

## Foreign Law As Self-Fashioning

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\* A Rhodes Scholar, a Rudden supervisee, a Weir breakfast host (he once cooked scrambled eggs for me in his Trinity rooms, which he served with caviar) — perhaps my three most forcible claims to something akin to academic distinction — I am based at the Sorbonne, where I offer an array of comparative courses ranging from the (un)translatability of law to civil procedure to legal reasoning. In addition (and much more significantly), I have long been teaching ‘comparative law’ (as the misnomer goes) at the Northwestern Pritzker School of Law (Chicago), at the University of San Diego School of Law, at the University of Cambridge and at Sciences Po. Besides these pedagogical undertakings, I hold no administrative responsibilities whatsoever, and I am not an active member of any society, organization, consortium, cluster, laboratory, institute, centre, research group, task force, committee or network. I do not control a budget, and I do not have access to financial resources. I do not evaluate research proposals or grant applications. I do not assess submissions for publication. I do not direct anything or anyone. Except as a marker of students’ work, I do not sit in judgment of others in any official capacity. And, if my reader must know, in my *impassioned* way of being-in-the-university, of dwelling-in-the-world also, I harbour no lust for renown or fame, no urge to be read or heard, cited or quoted, no propensity to be seen — a stroke of very, very good fortune indeed. Further faustity, for the sake of full disclosure: I have no tendency to promote any intemperate certainty (like neutrality), intemperate dogma (like objectivity) or imperious creed (like truth) — *nothing from the epistemic bargain basement*. Meanwhile, I gratefully dedicate this text to Geoffrey Samuel. An authentic scholar, a learned jurist, an expert in English law, an earnest comparatist, a thoughtful theoretician, an insightful epistemologist, a wise co-author, a generous contributor to collective endeavours, an enthusiastic dinner companion, a staunch Francophile, a devoted francophone and long a loyal friend, Samuel was my adviser during my English teaching years. As a senior departmental colleague, he offered considerable support and presented me with meaningful professional opportunities when I was launching the European segment of my career. Above all, he showed me that theoretical issues within comparative law deserve serious intellectual treatment. I remain in Geoffrey Samuel’s debt for his steadfast allegiance to the investigation of what it must mean to research foreign law and to compare laws.

‘One believes to be choosing something, and it is always oneself that one chooses’.

—Beckett<sup>1</sup>

‘A man sets himself the task of drawing the world. Over the years, he peoples a space with images of provinces, of kingdoms, of mountains, of bays, of ships, of islands, of fishes, of rooms, of instruments, of stars, of horses and of persons. Shortly before he dies, he discovers that that patient labyrinth of lines traces the image of his face’.

—Borges<sup>2</sup>

‘As existing beings [...], we are always *bestimmt*, attuned, oriented according to preferences and aversions, never simply-present [...] in the midst of objects, but actively situated and committed to actions destined to flee from certain things and to search for certain others. [...] It is only within the horizon of a project that things “are given”’.

—Vattimo<sup>3</sup>

‘Every word is a prejudice’.

—Nietzsche<sup>4</sup>

‘Much would be gained in our institutions of learning [...] if we would come to acknowledge that [...] it is always *about* us that we are talking, always *to* us, *for* us and *against* us, and that it is always *us* that we are talking, whenever we talk. Whenever we teach, explore, theorize, formalize, act, we teach *us* — we are the topic, we the addressee, we the professors — we explore *us*’.

—Hamacher<sup>5</sup>

In this essay, I do not aim to establish my claim to be right. Instead, I purport to exhort the thought that can be liberated at the juncture where an argument no longer seems wrong.

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Its considerable influence across a sheaf of disciplines notwithstanding, Hans-Georg Gadamer’s philosophical hermeneutics has deservedly attracted radical critique, not least from Jacques Derrida, who has convincingly challenged key aspects of its

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<sup>1</sup> [Beckett, S] (2009) [1940] in *The Letters of Samuel Beckett* vol I Fehsenfeld, MD and Overbeck, LM (eds) Cambridge University Press at 683.

<sup>2</sup> Borges, JL (2009) [1960] *El hacedor* Alianza Editorial at 128 [‘*Un hombre se propone la tarea de dibujar el mundo. A lo largo de los años puebla un espacio con imágenes de provincias, de reinos, de montañas, de bahías, de naves, de islas, de peces, de habitaciones, de instrumentos, de astros, de caballos y de personas. Poco antes de morir, descubre que ese paciente laberinto de líneas traza la imagen de su cara*’].

<sup>3</sup> Vattimo, G (2012) *Della realtà* Garzanti at 46 [‘*In quanto esistenti (...), noi siamo sempre bestimmt, intonati, orientati secondo preferenze e repulsioni, mai semplicemente-presenti (...) in mezzo agli oggetti, ma attivamente situati e impegnati in azioni dirette a sfuggire certe cose e a cercarne certe altre. (...) È solo entro l’orizzonte di un progetto che le cose “si danno”*’] (emphasis original).

<sup>4</sup> Nietzsche, F [1880] *Menschliches, Allzumenschliches* vol II in *Digitale Kritische Gesamtausgabe* Colli, G, Montinari, M and D’lorio, P (eds) <http://www.nietzschesource.org/#eKGWB/WS-55> at 2, §55 [‘*Jedes Wort ist ein Vorurteil*’].

<sup>5</sup> Hamacher, W (2004) ‘To Leave the Word to Someone Else’ in Wolfreys, J (ed) *Thinking Difference* Fordham University Press at 174 [emphasis original].

treatment of otherness.<sup>6</sup> Not even Derridean objections, however, detract from the signality of Gadamer's contribution to the decipherment of interpretive acts. Specifically, the hermeneutic notion of 'prejudice' — in the sense of the German '*Vorurteil*' or prejudgment — proves crucial in elucidating the fact that no interpreter comes to interpretation without his disposition, his inclination, his predilection — his way of thinking — being meaningfully inflected by a preset collection of epistemic impulses pertaining to what can aptly be styled 'cultural conditioning'.<sup>7</sup> Whether ascertainable or undetectable, this enculturation, this default prereflective experience, emerges out of the life-world within which the interpreter has been socialized or institutionalized. If it were a matter of a few sentences to extract from Gadamer's extensive articulation of the irreducible character of the embeddedness of interpretation,<sup>8</sup> one could inscript three statements in particular as being adequately re-presentative of his hermeneutic sensibility:

'[Prejudices] are the biases of our openness to the world'.<sup>9</sup>

'[A] hermeneutical situation is determined by the prejudices that we bring with us. [...] [T]hey represent that beyond which it is impossible to see'.<sup>10</sup>

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<sup>6</sup> I explore Derrida's demurrer in Legrand, P (2017) 'Derrida's Gadamer' in Glanert, S and Girard, F (eds) *Law's Hermeneutics: Other Investigations* Routledge at 144-67.

<sup>7</sup> Rather than 'culture', Gadamer's operational term is 'tradition'. For instance, he writes that '[t]he anticipation of meaning that governs our understanding [...] determines itself out of the commonality that binds us to the tradition': Gadamer, H-G (1986) *Wahrheit und Methode* (5th ed) Mohr Siebeck at 298 ['(d)ie Antizipation von Sinn, die unser Verständnis eines Textes leitet, (...) bestimmt sich aus der Gemeinsamkeit, die uns mit der Überlieferung verbindet']. I accept that '[w]e have received more than we believe we know from tradition': Derrida, J (1990) *Limited Inc* Weber, E (ed) Galilée at 139 ['(n)ous avons reçu plus que nous ne croyons savoir de la tradition']. Eg: Krygier, M (1986) 'Law As Tradition' (5) *Law and Philosophy* 237. While I agree that the past *lives on* — see Derrida, J (2004) [1979] 'Living On' Hulbert, J (trans) in Bloom, H et al *Deconstruction and Criticism* Continuum at 62-142 — and although I emphasize the trope of 'survival' in much of my work, I find an exclusive insistence on the notion of 'tradition' inconveniently narrow and reactionary, embalming and authoritarian. Importantly, such focus fails to account for detraditionalization processes. Eg: Heelas, P, Lash, S and Morris, P (eds) (1996) *Detraditionalization* Blackwell. I deem culture, which I deploy along the lines of Giorgio Agamben's characterization ('[e]very culture is essentially a process of transmission and of *Nachleben*') a more rewarding interpretive term. For this definition, see Agamben, G (1977) *Stanze* Einaudi at 131 ['*un processo di trasmissione e di Nachleben*'] (emphasis original).

