

## On the Singularity of Law

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We must attempt to hear only what is said there.  
—Heidegger<sup>1</sup>

Thus, situating myself within a cosmopolitan polycentricity, I discern two salient interpretive strategies purporting to ascribe meaning to what is apprehended as “law”—neither of them ever appearing in pure guise, both of them always formulated as narrative *predilections* (or valorizations).

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The first approach discounts the singularity of law. Underlying this management-driven, productivity-oriented response to law-texts is the decision to instrumentalize law—that is, to press law into service in support of an agenda diversely introduced as “harmonization,” “integration,” “uniformization,” “unification,” or “globalization.” This program of rationalization’s principal discursive configurations are law-as-meta-law and meta-law-as-law.

The initial variation on the theme of trans-legality concerns the move from localism to transcendentalism. Assumptions informing the prescriptive case for law-as-meta-law include the idea that law’s facticity must be regarded as the largely obsolete remnant of an early-modern worldview mired in diverse brands of stultifying nationalism; the related idea that as long as law’s particularism continues to abide, not enough has been done to move beyond the post-feudal shackles of melancholic parochialism; and the further idea that meta-law is worthy of high estimation as a progressive political, economic, or social weapon. For the partisans of law-as-meta-law, the responsible thing to do in the face of obstinate traces of stupefied localism is to surpass them, that is, to foster an emancipatory project of liberation from prejudice that moves

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1. MARTIN HEIDEGGER, INTRODUCTION TO METAPHYSICS 155 (Gregory Fried & Richard Polt trans., Yale Univ. Press 2000) (1953) (I have modified the translation [“*Wir müssen versuchen, nur zu hören, was da gesagt wird.*”]).

beyond/beneath any culturality/traditionality of law.<sup>2</sup> Unsurprisingly, advocates of this position, possibly taking the view that law-texts are striving for self-realization through assimilation into a totality and for reconciliation *inter se* within the totality, find law inherently repeatable and indeed incessantly repeated.<sup>3</sup> Almost inevitably envisaging law as consisting of basic units somehow unconnected in any meaningful way to any local network of intelligibility, which they proceed to make isomorphically homogeneous across borders, the partisans of law-as-meta-law readily refer to the transportability of law and, indeed, to the obviousness of the transportability of law.<sup>4</sup>

The other main variation on the theme of transcendentalization involves meta-law-as-law—that is, supranational regulatory or conflict-resolution regimes operating, often outside the realm of governmental law-making or international treaties and within self-established procedural frameworks, as issuers and enforcers of sometimes highly specialized rules. Whether one has in mind the Apparel Industry Partnership,<sup>5</sup> the WTO Appellate Panel, the International Federation of Consulting Engineers Model Contract, the *lex mercatoria*, the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”), or the World Heritage Convention, “global” rules of governance are understood as functioning in a standard manner showing no meaningful deviation from one locus to the next—that is, as being implemented “irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied.”<sup>6</sup> Again, law is found to be inherently repeatable and indeed incessantly repeated. Even within the European Community, where the Treaty of Rome’s preoccupation is with the harmonization of laws (i.e., not with uniformity, equivalence, or convergence) and where all directives concede a national margin of appreciation to Member States,

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2. While “beyondness” straightforwardly suggests “universal” (or “celestial”) terms, “beneathness” stands for the “tellurian” version of transcendentalization. For instance, the notion of “common core” refers to a nucleus or kernel, which must be “unearth[ed],” undergirding what is understood as the surface differentiation of laws. Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 COLUM. J. EUR. L. 339, 340 (1998). I am indebted to André Potocki for his material insight.

3. See, e.g., James Gordley, *Comparative Legal Research: Its Function in the Development of Harmonized Law*, 43 AM. J. COMP. L. 555, 561 (1995) (“[T]he German, the American, and the Frenchman . . . are addressing a problem that arises in each of their own countries but neither the problem nor its solution are any more German than American or French.”); Basil S. Markesinis, *The Destructive and Constructive Role of the Comparative Lawyer*, 57 RABELSZ 438, 443 (1993) (“[F]oreign law is not very different from ours but only appears to be so.”); KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 39 (Tony Weir trans., Oxford Univ. Press 3d ed. 1998) (1969) (“[L]egal systems give the same or very similar solutions, even as to detail, to the same problems of life . . .” [“Rechtsordnungen kommen . . . in den gleichen Lebensfragen oft bis in Einzelheiten hinein zu gleichen oder doch verblüffend ähnlichen Lösungen.”]).

4. See, e.g., ALAN WATSON, LEGAL TRANSPLANTS 94–95, 100–01 (Univ. of Georgia Press 2d ed. 1993) (1974) (“[T]he transplanting of individual rules or of a large part of a legal system is extremely common . . . [T]ransplanting is, in fact, the most fertile source of development . . . [T]he transplanting of legal rules is socially easy . . . [I]t follows . . . that usually legal rules are not peculiarly devised for the particular society in which they now operate . . . [I]t would be a relatively easy task to frame a single basic code of private law to operate throughout [the whole of the Western world.]”).

