.<sup>189</sup> Contrary, then, to a continuous argument that would unfurl starting from (so-called) primordial theses or foundational premises, an essay that ‘thinks in fragments, just as reality is fragmentary, and finds its unity in and through the breaks and not by glossing them over’,<sup>190</sup> that ‘does not let its domain be prescribed for it’,<sup>191</sup> whose ‘innermost formal law is heresy’,<sup>192</sup> has much to do with ‘[I]uck and play’.<sup>193</sup> Like Adorno, I think that a comportation of fragments whose assemblage forms a constellation of ideas appears optimally suited to a critical theory that has renounced the claim to a theoretical *order*. And this organization befits the finite thinking that optimally suits the comparatist as he faces the ineffability of foreign law and yet proceeds to write *towards* it (rather than on it), as he obstinately *countersigns* it in a way that both confirms the signature of the other, of the other’s work, and that compromises that text through a re-presentation mediating between self-surrender and self-affirmation.<sup>194</sup> Indeed, ‘[a] finite thinking is [...] a thought that thinks this: that it cannot *think* what comes to it’.<sup>195</sup>

•

Though there is arguably no mood-free interpretation of textuality, it ought to be obvious that one need not be a negative, sceptical or pessimistic person in order to argue the case for negative comparative law. Relativizing the binary distinction to the effect that the positive is good and the negative bad, the governing idea informing my specific use of the term ‘negative’, to quote Derrida once more, is that ‘negativity is a *resource*’,<sup>196</sup> that it is *edifying*.<sup>197</sup> If it were a matter of a sentence to say, then, I aim to make comparativism within law into a mode of thinking substantially more *vital* than has thus far been the case. But this goal can only be achieved if ‘comparative law’ will overcome the severe epistemic deficit that has been besetting it and that has been prompting critics to denounce resort to foreign law as ‘deceptive’.<sup>198</sup>

<sup>183</sup> Adorno, TW ‘Der Essay als Form’ supra note 117 at 19.

<sup>184</sup> Id at 20.

<sup>185</sup> Id at 24.

<sup>186</sup> Id at 18.

<sup>187</sup> Id at 22.

<sup>188</sup> Id at 18.

<sup>189</sup> Id at 17.

<sup>190</sup> Id at 24.

<sup>191</sup> Id at 10.

<sup>192</sup> Id at 33.

<sup>193</sup> Id at 10.

<sup>194</sup> Derrida, J *Acts of Literature* supra note 68 at 62 and 69. See generally Derrida, J ‘Countersignature’ supra note 73.

<sup>195</sup> Nancy, J-L (1990) *Une pensée finie* Galilée at 31.

<sup>196</sup> Derrida, J *L’Ecriture et la différence* supra note 77 at 381 [emphasis original].

<sup>197</sup> Rorty stresses the value of ‘edifying’ as opposed to ‘systematic’ studies: Rorty, R (1979) *Philosophy and the Mirror of Nature* Princeton University Press at 365-72.

<sup>198</sup> Loughlin, M (1997) ‘The Importance of Elsewhere’ (4) *Public Law Review* 44 at 57.



In my view, it has become crucial not only as a question of basic scholarly credibility, but also as regards the concrete business of generating meaningful results in the law, that the comparatist should advocate a critical engagement with the notion of 'comparativism'. In other terms, I argue that, even as it delves into, say, the various models of constitutional review or the many approaches to the protection of minority shareholders, 'comparative law' should now unfold also as second-order observation upon its own activity. To refer to Pierre Bourdieu's sociological insight, 'the progress of knowledge [...] assumes progress in the knowledge of the conditions of knowledge'.<sup>199</sup>

•

In imparting radical and discerning intellectual equipment restively allowing for the tracing of its assemblages, even as it remains aware of the frangibility of its vocabulary of ascription vis-à-vis selfhood and otherness, *NCL* stands for a strong valorization of the foreign and of 'comparative law''s argument in favour of the legally foreign. In Beckett's evocative words, '[t]he artist is active, but negatively'.<sup>200</sup> So, in law, must be the comparatist.

<sup>199</sup> Bourdieu, P (1980) *Le Sens pratique* Editions de Minuit at 7.

<sup>200</sup> Beckett, S (2006 [1931]) *Proust in The Grove Centenary Edition* Auster, P (ed) vol IV Grove Press at 539.

NEGATIVE COMPARATIVE LAW:  
A CONSPECTUS OF THE ARGUMENT

- I. No Representation
- II. No Purity (of Law)
- III. No Objectivity
- IV. No Truth (in Interpretation)
- V. No Method
- VI. No Understanding
- VII. No Sameness (of Laws)
- VIII. No 'Transplants'
- IX. No Universal (Law)
- X. No Better Law
- XI. No Translatability
- XII. No Globalization