<sup>8</sup> Rudolf Bultmann has also written decisively on this topic. Eg: Bultmann, R (1950) 'Das Problem der Hermeneutik' (47) *Zeitschrift für Theologie und Kirche* 47.

<sup>9</sup> Gadamer, H-G (1986) [1966] 'Die Universalität des hermeneutischen Problems' in *Gesammelte Werke* vol II Mohr Siebeck at 224 ['(Vorurteile) sind Voreingenommenheiten unserer Weltoffenheit']. Envisaging prejudice as being productive of knowledge, Gadamer seeks to break with a long-standing denigration of the concept. For an examination of the view of prejudice as epistemic impediment, as a problem that must be overcome, with particular reference to the work of Bacon, Descartes and Kant, see Sandel, AA (2014) *The Place of Prejudice* Harvard University Press at 24-53.

<sup>10</sup> Gadamer, H-G *Wahrheit und Methode* supra note 7 at 311 ['(E)ine hermeneutische Situation (wird) durch die Vorurteile bestimmt (...), die wir mitbringen. (...) Sie stellen das dar, über das hinaus man nicht zu sehen vermag'].

'[T]here is certainly no understanding that would be free of all prejudices, however much the will of our knowledge must be directed towards escaping the spell of our prejudices'.<sup>11</sup>

Gadamer consistently acknowledged having been profoundly affected by the philosophy of Martin Heidegger, who taught him in Marburg from 1923 to 1928, and he long avouched liberally drawing on Heidegger's existential intuitions (this discipleship having affirmed itself despite the somewhat fraught personal relationship between the two philosophers). Indeed, the idea of 'prejudice' is easily traceable to Heidegger's account of the radical historicity of the human situation. Having interrupted the age-old Cartesian investment in the supremacy of rational autonomy and in explicit self-consciousness as the foundation of all certitude, Heidegger's non-dualist philosophy of existence holds that '[t]he interpretation of something as something is essentially grounded through fore-having, fore-sight and fore-conception'.<sup>12</sup> For Heidegger, '[i]nterpretation is never a presuppositionless grasping of something previously given'.<sup>13</sup> Otherwise said, interpretation is 'not direct'.<sup>14</sup> Consider Heidegger's own words regarding his understanding of a piece of chalk, a blackboard or a door: 'I understand it in such a way that I have, as it were, at the outset, already been around it'.<sup>15</sup> Indeed, interpretation cannot be dissociated from the idea of a radical fore-structure — a *rooted* fore-structure — within which thought always already dwells. In effect, interpretation necessarily projects itself out of that fore-structure, which is prejudicial. And it is the projective character of interpretation that inevitably delineates what interpretive possibilities will prove available or foreclosed to the interpreter. Interpretation, projection and possibility are thus as empirically governed as they are inextricably entwined. (Observe that it would be simplistic to reduce the prejudicial fore-structure to 'pre-knowledge' for the instrumental nexus I discuss operates at a much more primordial level. For instance, it embodies all manner of prepredicative emotions that inform interpretation even as they do not concern knowledge strictly understood.<sup>16</sup>)

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<sup>11</sup> Id at 494 ['(E)s (gibt) gewiß kein Verstehen, das von allen Vorurteilen frei wäre, so sehr auch immer der Wille unserer Erkenntnis darauf gerichtet sein muß, dem Bann unserer Vorurteile zu entgehen'].

<sup>12</sup> Heidegger, M (2006) [1927] *Sein und Zeit* Niemeyer at 150 ['(d)ie Auslegung von Etwas als Etwas wird wesentlich durch Vorhabe, Vorsicht und Vorgriff fundiert'].

<sup>13</sup> Ibid ['Auslegung ist nie ein voraussetzungsloses Erfassen eines Vorgegebenen'].

<sup>14</sup> Heidegger, M (1995) [1926] *Logik* in *Gesamtausgabe* vol XXI (2nd ed) Biemel, W (ed) Klostermann at 147 ['nicht direkt'].

<sup>15</sup> Ibid ['(I)ch erfasse es so, daß ich es gleichsam im vorhinein schon umgangen habe'].

<sup>16</sup> Gilles Deleuze and Derrida offer insightful appreciations of the prejudicial fore-structure. Consider Deleuze's mention of 'a singular composition, an idiosyncrasy, a secret cipher like the unique chance that those very entities were retained, wanted, that very combination, drawn: that one and not another': Deleuze, G (1993) *Critique et clinique* Editions de Minuit at 150 ['une composition singulière, une idiosyncrasie, un chiffre secret comme la chance unique que ces entités-là aient été retenues, voulues, cette combinaison-là, tirée: celle-là et pas une autre']. This 'singular composition', this 'idiosyncrasy', this 'combination' concerns 'entities' such as one's language, one's family, one's teachers, one's interlocutors, one's (favorite) authors, one's (preferred) speakers and so forth. The self consists in that particular assemblage, that 'secret cipher', that exceptional arrangement, that 'unique chance'. In Marramao, G (2009) *Passaggio a Occidente* (2nd ed) Bollati Boringhieri at 106-07, Giacomo Marramao gives poignant

Gadamer's explication, then, is that it is impossible for interpretation, as it engages with the world, to generate transcendental standards of appreciation, an ultimately unintelligible idea. In other words, there are no guiding interpretive criteria that can obtain without being epistemically moored to the prejudicial fore-structure within which one's apperception inevitably abides, no matter how purportedly distinctive.<sup>17</sup> It is not, of course, that one's thought is imprisoned within the prejudicial fore-structure in the sense that it would be framed anticipatorily in exhaustive and permanent fashion. Gadamer's crucial insight is rather that even the most sophisticated interpretive intervention must accept that it does not take place '*grundlos in der Luft*', that is, 'groundlessly, in the air', to borrow from Edmund Husserl's seminal critique.<sup>18</sup> Rather, interpretation is anchored, which means that it is always already cultural or public in some sense, that it can never be limited to the personal intention of a given interpreter. Indeed, on account of the ontological primacy of the prejudicial fore-structure as epistemic matrix, the interpreter's projection can only be finite. One's thought, being reeved, can only extend so far.

After Husserl's phenomenology, Gadamer indeed refers to interpretive possibility being circumscribed or confined within a 'horizon'. For him, '[the] horizon is the range of vision that encloses and includes everything that is visible from a particular vantage point' (which is not at all to say that this containment is a limitation one notices).<sup>19</sup> And one 'never escape[s]' one's horizon, one's approach of the world having to be articulated through 'the questions that arise from [one's] [...] horizo[n]'.<sup>20</sup> Since 'each

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expression to the contingency that Deleuze addresses: 'Even the present identity of each of us is nothing but the result of selections and bifurcations, unrepeatable or at least highly unlikely; had we, at certain points in our lives, chanced upon other opportunities, or had we, in the face of crucial options, made a different decision from that which we actually took, then we would certainly be different persons from the ones we are today' [*La stessa identità attuale di ciascuno di noi non è che la risultante di selezioni e biforcazioni irripetibili, o perlomeno altamente improbabili: se in determinati momenti della nostra vita ci fossimo imbattuti in altre occasioni, se di fronte ad alternative cruciali avessimo assunto una decisione diversa da quella che abbiamo effettivamente preso, saremmo oggi persone certo diverse da quelle che siamo*']. For his part, Derrida notes how '[i]n a minimal autobiographical trait can be gathered the greatest potentiality of historical, theoretical, linguistic, philosophical culture': Derrida, J and Attridge, D (2009) [1989] 'Cette étrange institution qu'on appelle la littérature' in *Derrida d'ici, Derrida de là* Dutoit, T and Romanski, P (eds) Galilée at 262. The words are Derrida's. Appropriating Emmanuel Levinas, Derrida also writes as follows: 'The subject: a host': Derrida, J (1997) *Adieu Galilée* at 102 ('*Le sujet: un hôte*'). For Levinas's text, see Levinas, E (2000) [1971] *Totalité et infini* Le Livre de Poche at 334: 'The subject is a host' [*Le sujet est un hôte*']. For a well-known thesis to the effect that emotions are judgments, see Solomon, RC (1988) 'On Emotions As Judgments' (25) *American Philosophical Quarterly* 183; Solomon, RC (2001) *True to Our Feelings* Oxford University Press at 203-17.