5. See Paul S. Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 369 (2002).

6. GOVERNING COUNCIL OF UNIDROIT, *Introduction, in UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS*, at xv (2d ed. 2004).

designations like “European Contract Law,” “European Tort Law,” “European Private Law,” “European Administrative Law,” “European Public Law” (dereferralized labels *all*), to confine myself to the smallest number of illustrations culled from the plethoric references to “one law,” point to the view that “[u]niformity, in an ideal [European Community] would be both substantive and procedural. Not only would black-letter law be the same in all Member States, as if diligently copied or faithfully translated from a single private law code, but judicial remedies would reflect an identical sense of procedural justice as well.”<sup>7</sup>

As the articulation of law-as-meta-law assumes the “redemption” of the law-text which is re-conceptualized as the embodiment of a supposedly enlightened humanity, the understanding of meta-law-as-law suggests an appreciation for a post-national developmental logic. In both instances, the directing idea is that a notion of “similarity” or “semblance” can serve as an exhaustive principle of explanation accounting for the implementation of the law-text at issue. For instance, what matters for meta-lawyers concerned with law-as-meta-law is that France can be said to have adopted “plea bargaining” and that it can thus be seen to be converging with the United States. What does *not* matter nearly as much for such meta-lawyers is that the framework implemented by France for “*comparution sur reconnaissance préalable de culpabilité*” is typically French, specifically as regards the constraints limiting the authority of the public prosecutor and the extensive supervisory power exercised by the judge. Similarly, what matters for meta-lawyers concerned with law-as-meta-law is that before the U.S. Supreme Court decision in *Lawrence v. Texas*, the European Court of Human Rights in *Dudgeon v. United Kingdom* had invalidated a statute criminalizing sodomy such that the United States can now be seen to be converging with Europe.<sup>8</sup> What does *not* matter nearly as much for such meta-lawyers is that *Lawrence* had to do with substantive due process, rational-basis review, fundamental rights, strict-scrutiny review, and judicial deference for statutes while *Dudgeon* concerned privacy, necessity, pressing social need, proportionality, and Europeanization. What matters for meta-lawyers concerned with meta-law-as-law is the development of a “European Company Law.” What does *not* matter nearly as much for such meta-lawyers is that “the actual harmonization of divergent national laws and legal traditions seems to be meagre” and at times “drastically overstate[d],” or that “European businesses are not relying on the company law directives,” or that there exists a “German European Company Law” (or “*Deutsches Europäisches Gesellschaftsrecht*”)—that is, a reconstruction, in the European Community’s single largest jurisdiction, of European materials in national doctrinal terms with a view to protecting local law (and local providers of expert

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7. Daniela Caruso, *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration*, 3 EUR. L.J. 3, 11 n.19 (1997).

8. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981).

information) from a perceived invasion by English companies.<sup>9</sup> What matters for meta-lawyers concerned with meta-law-as-law is the introduction in Poland of the European Community's sanitary standards pertaining to the food industry with a view to integrating Polish products and firms within the European "technological zone" so as to further confidence and investment. What does *not* matter nearly as much for such meta-lawyers is that the flow of capital into Poland is accompanied by the erection of significant financial and psychological barriers to market participation by a substantial number of small processing firms and small farmers who thus find themselves excluded from formal markets, driven into an illicit economy, and cast into a new hierarchy of power characterized by covert or open forms of tension regarding, for instance, conceptions of personhood and social relations.<sup>10</sup> What matters for meta-lawyers concerned with meta-law-as-law is the development of "supranational capital markets [which] have joined many of the world's various peoples and societies into a new polity, a single virtual metropolis . . . [such that a] seemingly simple order to buy stock in a company rests on a great deal of shared and legally enforceable culture . . . . Language, contractual obligation, institutional relation, money, accounting, property, and hence deeper matters like the past, the future, the individual, and the exercise of the will, must be understood in similar ways."<sup>11</sup> What does *not* matter nearly as much for such meta-lawyers is that "[t]he translation [by the Japanese] of the Greek word for 'economy' into 'serving the country, helping the world' . . . links the realization of the Western ego with the Eastern sacrifice for the country, thus making conducting business ethically a highly honoured work," and that "Asian business schools, drawing on the long Chinese tradition of the 'art of war,' describe business as being similar to military combat . . . [such that] the Japanese and Chinese engage in economic competition as though they are engaged in war."<sup>12</sup>

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9. Harald Halbhuber, *National Doctrinal Structures and European Company Law*, 38 COMMON MKT. L. REV. 1385, 1406–08 (2001). This is not in the least an isolated instance, for "there are as many European laws as there are relatively autonomous legal discourses, organized mainly along national, linguistic and cultural lines." Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, 14 DUKE J. COMP. & INT'L L. 149, 160 (2004).

10. See Elizabeth C. Dunn, *Standards and Person-Making in East Central Europe*, in GLOBAL ASSEMBLAGES 173, 173–93 (Aihwa Ong & Stephen J. Collier eds., 2005). The idea of "technological zone" is indebted to Andrew Barry. ANDREW BARRY, *POLITICAL MACHINES* 37–61 (2001).

11. DAVID A. WESTBROOK, *CITY OF GOLD* 1 (2004).

12. Pham Duy Nghia, *Confucianism and the Conception of the Law in Vietnam*, in ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM 87 (John Gillespie & Pip Nicholson eds., 2005) [hereinafter ASIAN SOCIALISM AND LEGAL CHANGE]. Although, as Unidroit's agenda makes clear in, for example, GOVERNING COUNCIL OF UNIDROIT, *supra* note 6, there will be those "dismissing indigenous business culture as sub-optimal or non-existent." John Gillespie, *Changing Concepts of Socialist Law in Vietnam*, in ASIAN SOCIALISM AND LEGAL CHANGE, *supra*, at 59. I feel the need to emphasize that I am not defending the excessive claim that local knowledge simply does not concern meta-lawyers. Indeed, I have been careful at the outset to refer to *predilections* (or valorizations). For a study of international currency markets showing how global domains are shaped by interaction principles habitually associated with local contexts, see Karin Knorr Cetina & Urs Bruegger, *Global Microstructures: The Virtual Societies of Financial Markets*, 107 AM. J. SOCIO. 905 (2002). Westbrook also offers a good illustra-

In other words, in all these situations what matters is a feature of law—let us say, the *preceptual* dimension—which, it is thought, can be identified as manifesting itself independently of location in space and independently of situation in time, as showing orderly regularities “that emerge” irrespective of space and time.<sup>13</sup> The ascertainment of preceptual commonalities across laws “establishes” a descriptive case for meta-law, either emerging from local law or applying locally as law.

Fascinatingly, the defenders of meta-law readily address the question from “a dogmatic point of view,” in terms of “order” and “a coherent structure.”<sup>14</sup> For instance, they claim that “[w]hat is required is a sharply-defined set of legal concepts and integral rules and principles,”<sup>15</sup> which only “a codified set of principles can provide.”<sup>16</sup> With specific reference to the matter of a European civil code, it has also been said that “the crucial question” is that this legal order must exist “in a manner that is binding on everyone so that reliable behaviour control—in other words, legal certainty—is created.”<sup>17</sup> In sum, what stands in the way of such *Ordnungsschema* must be overcome as so many *subtilitas interpretandi*. Even studies attesting to the fragmentation of the global legal order and to the insuperable character of incompatibilities between colliding rationalities across global sectors of legal activity mention “the *problematic*

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tion of a meta-lawyer (in his case, someone arguing for the significance of transcultural corporate governance) who acknowledges the role of localism, both in practice, *see, e.g.*, WESTBROOK, *supra* note 11, at 260, and as a question of theory, *see, e.g., id.* at 296–97. A representative statement is that, “[t]he financial markets are constructed by law, law, and more law—and a more artificial, in that sense cultured, process cannot be imagined.” *Id.* at 313. But this passage is to be found only deep into a forbidding thicket of endnotes running to thirty-six pages in small print. In other words, Westbrook’s thesis is clearly not about how it matters that one is dealing with a “GmbH,” a “S.A.,” or a “plc” so much as it is about something like a Hegelian master-narrative of “global corporatism.” In an e-mail correspondence, Westbrook argues that “[t]he Bretton Woods institutions, at bottom, do not establish a meta-discourse.” E-mail from David A. Westbrook, Professor, University at Buffalo Law School, State University of New York, to Pierre Legrand, Professor of Law and Director of Postgraduate Comparative Legal Studies, Université Panthéon-Sorbonne, Paris (Feb. 25, 2006) (on file with author). As I understand it, “Bretton Woods” is a system of rules, institutions, and procedures designed to regulate the international monetary system. When the World Bank imposes conditions known as “Structural Adjustment Programs” on loan recipient countries forcing them to adopt measures such as deregulation of capital markets, privatization of state companies, or pension reform, I find it reasonable to apprehend these “modalities” in terms of meta-law. A similar argument can be made as regards the International Monetary Fund’s loan conditionalities to governments imposed with a view to applying neoliberal pressure on local policy, whether domestic or foreign. *See* NGAIRE WOODS, *THE GLOBALIZERS: THE IMF, THE WORLD BANK, AND THEIR BORROWERS* 70–72 (2006).

13. “What counts for the purpose of comparison is the fact of a solution and not the ideas, concepts, or legal arguments that support the solution.” George P. Fletcher, *The Universal and the Particular in Legal Discourse*, 1987 *BYU L. REV.* 335, 335.

14. Christian von Bar & Stephen Swann, *Response to the Action Plan on European Contract Law: A More Coherent European Contract Law (COM (2003) 63)*, 11 *EUR. REV. PRIVATE L.* 595, 599, 601 (2003).

15. *Id.* at 599.

16. *Id.* at 598.

17. Hans-Peter Schwintowski, *Auf dem Wege zu einem Europäischen Zivilgesetzbuch*, *Juristen Zeitung (JZ)* 205 (2002), at 208 [“Die entscheidende Frage” / “dass es sie für alle verbindlich gibt, so dass verlässliche Verhaltenssteuerung—sprich Rechtssicherheit—entsteht.”]. The English words “behaviour control” fail to capture the very strong connotations evoked by the German term “Verhaltenssteuerung.” This usage is now obsolete in Germany.

issue of consistency.”<sup>18</sup> The fixation with monistic thought can go so far as to ignore “inconvenient” arguments that make the case for the persistence of law as local knowledge. Consider the well-rehearsed debate surrounding the matter of good faith. A 750-page book aiming to promote the view that there is to be found a meta-law of good faith within the European Community chose to *overlook* a sophisticated argument showing otherwise.<sup>19</sup> Also, a chapter purporting to “examine . . . how the concept of objective good faith is understood in the various [European] countries” and claiming by way of conclusion that “a good faith clause . . . may be of particular importance for a new [civil or contract] code for Europe” elected not to refer to the 1992 House of Lords decision in *Walford v. Miles*,<sup>20</sup> in which the court took the view that, in English law, a doctrine of good faith is “unworkable in practice” since it is “inherently repugnant to the adversarial position of the parties.”<sup>21</sup> Nowhere in the chapter’s 28 pages or 159 notes is the case mentioned.<sup>22</sup>