<sup>17</sup> See Gasché, R (1998) *The Wild Card of Reading* Harvard University Press at 4-5.

<sup>18</sup> Husserl, E (2012) [1956+] *Die Krisis der Europäischen Wissenschaften und die transzendente Phänomenologie* Ströker, E (ed) Meiner at 153.

<sup>19</sup> Gadamer, H-G *Wahrheit und Methode* supra note 7 at 307 [*Horizont is der Gesichtskreis, der all das umfaßt und umschließt, was von einem Punkt aus sichtbar ist*].

<sup>20</sup> Bernstein, RJ (2002) 'Hermeneutics, Critical Theory and Deconstruction' in Dostal, RJ (ed) *The Cambridge Companion to Gadamer* Cambridge University Press at 273.

reading [...] traces an interpretive course which corresponds to the horizon of the reader',<sup>21</sup> it follows that interpretation can only be partial, in both senses of the term: it will be biased, and it will be incomplete. As every interpretation is appropriated to one's horizon, it is made to fit within a prejudicial fore-structure in order to make sense to one (which means that interpretation must contend with cultural appropriation's spontaneous integrative tendency to overlook heterogeneities, if at the cost of some dissonance).<sup>22</sup> Given the fact that any interpretation is necessarily manifesting itself as a projection issuing from a prejudicial fore-structure, and because interpretation therefore unavoidably bears the imprint or the colour of the prejudicial fore-structure in question, it is the case that one's interpretive relation with the world is effectively, uncircumventably, a disrelation — in the sense at least that one can only ascribe meaning to an *interpretandum* as envisaged through a prejudicial fore-structure rather than as such, *an sich, tel quel*.<sup>23</sup> In Gadamer's words, '[i]t is enough to say that one understands differently, when one understands at all'.<sup>24</sup> Again, however, while interpretation cannot not be prejudiced (in as much as prejudice can never be eradicated from any interpretive enterprise), no heteronomous arrangement is definitive, and the semiotic configuration being articulated within the prejudicial fore-structure can find itself revised: the framework's frame is not fixed. In Gadamer's terms, '[t]he horizon is [...] something into which we wander and that wanders with us. Horizons change for the person who is moving'.<sup>25</sup> (Acceptance of this potential revisability depends, of course, on how deterministic a view one takes of the human

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<sup>21</sup> Rastier, F (2001) *Arts et sciences du texte* Presses Universitaires de France at 277 [*'chaque lecture (...) trace un parcours interprétatif qui correspond à l'horizon du lecteur'*].

<sup>22</sup> The matter involves the contrivance of epistemic safeguards whereby external perturbations are coded as information in the culture's prevailing (or pre-vailing) terms so that any change to this background setting tends to be marginal and incremental. Like other organisms, a culture strives to maintain a homeostatic equilibrium with respect to its environment and to perpetuate itself through duplication: it aims to overcome transgressions.

<sup>23</sup> Indeed, the very idea of an 'in-itselfness' of the *interpretandum* is epistemically unavailable since it is, literally, *unimaginable*. How, indeed, could the interpretive mind envision something — 'the entity in itself' — which is deemed *ex hypothesi* to be beyond the mind, safe from the mind's prejudices? The 'in-itselfness' of the *interpretandum* is unfathomable; ultimately, it is inconceivable even as that which is inconceivable. The fact is that one cannot have an entity-without-the-mind in mind without having it in mind, which must mean that one cannot have an entity-without-the-mind in mind.

<sup>24</sup> Gadamer, H-G *Wahrheit und Methode* supra note 7 at 302 [*'(e)s genügt zu sagen, daß man anders versteht, wenn man überhaupt versteht'*] (emphasis original). Although these words strike me as percipient if read on their own terms, I cannot forget that they partake of a general theory which maintains that the self can ultimately reach the other. Eg: Gadamer, H-G (1993) [1985] 'Destruktion und Dekonstruktion' in *Gesammelte Werke* vol II Mohr Siebeck at 364. According to Gadamer, there then occurs the 'miracle' ('*Wunder*') of understanding: Gadamer, H-G *Wahrheit und Methode* supra note 7 at 297, 316 and 347. Like Derrida, I do not believe in miracles. In particular, I do not subscribe to the irenicism and optimism that the idea of 'miracle' appears to evoke. For an examination of Derrida's justifiably sceptical reaction to Gadamer's stance, see Legrand, P (2017) 'Derrida's Gadamer' supra note 6.

<sup>25</sup> Gadamer, H-G *Wahrheit und Methode* supra note 7 at 309 [*'(d)er Horizont ist (...) etwas, in das wir hineinwandern und das mit uns mitwandert. Dem Beweglichen verschieben sich die Horizonte'*].

situation — an opinion which, in its turn, cannot be detached from one's prejudicial fore-structure.<sup>26)</sup>

Consider José de Acosta's XVIth-century account of foreign lands. Acosta (1539-1600), a Spaniard and a Jesuit, resided in Peru and Mexico from 1570 to 1587. In the entry I quote from his chronicles, an early and now famous report on the New World initially published in Spanish in 1590, Acosta purports to describe a llama, an animal actually before him in Peru that he has never seen previously. In order to achieve his descriptive task, he necessarily projects out of a prejudicial fore-structure which provides him with the range of his interpretive possibility — in this instance, sheep, calves and camels — and, less expressly but at least as primordially, which supplies him with, say, his appreciation of animality, his conception of description and his familiarity with the Spanish language. It is key to appreciate how Acosta's narrative emerges out of the prejudicial fore-structure into which he has been encultured — and how it could not not have issued from that prejudicial fore-structure. While the prejudicial fore-structure furnishes Acosta with necessary interpretive tools,<sup>27</sup> this epistemic foregrounding entails that he cannot show fidelity to the llama on its own terms, that his interpretive account of the llama must work as a disrelation vis-à-vis the *interpretandum*:

'There is nothing richer or more profitable in Peru than the livestock of that land, which our people call Indies sheep and the Indians in their language llama [...]. [...] These sheep or llamas are of two species: of one kind are the alpacas, or woolly sheep, while others are smooth or have little wool and are better for carrying loads. They are larger than large sheep and smaller than yearling calves; they have a very long neck like a camel, and they need it because they are tall animals and high in the body and require a long neck in order to graze'.<sup>28</sup>

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<sup>26</sup> As I read him, Heidegger himself favours a hegemonic determinism. Eg: Heidegger, M *Sein und Zeit* supra note 12 at 20: 'In its factual being [one] always is how and "what" [one] already was. Whether explicitly or not, [one] is [one's] past' ['(Man) ist (...) in seinem faktischen Sein, wie und "was" (man) schon war. Ob ausdrücklich oder nicht, (man) ist (...) seine Vergangenheit'] (emphasis original). Also, the German language allows Heidegger to write '[I]ch bin-gewesen', literally 'I am-been' (instead of 'I have been'): Id at 327 [emphasis omitted]. There is, then, the primordial 'beenness' of the individual (his 'Gewesenheit') as a constitutive element of his very existence. For Heidegger, the prejudicial fore-structure's governance persists even if a revision subsequently intervenes. Such is the case because any modification necessarily situates itself vis-à-vis the prejudicial fore-structure: 'In it, out of it and against it are accomplished all genuine understanding, interpreting and communicating, all re-discovering and appropriating anew': Id at 169 ['In ihr und aus ihr und gegen sie vollzieht sich alles echte Verstehen, Auslegen und Mitteilen, Wiederentdecken und neu Zueignen'].