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The second approach can be understood by its resistance to such thinking. It contests the merits of the surgical operation being performed on law in order to exclude traces of localism so that, say, “French” law appears as devoid of any feature that would make it in any recognizable way “French,” or “U.S.” law appears as devoid of any feature that would make it in any recognizable way “Unitedstatesean.” It disputes the view that “there is no such thing as a French law or German law or American law that is an independent object of study apart from the law of other countries.”<sup>23</sup> It objects to an act of instrumentalization, of coercion, of symbolic violence that reveals an analyst not as bearing (critical) witness to what characterizes “French” or “U.S.” law, but as re-fashioning “French” or “U.S.” law in order to make these laws amenable to his ideological pursuits. It is not, of course, that there can be identified an “essence” of French or U.S. law that would be unproblematically there, waiting

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18. Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999, 1003 n.17 (2004) (emphasis added).

19. See GOOD FAITH IN EUROPEAN CONTRACT LAW (Reinhard Zimmermann & Simon Whittaker eds., Cambridge Univ. Press 2000). The book omits any reference to Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

20. *Walford v. Miles*, [1992] 2 A.C. 128, 138 (H.L.) (Lord Ackner).

21. Martijn W. Hesselink, *The Concept of Good Faith, in TOWARDS A EUROPEAN CIVIL CODE* 471–72, 497–98 (Arthur Hartkamp et al. eds., 3d ed. 2004).

22. Other cases omitted from the author’s contribution offer well-known illustrations of the English resistance to the idea of “good faith.” See *Inter-Photo Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1989] Q.B. 433 (denying the existence of a doctrine of “good faith”). See also *Director General of Fair Trading v. First National Bank plc*, [2002] 1 A.C. 481 (H.L.), where “good faith” is domesticated as “fair and open dealing.” Strangely, the author does not refer to a single English case throughout his paper and confines his repertoire of authorities bearing on English law to one regulation, one law review article, and six textbooks. But this exceedingly *thin* array of (ethnocentric) references does not prevent the pronouncement that the English reticence vis-à-vis good faith is “unjustified.” See Hesselink, *supra* note 21, at 498.

23. Gordley, *supra* note 3, at 566.

to be discovered by the thoughtful interpreter. Elementary hermeneutics teaches that every interpretation, no matter how purportedly faithful to the law-text being interpreted, will ground its understanding in a meaning-giving activity being conducted according to a self's motivations and goals (whether consciously or not). But there is an obvious distinction between a reading that conceives of its task as the pragmatic utilization of a text and another that shows itself as being ready to respond to the text's specific utterance.

For the critic of law-as-meta-law or of meta-law-as-law, "[t]here exists no place that can be said to be 'non-local.'"<sup>24</sup> The idea of non-location in space and, indeed, non-situation in time is untenable. Any manifestation of the legal—even the most allegedly “global”—must be located in space and situated in time. No matter how cosmopolitan the trans-national institution or practice, any *effectuation* of it must manifest itself singularly. Whatever persuasive or binding character a clause of the Apparel Industry Partnership may hold, it will hold as it is implemented in *this* way by *this* clothing manufacturer in *this* instance. Whatever persuasive or binding character a decision of the WTO Appellate Panel may hold, it will hold as it is implemented in *this* way by *this* country with respect to *this* trade dispute. Whatever persuasive or binding character a clause of the International Federation of Consulting Engineers Model Contract may hold, it will hold as it is implemented in *this* way by *this* building contractor as regards *this* construction site. The point is that between any meta-law, no matter how compelling, and its instantiation, there is inevitably a hiatus.<sup>25</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 compellingly emerges: “[H]omogeneity . . . is still the local kind.”<sup>26</sup> The ultimate

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24. BRUNO LATOUR, REASSEMBLING THE SOCIAL: AN INTRODUCTION TO ACTOR-NETWORK-THEORY 179 (2005). For an excellent demonstration of localism *partout*, see PATTERNED GROUND: ENTANGLEMENTS OF NATURE AND CULTURE (Stephen Harrison et al. eds., 2004).

25. Cf. 1 PAUL RICOEUR, PHILOSOPHIE DE LA VOLONTÉ 165 (1950) (observing that even “*entre la règle la moins contredite et son application il demeure toujours un hiatus*” [“between the least contradicted rule and its application, there always remains a hiatus”]).

26. KWAME ANTHONY APPIAH, COSMOPOLITANISM 102 (2006). This appreciation has prompted the emergence of a notion of “glocalization.” Roland Robertson, *Glocalization: Time-Space and Homogeneity-Heterogeneity*, in GLOBAL MODERNITIES (Mike Featherstone et al. eds., 1995). It seems apt to observe that I do not see myself as disagreeing with Joerges as he notes, with specific reference to European Community law, that “an important characteristic of the integration process [is] that it effectively dissolves the links between private law and its regulatory environment”—although I would rather talk of “reconfiguration” than “dissolution.” Indeed, this “disintegrative side-effect” is precisely one illustration of the differentialization processes that I argue meta-law cannot circumvent as it effectuates itself locally. Joerges, *supra* note 9, at 183. Some of my questions to Joerges would have to do with the discursive “de-couplings” themselves. Does the fashioning of these “de-couplings” not turn in significant ways on an array of autochthonous epistemological “markers” such that, for example, 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 French, would matter? In other words, are we not operating squarely within the realm of localism? This issue brings to mind other instances where terms are deployed which cannot mean anything other than locally. How many times has it been claimed that uniformization of law would lower transaction costs? But “transaction costs” can only signify anything when analyzed locally: these costs here and those costs there. Surely, particulars are what matters and just as surely particulars cannot be understood or determined under some pre-given rule of

dependency of the “global” on the “local” also reveals itself in “*comparution sur reconnaissance préalable de culpabilité*” or *Dudgeon v. United Kingdom*, no matter how much one would want to see those legal artifacts “as hovering nonemergently in some special epistemic heaven and controlling practice from without.”<sup>27</sup>

Such critique adheres to the post-Cartesian view that law is always law-*in*-world—the preposition aiming to capture the kind of all-encompassing relation that a sentence like “Pierre is *in* love” might suggest. For example, it takes the view that given the inherent worldliness of law, what is excluded as not partaking in law is not eliminated unproblematically. Indeed, it claims that this exclusion is such as to eviscerate law to the point where what remains—and what is re-presented as “French” or “U.S.” law—is no longer “law” in any meaningful sense of the term. When *Dudgeon* is confined to its preceptual element and is then said by the U.S. Supreme Court in *Lawrence* to be European law, it is no longer “law” in any meaningful sense of the term. Too much has been excluded. Too much is being repressed. What is being excluded or repressed—let us say, world—is so importantly a constitutive element of law that what is left is left to exist without significance. The exclusion of world is the erasure of significance. To cast the argument in philosophical terms, the critic of law-as-meta-law argues that any ontology of law (that is, any exploration of law’s being, of what law is) must be apprehended as a *hauntology*.<sup>28</sup> The point is that the very being of law is haunted, that for law to be as “law” means for law to be constitutively inhabited by specters, that is, by discursive formations—historical, political, economic, social, psychological, linguistic—that, although not necessarily “present” in the sense that they would be “there,” on the sheet of paper or on the computer screen, in so many words, like the text of the statute or of the judicial decision, are nonetheless present in that they constitute the very being of law at least as much as the actual wording of statute or case. These traces are the *archive* of the law. What does not immediately show itself (say, the historicity of the discourse) belongs to what shows itself (the words of the statute) and belongs to it so crucially as to be constitutive of its very identity. Consider France’s statute no. 2004-228 of 15 March 2004, which regulates, “in application of the principle of secularism, the wearing of signs or clothes expressing a religious affiliation in public primary schools, junior and senior high schools.”<sup>29</sup> A critic of law-as-meta-law would oppose the idea that this law-text can be meaningfully understood at a strictly preceptual level, that is, as prohibiting certain religious dress at school, and would claim that local conceptions of republicanism and citizenship, local appreciations of the scope of the public vis-à-

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27. ANDREW PICKERING, *THE MANGLE OF PRACTICE* 200 (1995).

28. JACQUES DERRIDA, *SPECTRES DE MARX* 255 (1993) (“*hauntologie*”).

29. Legifrance, <http://www.legifrance.gouv.fr/WAspad/UnDocument?base=LEX&nod=1LS004228> (last visited Apr. 8, 2006) (“*Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.*”).

vis the private sphere, local understandings of the relationship between state and church, local demographics, local fears, and local hopes, *inter alia*, must be integrated into any meaningful reading of the law-text because they are constitutively part of it. In other words, without this constellation of discourses, the law-text would be reduced to an enunciation that, literally, would become devoid of meaning. To reduce the French text to its preceptual element and to argue that it is, in effect, “repeating,” say, a Turkish text which, having also been reduced to its preceptual element, could also be said to concern the prohibition of religious dress at school,<sup>30</sup> and *then* to advance the view that France and Turkey “give the same or very similar solutions, even as to detail, to the same problems of life (Zweigert and Kötz),” that “[Turkish] law is not very different from [French law] but only appears to be so (Markesinis),” that “there is no such thing as a French law or [Turkish] law . . . that [could be] an independent object of study (Gordley),” and that “legal rules are not peculiarly devised for the particular society in which they now operate (Watson)” is, for the critic of law-as-meta-law, to deceive on a massive scale.

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Recognizing that neither law nor meta-law can be situated “beyond space” or “out of time;” wanting to reduce the danger of “thin” understanding and the risk of “thin” interpretation; wishing to mitigate the symbolic violence being visited on law-texts; regarding the “how-ness” and the “what-ness” of law as inherently constitutive of law; acknowledging that I am forging differential analysis of juriscultures in the smithy of my mind and that I am thereby also engaging in symbolic violence, but taking the view that the violence that purports to account for the difference that is the case (to the extent that anything can be said to be the case) between laws and between instantiations of meta-law on account of the inescapable relation of law and world is emphatically the lesser violence (in contrast to the fundamentally aggressive model of universalism as self-assertion); valuing the contrarian challenge that arises from differential comparativism in lieu of the comforting vindication that is generated by the (claimed) identification of sameness; thus placing myself firmly in the critical camp, I defend a basic interpretive strategy aiming to overcome the forgetfulness of law’s being to which involvement in ideological projects has apparently condemned interpreters. I argue for a politics of remembering, and thus of enablement and empowerment. The point is not so much to defend truth against falsehood, but to promote a richer *yield*. If, of course, the goals sought (though never attainable) have something to do with understanding what is there (to the extent, again, that anything can ever be apprehended as a “there”),<sup>31</sup> to say that French law is like Turkish law eluci-

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30. See *Şahin v. Turkey*, No. 44774/98 (Eur. Ct. H.R. Nov. 10, 2005), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search in “Complete Text” for “44774/98” then follow link “Case of Layla Şahin v. Turkey” for date Nov. 10, 2005).