<sup>27</sup> To emphasize their enabling character, Gadamer refers to prejudices as 'conditions of understanding': Gadamer, H-G *Wahrheit und Methode* supra note 7 at 281 ['Bedingungen des Verstehens'].

<sup>28</sup> Acosta, J de [1590] *Historia natural y moral de las Indias* vol I at 445-46 in Internet Archive, California Digital Library <https://archive.org/stream/historianatural01acosrich#page/n485/mode/2up> ['Ninguna cosa tiene el Perú de mayor riqueza y ventaja, que es el ganado de la tierra, que los nuestros llaman carneros de las Indias; y los Indios en lengua general los llaman llama (...). (...) Son estos carneros ó llamas en dos especies: unos son pacos ó carneros lanudos: otros son rasos y de poca lana, y son mejores para carga: son mayores que carneros grandes, y menores que becerros; tienen el cuello muy largo á

This excerpt prompts me to enter five sets of remarks. First, Acosta’s discourse is not strictly descriptive or indicative. Indeed, it could not have been, no matter what form it took. Irrespective of how purportedly descriptive or indicative it seeks to be, every discourse is always already entangled with expressivity — *it is gripped, say, by this inflexion or that tonality* — so that there can be no such thing as discursive descriptive or indicative purity. Specifically, quite simply, ‘[no] standpoint [...] is removed from existence’s sphere of influence, [not] even only by a tiny bit’.<sup>29</sup> Bracha Ettinger thus coins the word ‘wit(h)nessing’ which, through the adjunction of one letter, wants to underscore the active, meaningful role of the interpreter in terms of the account that takes place.<sup>30</sup>

Second, it is clear that Acosta’s interpretation, his articulation of intelligibility, depends on ‘his’ prejudicial fore-structure.<sup>31</sup> Plainly, ‘there is no understanding or interpretation in which the totality of this existential structure does not function, even if the intention of the knower is none other than to read “what is there” and to extract from the sources “how it really was”’.<sup>32</sup> Indeed, it could be said that Acosta’s interpretation is

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*semejanza de camello, y hanló menester, porque como son altos y levantados de cuerpo, para pacer requiere tener cuello largo’*. I borrow the English version from Acosta, J de (2002) [1604] *Natural and Moral History of the Indies* Mangan, JE (ed) López-Morillas, F (trans) Duke University Press at 244.

<sup>29</sup> Adorno, TW (2001) [1951] *Minima Moralia* Suhrkamp at 481 [‘(kein) Standort (...) (ist) dem Bannkreis des Daseins, wäre es auch nur um ein Winziges, entrückt’]. See also, eg, Barad, K (2014) ‘Diffracting Diffraction: Cutting Together-Apart’ (20) *Parallax* 168 at 180: ‘The apparatus is an inseparable part of the observed phenomenon’. Observe that just as there is no description without interpretation, no interpretation is possible without description. See Schmitt, C (2016) ‘Interpret or Describe?’ (135) *Representations* 102.

<sup>30</sup> Ettinger, BL (2006) *The Matrixial Borderspace* Massumi, B (ed) University of Minnesota Press at 147 and passim.

<sup>31</sup> The use of the possessive adjective wants to refer to the prejudicial fore-structure out of which Acosta, and not anyone else, commits to interpretive projection. But the word does not mean to suggest that the prejudicial fore-structure belongs to him, and that he would therefore be in control of it and have personally delineated it. Heidegger’s notion of ‘thrownness’ (*‘Geworfenheit’*) perceptively captures the idea that one is delivered over to a factual existence which pertains to the public space and which is not of one’s own making. Specifically, one is thrown into the constitutive features of one’s prejudicial fore-structure such as language, religion, morality, forms of politeness — or law. Note that since the space into which one is thrown inscribes the range of acceptable possibilities, the process does not deny pluralism. In other words, even assuming a minimal community only (and acknowledging that any community is constructed and contested), not everyone within this community will speak the community’s language in the same way. But everyone will be speaking the community’s language (a fact which the very idea of ‘community’ indeed assumes), a language which one was not invited to choose and which one is certainly not allowed to make radically idiosyncratic lest one should forego communication. Eg: Heidegger, M *Sein und Zeit* supra note 12 at 135 and 383. Observe that ‘[n]ot only is thrownness not a “finished matter of fact”, it is also not a self-contained fact. [Our] facticity is such that [one], as long as [one] is what [one] is, will remain in the throw’: Id at 179 [‘(d)ie Geworfenheit ist nicht nur nicht eine “fertige Tatsache”, sondern auch nicht ein abgeschlossenes Faktum. Zu (unserer) Faktizität gehört, daß (man), solange (man) ist, was (man) ist, im Wurf bleibt’] (emphasis original).

<sup>32</sup> Gadamer, H-G *Wahrheit und Methode* supra note 7 at 266-67 [‘(es) gibt (...) kein Verstehen und Auslegen, in dem nicht die Totalität dieser existenzialen Struktur in Funktion wäre — auch wenn die

*suspended* to his prejudicial fore-structure not only in the sense that it depends upon it, but also because there is an element of suspense as to which aspects of the prejudicial fore-structure will move into enabling interpretive action at the relevant moment. Who could have anticipated the reference to ‘yearling calves’ in Acosta’s description of llamas? All along, however, the active role of the prejudicial fore-structure is not in doubt. Again, it is the prejudicial fore-structure that supplies Acosta with his interpretive equipment. For example, if his prejudicial fore-structure had not included calves, Acosta’s interpretation of the llama could not have formulated itself around this animal and would therefore have differed from the statement that he inscribed in his diary. And if Acosta had solicited other elements out of his prejudicial fore-structure to enter the interpretive space and sustain the (heavy) burden of meaning, he would have actualized other interpretive possibilities and offered a different interpretation of the llama yet again. For instance, he could have referred to ostriches (which his book indicates he knew). Also, on the assumption that he was familiar with beef and lamb, he could have described the taste of llama meat as lying somewhere between the two, although closer to beef — llama meat typically being described as a lighter and sweeter beef. In sum, the prejudicial fore-structure that Acosta mobilizes in order to make sense of the llama affords him a pre-sense, which is also a presence: it is what is there, for him.

Third, Acosta’s narration consistently accounts for the llama in terms of what it is not. The llama is thus appropriated to sheep and calves through the unheralded ideas of ‘equivalence’ or ‘analogy’, both *similarizing* connectors silently operating to disrelate the prejudicial fore-structure to/from the *interpretandum*. Meanwhile, the key differences between the various animals making an appearance within the narrative are either mitigated or effaced.<sup>33</sup> In effect, Acosta’s llama is a translation,<sup>34</sup> a notion which cannot be separated from the idea of ‘transformation’,<sup>35</sup> a process raising the matter of

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*Intention des Erkennenden keine andere ist, als zu lesen, “was da steht”, und den Quellen zu entnehmen, “wie es eigentlich gewesen ist”*].

<sup>33</sup> Cf Deleuze, G (1968) *Différence et répétition* Presses Universitaires de France at 56: ‘It is therefore inevitable that analogy falls into an unresolvable difficulty: it must essentially relate being to particular existents, but at the same time it cannot say what constitutes their individuality’ [*Il est dès lors inévitable que l’analogie tombe dans une difficulté sans issue: à la fois, elle doit essentiellement rapporter l’être à des existants particuliers, mais elle ne peut dire ce qui constitue leur individualité*].

<sup>34</sup> Cf Deleuze, G (2010) [1964] *Proust et les signes* (4th ed) Presses Universitaires de France at 124: ‘To think is therefore to interpret, it is therefore to translate’ [*Penser, c’est donc interpréter, c’est donc traduire*].