31. My point is that “thereness” is constructed such that one also needs to focus on the mediators. Thus,

dates very little about either. To talk about European Contract Law is even less helpful. To unravel the singularity of French law, Turkish law, or European laws of contract, to hearken to texts on their “own” terms, to allow law-texts to speak for themselves, as an example only of themselves—a process that stops when the reading reaches a space where the text is felt to project itself so specifically that any further interpretation begins to be sensed as in any event inadequate—is infinitely more *edifying*.<sup>32</sup> The singularity at issue is not some sort of punctual idiosyncrasy to be particularized in its oddity and separateness. What a law-text is, is precisely its force of implication in a network of assumptions, usages, beliefs, and emotions, that is, in a concrete and constitutive state of affairs. Thus, the singularity of the individual law-text is its precise inflection of the relational interplay that makes it what it is. Its recognition always involves a negotiation that must operate very slowly, since it concerns the basic reorientation of one’s more general stance toward the law—that is, the fashioning of a resistance to the ever-present temptation of coming to law-texts in terms of what we find familiar or think we already know. The singularity of law is that it necessarily exceeds being understandable in universal (or universalizable) terms.

The idea cannot be, of course, for the interpreter to withdraw from law-texts or to abdicate any responsibility vis-à-vis world. Rather, the interpreter opting to recognize the singularity of law actively engages with the law-text in an effort to elucidate it on its own terms, as such—or, at least, with as much “as-suchness” as is possible given the cultural/traditional embeddedness of the discourse and the prejudices of the interpreter. This apprehension of the law-text calls for interpretive rigor, for an elucidation of the constitutive discursive constellations (understood not as “noise” impeding the aim to secure knowledge, but as enhancing intelligibility), which fashion that which shows itself. Thus, my argument wants to be an explicit and rigorous movement toward clarity and depth. This is not, then, to eschew the pitfalls that will attend the enterprise of elucidation—the fact of the hermeneutic situation of the interpreter, who always intervenes within a fore-structure of presuppositions that are always projected in advance of what he is interpreting, being one such pitfall, and the problem of closure (how far does one go in uncovering ever-deeper levels of meaning?) being another. Singularity includes the provocation of what cannot be fully understood. It is an ethics of understanding offering a model of responsible reading as both the most demanding and non-compartmentalized breadth of description while simultaneously engaging with a text’s minutiae. The absence of a universal frame of reference cannot mean a loss of authority for the law-text. On the contrary, it helps to

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“whenever anyone speaks of . . . a ‘global feature,’ . . . a ‘world economy’ . . . , the first . . . reflex should be to ask: ‘In which building? In which bureau? Through which corridor is it accessible? Which colleagues has it been read to? How has it been compiled?’” LATOUR, *supra*, note 24 at 183.

32. For the value of “edifying” as opposed to “systematic” studies, see RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 365–72 (1979).

secure its force by refusing the reader the easy option of interpretation within some pre-given framework. It draws understanding back into the text and its particular configurations, their singular resistance and resonance. It makes the text into a statement. The text has force because it is (allowed to be) a statement. The singularity of law names the specific being of a law-text. It underlines its resistance to the currently prevailing project of a universal language of legal significance into which one would translate everything according to its effectiveness for the project and that would ground what the “legal” should be on the basis of some supposedly shared attribute.

To reject the view that any manifestation of the “legal”—say, a situated instantiation of an alleged meta-law—is singular is ultimately to suggest that a distinction can be drawn between “something” that could be discreetly identified as “legal” and “something else” that could be severed from it. I claim that such a distinction must fail. I also argue that this failure is a necessary failure in as much as it concerns the very constitution of the “legal,” whether as practice or institution. In other words, law’s being is such that any attempt to transport it “above” or “beyond” singularity rapidly loses itself in artificial if not arbitrary acts of separation. Whether one is talking about a municipal ordinance, a European directive, or an international convention, whether one is addressing security issuance, syndicated loans, or Incoterms, each manifestation of law is an event, that is, it occurs or deploys itself as “something” that is never the repetition of anything else and that will never be repeated either—it occurs as something operating within a specific historical situation and within a historical situation which, because time is what it is, is inevitably specific.<sup>33</sup> (There is, I hasten to add, nothing mystical about this account.) Indeed, this singularity is such that it necessarily exceeds the limits of any rational or analytical accounting if only because it exceeds conscious experience. Incoterms—yes, Incoterms!—as they are implemented by merchants, lawyers, arbitrators, and judges, generate, on each and every occasion, an original configuration. The originality may be slight, but it is present even in what seems most familiar. Every purported replication of the “legal” in fact produces singularity—that is, generates “something” that differs from what has come before and from what will come after. It can be a matter of cognitive inclinations, predispositions, or associations. It can be a matter of legal reasoning. Whatever “there is,” there is not unalloyed sameness. Rather, there is specificity, which means that there is singularity or alterity (in the sense of something other than what has come before and what will come after) in the way the “legal” encounters world linguistically. This singularity/alterity is always there, every time. It is (the closest thing to) a “fact.” The ever-present “fact” of the facticity of law is, if you will, the only repetition—put another way, *global* means *several local places at once*.

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33. In Derrida’s parlance, this non-repeatability is captured by the notion of “iterability.” See, e.g., JACQUES DERRIDA, *MARGES—DE LA PHILOSOPHIE* 374–81 (1972).

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There seems no doubt that a certain model of capitalism, a somewhat jubilant faith in the natural good of the market, and an anti-intellectual mercantilism are at present coinciding with an aftermath of communism to foster a celebratory proclamation of rationalization triumphant, to presume a universality of commodification, and to posit a collapse of the “cultural” into the “economic.” But the very seizure of those cultural forms that transnational capitalism regards as backward (recall the Polish food industry) produces the conditions for the emergence of sites of contestation *within capital* that present themselves as alternatives to the practices of “globalization.” In other words, the encounter between hegemonic discourse and local particularism inevitably generates a specific articulation, a singular “assemblage.”<sup>34</sup> How is one to respond as the coercions of late modernity manifest themselves through a transcendentalizing, universalizing, and aestheticizing impulse? Of course, one can deploy reading and writing techniques that will lessen or annul the experience of singularity by recasting the assemblage-as-event, with the help of a surfeit of ego or “hyperdesire for relevance,”<sup>35</sup> in terms of exemplarity within an all-encompassing structure of significance. This gaze is familiar: “When [analysts] pronounce the wor[d] [‘global’], they often jump straight ahead to connect vast arrays of life and history, to mobilize gigantic forces, to detect dramatic patterns emerging out of confusing interactions, to see everywhere in the cases at hand yet more examples of well-known types.”<sup>36</sup> Or, abandoning the strange idea that all experience is translatable in the already established idiom of the “global” and renouncing all-encompassing explanation in favor of sharp-sighted description of hybridity,<sup>37</sup> one can intensify the de-totalizing pressure through focusing on the event and through insistence on one’s experience of the event. I claim that instantiations invite responsible interventions which, as manifestations of critical vigilance, resolutely embark on an examination of the detail of local response and thus challenge the always-simplifying, necessarily reductive, and unacceptably violent narrative of de-particularization and de-materialization, that is, of over-interpretation. The goal must be to take into account, as fully as possible, by restaging them through the supply of ever more details, the local’s own recalcitrant performances of referentiality and ethnicity.<sup>38</sup>

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34. Stephen J. Collier & Aihwa Ong, *Global Assemblages, Anthropological Problems*, in GLOBAL ASSEMBLAGES 4 (Aihwa Ong & Stephen J. Collier eds., 2005). Observing that “global forms are articulated in specific situations—or territorialized in *assemblages*,” and that “they define new material, collective, and discursive relationships,” these authors refer to “global assemblages.” *Id. Quaere*: Why not “singular assemblages?” One is back to the matter of *predilections* (or valorizations). Note that the idea of “assemblage” is already present in the work of Paul Rabinow. See generally PAUL RABINOW, ANTHROPOS TODAY (2003).

35. George E. Marcus, *On the Unbearable Slowness of Being an Anthropologist Now: Notes on a Contemporary Anxiety in the Making of Ethnography*, XCP: CROSS CULTURAL POETICS, Apr. 2003, at 7, 14.

36. LATOUR, *supra* note 24, at 22. I adopt and adapt this view.

37. See generally MARWAN M. KRAIDY, HYBRIDITY, OR THE CULTURAL LOGIC OF GLOBALIZATION (2005).

38. This is not to suggest that localism is inherently valuable and that one must reflexively militate against change. The local is in constant flux. And it is easy to imagine how the inscription of the global

I argue for a dynamic practice of reading and writing that, while acknowledging migrancy (something *is* happening), will disturb the self-assurance of totalizing discourse and respond scrupulously to the *fragmentary demand* (that is, to the demand made by the fragmentary).<sup>39</sup> The whole that there appears to be—say, “global” capitalism—is in effect a loose assembly of assemblages, a non-unitary, dislocated whole on account of the event of fragmentation as it emerges locally. It is this event (and the experience of it) that makes a demand, necessary and unavoidable, pragmatic and ethical, on reading and writing, which must unfold as a decision to respond to the “hap” in what is “happening,” that is, to address the element of contingency, the conjectural dimension, which words like “haphazard,” “perhaps,” and “mishap” capture—no matter how volatile, anecdotal, elliptic, *sparse* the autochthonous hybridization, no matter how slight the *fold*. Because the fragmentary exceeds the figure of totality,<sup>40</sup> given that any possibility of totality-as-unity has always/already withdrawn, the response to the differend that is the “global”-inscription-in-facticity must deploy itself in terms of an insistent account of singularity-as-an-unignorable-being-there promoting a view of the “cultural” as resistance to appropriation for domination/exploitation, and, in the end, as defending the idea of the “cultural” as, still, “political.”<sup>41</sup>

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To say of a law that it is singular is the least one can say of it short of saying nothing at all. No two laws, no two manifestations of meta-law have ever been anything other than singular.<sup>42</sup> Yet, readings obdurately marginalizing the singularity of law have become unusually dominant within the fields concerned with trans-legal matters, such that it is now something of a rarity to encounter a response to the “legal” that attempts to postpone the moment of purposive co-optation or even a theory that argues for the importance of this kind of attempt (such a theory in any event readily finding itself marginalized).<sup>43</sup> Be that as it may, my claim in favor of the singularity of

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can have a liberating impact. But these observations do not detract from the singularity of the assemblage at the site of inscription.

39. See IAN JAMES, *THE FRAGMENTARY DEMAND* (2006).

40. Cf. MAURICE BLANCHOT, *L'ENTRETIEN INFINI* 526 (1969) (“*l'exigence fragmentaire . . . dépasse la totalité.*” [“The fragmentary demand surpasses totality.”]).