<sup>35</sup> Eg: Derrida, J (1972) *Positions* Editions de Minuit at 31: ‘[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’ [(A) *la notion de traduction, il faudra substituer une notion de transformation: transformation réglée d’une langue par une autre, d’un texte par un autre*] (emphasis original)]. A leading translation theorist makes the point succinctly through a felicitous title: Venuti, L (2013) *Translation Changes Everything* Routledge.

its 'justness'.<sup>36</sup> The sheep/calf/camel configuration intervenes as a second original (an appreciation evoking a more complicated architectonics than an arrangement which would feature a *Haupttext* and an *Untertext*, an over-text and an under-text). Acosta's llama is not not-the-llama (the way the text of Pierre Leyris's French translation of *Macbeth* published in 1977 is not not-Shakespeare's-play). But it is not the llama either (as the text of Leyris's translation is not Shakespeare's play). In the same manner that the text of Leyris's translation cannot duplicate Shakespeare's *Macbeth* (and presumably does not aim to do so), Acosta's report cannot mimic the llama (a limitation of which Acosta is obviously cognizant). In the two cases, the refraction of the narrative, either through Acosta's or Leyris's prejudicial fore-structure, entails that the subsequent interpretation is productive rather than reproductive and confirms how the *abyss* across the epistemic worlds in co-presence is unbridgeable.<sup>37</sup> Derrida accounts for this agonism in compelling terms: '[B]etween my world and any other world, there is initially the space and the time of an infinite difference, of an interruption [that is] incommensurable with all the attempts at passage, at bridge, at isthmus, at communication, at translation, at trope and at transfer that [...] the [human] being [...] will try to pose, to impose, to propose, to stabilize. [...] [T]here are only islands'.<sup>38</sup> He adds: '[T]he worlds in which we live are different to the point of the monstrosity of the unrecognizable, of the un-similar, of the unbelievable, of the non-similar, of the non-resembling or resemblable, of the non-assimilable, of the untransferable'.<sup>39</sup> Note that neither the exegetic sophistication of Leyris's translation nor the fideliolous refinement of

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<sup>36</sup> For a discussion 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>37</sup> The word 'abyss' ('*Abgrund*') appears in Rainer Maria Rilke's and Paul Celan's correspondence to mark the separation between languages: [Rilke, RM] (1950) [1902] in *Rilke Briefe* vol I Rilke-Archiv in Weimar (ed) Insel at 41; Lyon, JK (2006) *Paul Celan and Martin Heidegger* Johns Hopkins University Press at 37.

<sup>38</sup> Derrida, J (2010) [2002] *La Bête et le souverain* vol II Lisse, M, Mallet, M-L and Michaud, G (eds) Galilée at 31 ['(E)ntre mon monde et tout autre monde, il y a d'abord l'espace et le temps d'une différence infinie, d'une interruption incommensurable à toutes les tentatives de passage, de pont, d'isthme, de communication, de traduction, de trope et de transfert que (...) l'être (...) tentera de poser, d'imposer, de proposer, de stabiliser. (...) (l)l n'y a que des îles']. Note that the gap between *interpretans* and *interpretandum* that Derrida asserts reveals 'an infinite difference', which the interpreter's existential finitude does not allow him to surmount: *Ibid.* ['une différence infinie']. To underscore his claim, Derrida juxtaposes 'entre' ('between') and 'antre' ('cavity' as in 'hollow place' or 'void'), which in French would be pronounced identically: Derrida, J (1972) *La Dissémination* Editions du Seuil at 240. Derrida thus rightly stands firmly opposed to any Gadamerian idea of 'fusion of horizons' ('*Horizontverschmelzung*'). Eg: Gadamer, H-G *Wahrheit und Methode* supra note 7 at 311, 383, 392 and 401. For a discussion of Gadamer's claim, see Rosen, S (1996) 'Horizontverschmelzung' in *The Philosophy of Hans-Georg Gadamer* Hahn, LE (ed) Open Court at 207-18; Eberhard, P (2004) *The Middle Voice in Gadamer's Hermeneutics* Mohr Siebeck at 77-95. Again, I explain Derrida's dissentience in Legrand, P 'Derrida's Gadamer' supra note 6.

<sup>39</sup> Derrida, *La Bête et le souverain*, supra note 38 at 367 ['(L)es mondes dans lesquels nous vivons sont différents jusqu'à la monstruosité du méconnaissable, de l'in-semblable, de l'in vraisemblable, du non-semblable, du non-ressemblant ou ressemblable, du non-assimilable, de l'intransférable'].

Acosta's description can eliminate the discrepancy I address.<sup>40</sup> Vis-à-vis the first original, the second original is always already 'out of joint',<sup>41</sup> regardless of how much acuity or adeptness the *interpretans* displays. There is no representation (as in mimesis), but a re-presentation, a presentation anew, a repetition with a difference, an iteration. Paradoxically, while Acosta cannot remain external to the llama that he asserts (there is no possible dissociation, and his chronicles tell 'his' llama) — this is the gist of my first set of remarks — the llama that obviously exists in advance of Acosta, that is there without him and irrespective of him, thus stays out of his epistemic reach, resists him and his interpretive foray (there is no possible identification, and his chronicles only tell 'his' llama). Such is Acosta's double bind: not to be in a position to make himself external to any re-statement of the llama means that he is effectively keeping the llama external to him. It is not that Acosta's interpretive authority finds itself disqualified, but that his authority is confined to his interpretive yield thus excluding any claim to objectivity (or truth).

Fourth, while Acosta draws on a prejudicial fore-structure which would have intersected in a number of ways with other prejudicial fore-structures — clearly, Acosta would not have been alone in 1590 Spain in being acquainted with 'yearling calves' — it remains that ultimately the prejudicial fore-structure he summons is unique (Deleuze makes this very point).<sup>42</sup> It is 'his' — once more, the idea is not that he is in charge of it, and that he can do whatever he wants with it, but that it is ultimately distinctive, *sans pareil*. Indeed, no two individuals in 1590 Spain can have boasted the self-same prejudicial fore-structure,<sup>43</sup> which means that each prejudicial fore-structure being applied to a certain array of circumstances (say, the presence of the llama before one in Peru) must manifest itself as a singular prejudicial fore-structure. One could assert of Acosta's act of interpretation that it therefore resolves itself as the application of a prejudicial fore-structure whose articulation and deployment (often beyond his mastery) does not cancel the singularity of his description (or, more accurately, of his inscription-as-

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<sup>40</sup> 'No matter how correct and legitimate they are, [...] [translations] are all maladjusted [...]. The excellence of translation cannot help it': Derrida, J (1993) *Spectres de Marx* Galilée at 43 ['*Si correctes et légitimes qu'elles soient, (...) (les traductions) sont toutes désajustées (...). L'excellence de la traduction n'y peut rien*'].

<sup>41</sup> Ibid.

<sup>42</sup> Supra note 16.

<sup>43</sup> Cf [Leibniz, GW] (1960) [1704] *Nouveaux essais sur l'entendement* in *Die philosophischen Schriften von Gottfried Wilhelm Leibniz* vol V Gerhardt, CJ (ed) Olms at 49; [Leibniz, GW] (1960) [1686] *Discours de métaphysique*, in *Die philosophischen Schriften von Gottfried Wilhelm Leibniz* vol IV Gerhardt, CJ (ed) Olms at 433. Often labelled 'Leibniz's Law', Leibniz's argument for the inevitability of what I call 'differential co-presence' stands for the proposition that only indiscernibles are identical or, if you will, that the diverse is necessarily 'other than' (or that distinct entities are never exact replicas of one another, that is, if there is X and Y, X is at least minimally something that exists as not-Y). Had Duchamp read Leibniz? In his posthumously published manuscript notes, he writes that '[a]ll "identicals" as identical they may be (and the more identical they are) come near this infra-thin separative difference': Duchamp, M (1999) [1980†] *Notes* Flammarion at 33 ['(t)ous les "identiques" aussi identiques qu'ils soient, (et plus ils sont identiques) se rapprochent de cette différence séparative infra mince'].

description). Interpretation thus features two intertwined dimensions: the 'encyclopedia' — the obsequent reservoir of facticity informing one's being-an-interpreter-in-the-world — and the 'autobiography' — the oneship that one injects into the writing of the interpretation as it is unfolding. For Derrida, interpretation is accordingly 'autobiographicoencyclopedic',<sup>44</sup> a practice that can be said to be 'contradictorily coherent'.<sup>45</sup>

Fifth, Acosta's interpretation can fail to persuade in as much as the rhetorical force of its enactment depends on the degree of acceptance that the text's readers are willing to concede to the claims being propounded. Acosta's re-presentation of the llama cannot impose itself on its readership. Rather, Acosta's dissolution of the llama into (necessarily askanted) inscription manifests itself as an event (of power) in which every reader is implicated and to whose determination every reader's opinion is invited meaningfully to contribute through some form or other of endorsement. Note that processes of validation by a text's readership can be expected to intervene in resonance with a reader's existing cultural or personal memories and on the basis of a reader's perception of textual corroboration. In sum, '[r]esearch results are thus what different communities of reception do with them'.<sup>46</sup>

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It seems an uncontentious proposition to state that jurists, as they preoccupy themselves with the world in their professional capacity, are mostly concerned with the interpretation of texts. Ascription of meaning to statutes, judicial decisions and scholarly commentary readily comes to mind. Arguably, the characteristic interpretive situation involves local circumstance — that is, local lawyers attempting to make sense of their local law in their local language.<sup>47</sup> The 2008 decision of the United States Supreme Court

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<sup>44</sup> Derrida, J (1987) *Ulysse gramophone* Galilée at 66 ['autobiographicoencyclopedique'].