41. Thinking through the singular assemblage is to think through “globalization,” *not* to think against it—as Westbrook’s *Aufhebung* of transnational capitalism accuses comparatists-at-law of doing. David A. Westbrook, *Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations, and the Effort to Think Gracefully Nonetheless*, 47 *HARV. INT’L L.J.* 489, 491–92 (2006).

42. Note that because law’s singularity consists of a constellation of discourses, it is always plural. In Derrida’s words, “there is no atom.” JACQUES DERRIDA, *POINTS DE SUSPENSION* 147 (Elisabeth Weber ed., Galilée 1992) (“*il n’y a pas d’atome*”). *Quaere*: What if one cracked open the so-called “common core” by throwing it to the floor like some coconut? What would one find? Is the “common core” not also an amalgamation, which would suggest that the ascribed commonality in effect hides further layers of [fill in the blank]?

43. Cf. JACQUES DERRIDA, *D’UN TON APOCALYPTIQUE ADOPTÉ NAGUÈRE EN PHILOSOPHIE* 83 (Galilée 1983) (“*[T]out discord ou tout désordre tonal, tout ce qui détonne et devient irrecevable dans la collocation géné-*

law prompts me to ask how much longer can interpreters continue to practice vacuous interpretations of law-texts, whether deliberately or through ignorance, to satisfy themselves with atomism (law re-presented as units) or reductionism (law re-presented as “thin” or *disarchivized*), to “purchas[e] a sense of universality in law but only at the price of the ideas and arguments that make the law a worthy creation of the human intellect?”<sup>44</sup> The vehement assertion of relations of duplication among laws-as-more-or-less-interchangeable-units, this display of legerdemain, is what must be resisted in the name of other values which, contrary to doctrines that purport to facilitate matters,<sup>45</sup> mean to complicate them. I am not calling for anything like the solace of “methodological nationalism,”<sup>46</sup> but rather asking for the acceptance of law-texts’ culturality/traditionality, of the way in which law-texts always/already speak culturally/traditionally. Somewhat cryptically, but nonetheless helpfully, a slogan is at hand to underwrite the desired derangement of epistemes: “[T]o let that which shows itself be seen from itself in the very way in which it shows itself from itself.”<sup>47</sup> In recognition of the fact that “[e]very local site is being localized by a flood of localizers,”<sup>48</sup> I am soliciting “a discipline of slow thought.”<sup>49</sup> Ultimately, resistance to the simulators in the form of an always-to-come attunement to acculturation and immanence is being urged as recognition, respect, justice: Only in *deferring* to the non-identical can the claim to *justice* be redeemed.<sup>50</sup> One must *equip* oneself to contain betrayal of singularity: “[I]l faut se débrouiller.”<sup>51</sup>

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*rale, tout ce qui n'est plus identifiable à partir des codes établis . . . passera nécessairement pour mystagogique, obscurantiste et apocalyptique. On le fera passer pour tel.* [“Every discord or every tonal disorder, everything that is off key and becomes unacceptable in the general colloquy, everything that is no longer identifiable on the basis of established codes . . . will necessarily pass as mystagogic, obscurantist, and apocalyptic. It will be made to pass as such.”]

44. George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 694 (1998).

45. In this respect, my current entry for the “Most Simplistic and Therefore Vacuous Label Award” is “Americo-European *ius commune*.” Stefan Grundmann, *Germany and the Schuldrechtsmodernisierung 2002*, 1 EUR. REV. CONT. L. 129, 147 (2005).

46. ANTHONY D. SMITH, NATIONALISM IN THE TWENTIETH CENTURY 191 (1979). It bears adding that I am not embracing a world of colliding soliloquy. The idea of “singularity” is not incompatible with that of “communication”—although it remains that “we understand in a *different* way, *if we understand at all*.” HANS-GEORG GADAMER, TRUTH AND METHOD 297 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed., Continuum 1998) [“*man anders versteht, wenn man überhaupt versteht*.”]. For his part, Derrida, rejecting any possibility of a “meta-language,” is led to refer to “negotiation” rather than “dialogue.” JACQUES DERRIDA, LE MONOLINGUISME DE L’AUTRE 43 (1996); JACQUES DERRIDA WITH PIERRE-JEAN LABARRIÈRE, ALTÉRITÉS 85 (1986). The complications surrounding the matter of “communication” are (not untypically) disregarded by Michael Hardt and Antonio Negri. MICHAEL HARDT & ANTONIO NEGRI, MULTITUDE 128 (2004).

47. MARTIN HEIDEGGER, BEING AND TIME 58 (John Macquarrie & Edward Robinson trans., 1962) (1927) [“*Das was sich zeigt, so wie es sich von ihm selbst her zeigt, von ihm selbst her sehen lassen*.”].

48. LATOUR, *supra* note 24, at 203.

49. Tilottama Rajan, *In the Wake of Cultural Studies*, 31/3 DIACRITICS 67, 76 (2001).

50. Westbrook suggests that “comparative law might well be over.” Westbrook, *supra* note 41, at 491. Because it dwells in singularity, and because the recognition of singularity harks back to justice, it is, literally, *unthinkable* that comparative legal studies should be “over.”

51. The injunction is Derrida’s. Brian J. Reilly, *Jacques Derrida*, in THE COLUMBIA HISTORY OF TWENTIETH-CENTURY FRENCH THOUGHT 504 (Lawrence D. Krizman ed., 2005) (“one has to manage”).