<sup>45</sup> Derrida, J (1967) *L'Écriture et la différence* Editions du Seuil at 410 ['contradictoirement cohérent(e)'].

<sup>46</sup> Marcus, GE (2015) 'The Ambitions of Theory Work in the Production of Contemporary Anthropological Research' in Boyer, D, Faubion, JD and Marcus, GE (eds) *Theory Can Be More Than It Used To Be* Cornell University Press at 52. Cf Latour, B (1987) *Science in Action* Harvard University Press at 56: 'Readers are devious people, obstinate and unpredictable — even the five or six left to read the paper from beginning to end'.

<sup>47</sup> To be sure, the idea of 'locality' requires problematization, and there is nothing obviously existing as local — or not. On circumspect analysis, even so-called 'globalized' law — a function of the increasing pace and breadth of capitalist neo-liberalization's deterritorialization and reterritorialization — manifests itself as 'glocalized' law on account of the global production of a kaleidoscope of embodied and significant disjunctive, differentiated and singularized local knowledges. Trivial exercises confirming this insight could involve the juxtaposition of a famous coffee-house on State Street in Chicago with another coffee-house of the same name on rue de Rivoli in Paris or the English text of a popular multi-volume children's novel with the French version of the same book. For the notion of 'glocalization', see Robertson, R (1995) 'Glocalization: Time-Space and Homogeneity-Heterogeneity' in Featherstone, M, Lash, S and Robertson, R (eds) *Global Modernities* Sage at 25-44. It appears that the English word is a transliteration from the Japanese: Robertson, R (1992) *Globalization* Sage at 173. Perhaps adverting to the fact that when one identifies knowledge as local one is presumably harnessing a local conception of the local, Whitehead

in *DC v Heller* is exemplary of the dynamics to which I apply myself.<sup>48</sup> In *Heller*, the Supreme Court purported to interpret the Second Amendment to the US Constitution, which reads thus: ‘A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed’. For the late Justice Antonin Scalia writing on behalf of a narrow majority of the Court, ‘[t]here seems [...] no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms’.<sup>49</sup> Justice Scalia emphasized that ‘the Amendment, in addition to furthering a militia-related purpose, also furthers an interest in possessing guns for purposes of self-defense’.<sup>50</sup> In his dissent, Justice John Paul Stevens took the view that ‘the Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. [...] Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution’.<sup>51</sup> For his part, Justice Stephen Breyer, contributing a separate dissent, claimed that ‘the Second Amendment protects militia-related, not self-defense-related, interests’.<sup>52</sup>

Whether the Second Amendment enshrines a right to self-defense (as Justice Scalia maintains) or is limited in scope to the rights of militia (as Justices Stevens and Breyer contend) is properly a matter of interpretation. Indeed, the interpretive situation that obtains in *Heller* is closely analogous to the one that Acosta faced in the writing of his Peruvian record. Clearly, the text of the Second Amendment existed in advance of any interpretation being made of it in *Heller*. It was already before the Court, twice: it had come into existence more than 200 years earlier, and it sat in front of the Justices, on the statute book, there. If no prior text had existed, it would have followed that the interpretations that were taking place in *Heller* would have been interpretations of nothing, which would amount to obvious nonsense. Still, the Second Amendment cannot mean on its own. The semantic extension of expressions like ‘well regulated Militia’ or ‘the right of the people’ is not fixated in self-evidence. As with any other text — whether it be *Macbeth*, *I Wandered Lonely As a Cloud* or the banner ‘Gone Surfing’ posted on Doug’s law-school coffee cart — the Second Amendment demands an interpreter in order to accede to signification. Although the Second Amendment exists independently of the Supreme Court, it cannot exist *meaningfully* without Justice Scalia or its other interpreters: it cannot exist *meaningfully* without a reader. Strictly speaking,

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refers to the ‘fallacy of simple location’: Whitehead, AN (1978) [1893] *Process and Reality* Griffin, DR and Sherburne, DW (eds) Free Press at 137.

<sup>48</sup> 554 US 570 (2008). A reading favorable to individual rights had heretofore stayed marginal. But see Levinson, S (1989) ‘The Embarrassing Second Amendment’ (99) *Yale Law Journal* 637.

<sup>49</sup> *DC v Heller*, 554 US 570 (2008) at 595.

<sup>50</sup> *Id* at 683.

<sup>51</sup> *Id* at 637.

<sup>52</sup> *Id* at 681.

it cannot exist meaningfully but as *interpreted words*: ‘The reader is the one who signifies’,<sup>53</sup> so that ‘reading becomes a *rewriting* of the texts’.<sup>54</sup> In other terms, since ‘the meaning of a text is not to be found in it like a stone and hel[d] up for display’,<sup>55</sup> because ‘[t]he text is *what* is read’,<sup>56</sup> ‘a signifying structure [is what] critical reading must *produce*’.<sup>57</sup> Given that ‘the meaning of a text is immanent not to the text, but to the practice of interpretation’,<sup>58</sup> without the decisive intervention of an interpreter’s language to make it mean, to make sense of it, the constitutional text is fated to remain meaningless. For the meaningfulness of the text to emerge, interpretation — in fact, speculation — must act constitutively; it must enable or emancipate the text into meaning: it spins, threads, knots, tresses, braids, strings it into meaning within ‘a space of *co-poiesis*’.<sup>59</sup> The Second Amendment effectively means in the form in which it is received in the language of its (authorized) interpreters. Meaningfully speaking, it therefore resolves itself as constitutive interpretation, or speculation. And each Supreme Court Justice proceeds to interpret or speculate until confident that he/she has framed a textual interpretation amenable to adhesion (any reception of the proposed reading being subordinated not to some algorithm, but to an extraordinarily intricate interlapping of complex regimes of interpretive elicitation and readerly appreciation). In sum, the words and sentence of the Second Amendment are materially present entities that harbour an ontological dependence, at least in terms of their meaning, on the way they are experienced by their interpreters.

Crucially, the Supreme Court Justices writing in *Heller* operate out of the respective prejudicial fore-structures into which they were encultured. To write economically in specifying the interests that motivate a given interpretive assignment of salience to certain features of the Second Amendment thus deemed pertinent (Justice Scalia underscores the non-limitative role of the reference to militias, while Justice Breyer opines that the use of the word ‘Militia’ constrains the scope of the text), one view is marked or coloured by ‘conservative’ ideology, while the other interpretive stance is informed by ‘liberalism’. No doubt the prejudicial fore-structure proves influential in many other respects also. For instance, as they foreground their substantive and stylistic accentuations, choice of authorities, selection of quotations, formulation of headings and adoption of certain words, as they forge their interpretive way through a very

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<sup>53</sup> Silverman, HJ (1994) *Textualities* Routledge at 79.

<sup>54</sup> Malabou, C (2009) *Changer de différence* Galilée at 66 [*la lecture devient une réécriture des textes*] (emphasis original). Consider Georges Bataille’s intricate reference to the role of his reader: ‘[T]he reader who acts me’, ‘who speaks within me’, ‘who maintains within me the living discourse addressed to him’: Bataille, G (1954) *L’Expérience intérieure* Gallimard at 75 [*le lecteur qui m’agit*; *qui parle en moi*; *qui maintient en moi le discours vivant à son adresse*].

<sup>55</sup> White, JB (1985), *Heracles’ Bow* Wisconsin University Press at 80.

<sup>56</sup> Silverman, HJ *Textualities* supra note 53 at 81 [emphasis original].

<sup>57</sup> Derrida, J (1967) *De la grammatologie* Editions de Minuit at 227 [*une structure signifiante (est ce) que la lecture critique doit produire*] (emphasis original).

<sup>58</sup> Rastier, F (2001) *Arts et sciences du texte* supra note 21 at 277 [*le sens du texte est immanent non au texte, mais à la pratique d’interprétation*].

<sup>59</sup> Ettinger, BL *The Matrixial Borderspace* supra note 30 at 109 [emphasis original].

strong process of *sorting* with a view to articulating a discursive assemblage (or *agencement*),<sup>60</sup> both judicial opinions can be traced to the prejudicial fore-structures that have constituted them and that have thus led them to unfold within a certain horizon. At any rate, it must be obvious that the judicial opinions under consideration do not arise ‘in the air’ (Husserl’s words),<sup>61</sup> but that they are embedded within a process of heteronomous framing, within a structure come from elsewhere. Gadamer’s observation is apposite: ‘Indeed, interpretation must start somewhere. But its deployment is not random. It is not at all a real beginning’.<sup>62</sup>

To probe some of the principal theoretical issues at greater length, there is therefore the text of the Second Amendment, which features a material existence (these words, that sentence) independently of any interpretation that may advene to it. And then there are the two versions of the Second Amendment — the two discordant interpretations of the text — being propounded by the Supreme Court, the multiplication of interpretations or speculations not changing anything to the materiality of the text, to its thingly character (there are still the same 27 English words to the Second Amendment, no matter how many readings of these are being advanced).

To be sure, it seems hard — despite all qualifications, extensions or refinements — to dispute the incongruence of the Scalia and Stevens/Breyer interpretations. Yet, awkward as this situation may prove from the standpoint of law’s normativity, the fact that two interpretations are contradictory does not exclude that they can both prove convincing at once, if from the perspective of various interpreters or different interpretive constituencies for whom the interpretation of the text at hand generates specific interpretive outcomes proving incompatible *inter se*.<sup>63</sup> It is to state the obvious to remark that ‘interpretative needs vary with the interests that people pursue in the world’.<sup>64</sup> Now, incongruent interpretations — one that claims the Second Amendment to be sanctioning a general right of self-defense, the other that explains how the text does not recognize such a legal entitlement except for militias — cannot both be true in the sense that the Second Amendment cannot both be enunciating and be denying a general right of self-defense. However, the notion of ‘truth’ is irrelevant to the pertinence of interpretive assertions since the constitutional text cannot mean as an

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<sup>60</sup> For a thoughtful reflection, see DeLanda, M (2016) *Assemblage Theory* Edinburgh University Press.

<sup>61</sup> *Supra* text at note 18.

<sup>62</sup> Gadamer, H-G *Wahrheit und Methode* *supra* note 7 at 476 [‘*Gewiß muß die Auslegung irgendwo einsetzen. Aber ihr Einsatz ist nicht beliebig. Er ist überhaupt kein wirklicher Anfang*’]. Cf Hutchinson, AC (2016) *Toward an Informal Account of Legal Interpretation* Cambridge University Press at 162: ‘There simply is no reliable intellectual device that will demonstrate that “law” has some distinctive and authoritative way to answer such questions as *What is a park?* or *What is a vehicle?* in any way that is separate and apart from the ideological orientation of the particular lawyers and judges doing the answering’ [emphasis original].

<sup>63</sup> Cf Belsey, C (2016) *Criticism* at 23-24: ‘Look at it one way, and it works. Look at it the other way, and it still works. Yet, [...] each reading excludes the other’.

<sup>64</sup> Glaeser, A (2015) ‘Theorizing the Present Ethnographically’ in Boyer, D, Faubion, JD and Marcus, GE (eds) *Theory Can Be More Than It Used To Be* Cornell University Press at 79.

interpretation-independent entity, which entails that there is no possible epistemic ingress to an interpretation-independent text — to a text *as such* — that would make it possible to appraise the tenor of a proposed interpretation against something like ‘the true text’ or ‘the text itself’.<sup>65</sup> Always already, the Second Amendment to the US Constitution is *thus*, this *thus* being ‘a thus without objective reference’, a thus ‘ineluctably in theory’.<sup>66</sup> Interpretation or speculation therefore excludes truth, what one calls ‘true’ being effectively that which one is willing to interpret *as if it were true*.<sup>67</sup> In fact, interpretation cannot be separated from the prejudicial fore-structure out of which one must proceed in order to engage in ascription of meaning.<sup>68</sup> As regards the meaning of texts, that which is named ‘truth’ is inevitably the result of an interpretive agent’s embodied prejudicial enculturation, which means that the idea that anyone

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<sup>65</sup> I address the epistemic unavailability of ‘in-itselfness’ supra note 22.

<sup>66</sup> Ricco, JP (2002) *The Logic of the Lure* University of Chicago Press at 77.

<sup>67</sup> Cf Vattimo, G (2009) *Addio alla verità* Meltemi at 73: ‘[T]here is no experience of truth that is not interpretive’ [‘(N)on c’è esperienza di verità che non sia interpretativa’]. Yet, according to Ronald 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 would legitimately — and creditably — be 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 inscribing an interpretation of the 2004 French statute on religious attire at school. Assume further that this comparatist is acting earnestly 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 or speculations to be found in various books or journals. However, this sense of achievement does not mean, need not mean and must not mean that this comparatist 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 that 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 or speculation over others. And there seems little sense in talking about ‘truth for me’, for if one adds this codicil the word ‘truth’ ultimately finds itself devoid of significant semantic import. But for a view congruent with Dworkin’s, see Gaskin, R (2013) *Language, Truth, and Literature* Oxford University Press at 254, who suggests that an interpreter contending that his interpretation ought to carry over mine is effectively maintaining that ‘[his] interpretation [...] is [...] *objectively better* than my interpretation’ [emphasis original]. Again, I disagree: no argument in favour of one interpretation or speculation deserving to prevail over another requires a reference to objectivity, an incomprehensible interpretive idea in any event other than if understood as the expression of values contingently related to place and time, if approached as a *cultural* claim (an appreciation which then fatally undermines it). There is one more point. As Gianni Vattimo writes, ‘every defense of truth is moved by a project, that is, by an interest’: Vattimo, G *Della realtà* supra note 3 at 93 [‘ogni rivendicazione di verità è mossa da un progetto e cioè da un interesse’]. What, then, was Dworkin’s project, his interest? And what is Richard Gaskin’s? After all, a claim to truth is also an assertion of power; it is a move to bring others under one’s epistemic command.

<sup>68</sup> Kermode, F (1979) *The Genesis of Secrecy* Harvard University Press at 68: ‘[A]ll interpretation proceeds from prejudice, and without prejudice there can be no interpretation’.

would be in a position to identify ‘the true’ — as in ‘the true Second Amendment’ — or the text as such, without any interpretive input on one’s part, simply cannot be maintained. In brief, I argue for pervasive perspectivalism as the most serious interpretive position to behold (an interpretive view, of course, which is itself perspectival). While the Second Amendment cannot adjudicate between the multiplicity of interpretive or speculative accounts that are applicable to it, it remains that every reading, necessarily mediated and implicitly denying other possible re-presentations, is an ever-defeasible narrative proposal which, in the absence of any unbiased criterion, is destined to be validated or disconfirmed on the basis of its (perceived) persuasive merit or demerit rather than because of any idea of intrinsic rightness or exactness. Again, however, to say, as I do, that whatever meaning is accessible regarding the Second Amendment can only be secured through interpretation or speculation is not to argue that the Second Amendment’s material existence is subordinated to the deployment of re-presentative resources by the interpreter aiming to make sense of it. *There are the Second Amendment’s 27 English words and not others*. Paradoxically — and this observation reprises what I mentioned about Acosta — while US Supreme Court justices cannot remain external to the Second Amendment that they enunciate (there is no dissociation, and their opinions tell ‘their’ Second Amendment), the Second Amendment that obviously exists in advance of the judges, that is there without them and irrespective of them, thus stays out of their epistemic reach, it resists them and their interpretive forays (there is no possible identification, and their opinions only tell ‘their’ Second Amendment). Such is Justices Scalia, Stevens and Breyer’s double bind: not to be in a position to make themselves external to any re-statement of the Second Amendment means that they are effectively keeping the Second Amendment external to them. It is not that the Justices’ interpretive authority finds itself disqualified, but that their authority is confined to their interpretive yield thus excluding any claim to objectivity (or truth).

The plurality of interpretations or speculations, the unavoidable conflicts of sense, cannot mean that there is more than one Second Amendment — which would be a silly claim to make — and these controversies do not entail either that the text is deficiently vague or dubious, in other words that it was poorly drafted (even if it could also be read to mean, say, that one holds a legal entitlement to the forelimbs of grizzlies or, leaving spelling to the side, that one has the right to denude one’s upper limbs).<sup>69</sup> Rather, it is that the text is, densely, *textual* — which means that it is ever-different from itself.<sup>70</sup> In addition to the prejudiced interpreter, the fabric of the text — the text’s texthood — must now be addressed as the other restriction bearing on interpretive acts. Every interpretation or speculation is indeed twice constrained. Not only does it depend on the interpreter’s prejudicial fore-structure, but it is subordinated to the play of the text.

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<sup>69</sup> See Amar, AR (2016) *The Constitution Today* Basic Books at 258-59.

<sup>70</sup> See Silverman HJ *Textualities* supra note 53 at 81. Still, if a text is to remain a text, if it is ascertainably to endure as *that* text instead of another, there must be limits to how much discontinuity from itself it can sustain. In this regard, the text’s material existence supplies necessary *containment*.

All texts — including, then, the Second Amendment to the US Constitution — are necessarily fashioned out of language whose intrinsic ductility generates an uncircumventable semantic lee-way or *play* — as in ‘room for action’ or ‘scope for activity’ (*Oxford English Dictionary*) — which pertains to the very texture of textuality. In other words, textuality’s primordial condition is as semantic heterogeneity, which means that the text’s presencing exists as incessant semantic movement. Because ‘the text itself *plays*’,<sup>71</sup> since it must follow that ‘meaning is *a function of play*’,<sup>72</sup> no original, fixed or ultimate meaning can be extracted from a text or assigned to it. Rather, the making of textuality is such that every text holds the possibility of disseminating an infinity of meanings — an irrepressible semantic fact confronting every interpreter. Even as the interpreter projects himself towards the text with a view to making sense of it — and to investing it with his endeavours or goals — the text, in some sort of counteracting drive, has always already undertaken to govern the interpreter’s doing. In particular, the text unceasingly plays through the interpreter no matter how resolutely the interpreter wants to arrest its motion. If you will, ‘the text stages *its own production*’,<sup>73</sup> which, as it claims to assert its ‘independence from discursivity’,<sup>74</sup> ‘defies all totalization, closure and completion’.<sup>75</sup> And it is precisely the inherently open-textured character of textuality that explains why more than 400 years after *King Lear* was first staged at court on 26 December 1606, the play continues to generate new readings of Shakespeare’s text.<sup>76</sup> Textuality is thus unceasingly and insistently on the move so that ‘[r]ather than allowing the text to close upon itself, to become one with itself, [it] produces only other, new texts with no end in sight’.<sup>77</sup> In effect, the overarching kinetic features of textuality are such that ‘[a] thousand possibilities will always remain open even as one understands something of that sentence which makes sense’.<sup>78</sup> Indeed, ‘[t]he meaning of a text is arrestable only through the cessation of its

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<sup>71</sup> Barthes, R (1984) [1971] *Le Bruissement de la langue* Editions du Seuil at 78 [‘le texte lui-même joue’] (emphasis original).

<sup>72</sup> Derrida, J *L’Écriture et la différence* supra note 45 at 382 [‘le sens est en fonction du jeu’] (emphasis original).

<sup>73</sup> Gasché, R (2011) *The Stelliferous Fold* Fordham University Press at 9 [emphasis original].

<sup>74</sup> Id at 15.

<sup>75</sup> Id at 14.

<sup>76</sup> Recall that James VI, King of Scots, acceded the English throne as James I in March 1603 and appointed Shakespeare to the royal household in May 1603. Casting the playwright as a court official, one of the ‘King’s Men’ seeking to please his new master after a shift in power, James Shapiro makes a case for the importance of the Jacobean Shakespeare, whom he argues is too often overlooked in favor of the Elizabethan writer. The *Lear* illustration that I mobilize shows the endlessness of the play of the text and the correlative impossibility to fixate interpretation. See Shapiro, J (2015) *The Year of Lear* Harvard University Press. And the fact that interpretation is an unending process means that Shapiro’s is not, and cannot be, the last interpretive or speculative word on *Lear* (or on Shakespeare). Indeed, see Vickers, B (2016) *The One King Lear* (Harvard University Press). See also Greenblatt, S (23 February 2017) ‘Can We Ever Master King Lear?’ *The New York Review of Books* at 34-36.

<sup>77</sup> Gasché, R *The Stelliferous Fold* supra note 73 at 191.

<sup>78</sup> Derrida, J *Limited Inc* supra note 7 at 122 [‘(m)ille possibilités resteront toujours ouvertes, alors même qu’on comprend quelque chose de cette phrase qui fait sens’].

readings'.<sup>79</sup> Observe that the textual renewability I discuss is 'not only an index of [the text's] constant failure [to mean securely] but also some sort of promise [to mean expansively]'.<sup>80</sup>

Any interpretive assurance must therefore contend with the fact that while the interpreter purports to achieve the unconcealment of the text, the playing text always already withdraws from any attempt to stabilize it across any self/other line. Considering this resistance to elicitation, Heidegger refers to 'the primal conflict between clearing and concealing'.<sup>81</sup> Instead of a consensus between *interpretans* and *interpretandum*, there is insurmountable strife. And it is because of such discord that Heidegger rejects 'the structure of an agreement between knowing and the object in the sense of an adjustment of one being (subject) to another (object)'.<sup>82</sup> As the text's presencing takes the form of an obtrusion, textual play operates agonistically. The inherence of play to textuality thus denies every archaeological attempt to seize the totality of the text's meaning, to capture the text fully. No matter how sophisticatedly the interpreter responds to the play of the text, this failure of isomorphism means that textuality will preserve a secret, an interpretive remainder, a 'singularity forever encrypted'.<sup>83</sup> Even assuming, *concessio non dato*, that something like foreign-law-as-such could be devised, it remains that the comparatist's understanding will have to contend with the interpretive unsaturability of the foreign law under examination. Foreign law ultimately eludes the semantic reach of every effort at exhaustive enunciation: it exceeds every thorough re-presentation, it lies beyond complete articulability, it escapes the harness of integral interpretation.

The comparatist will never reach a point where he is able demonstrably to claim that he has said all that can be uttered regarding foreign law. No matter how detailed and how long his study, it is the case that the comparatist can never confidently assert — whether he is talking about the English law of anticipatory breach or the Argentine law of *amparo* or the Indonesian law of *adat* — that he has managed to make it entirely present, there, in his interpretive text. In the event, there is always something more that could have been displayed, that the comparatist did not show. There is that which remains to be said within/beyond that which has been said. In the absence of 'total surveyability [and] familiarity',<sup>84</sup> the extensive account is therefore always for another

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<sup>79</sup> Rastier, F *Arts et sciences du texte* supra note 21 at 278 ['(l)e sens d'un texte n'est clôturable que par l'arrêt de ses lectures'].

<sup>80</sup> Gasché, R *The Stelliferous Fold* supra note 73 at 191.

<sup>81</sup> Heidegger, M (2015) [1950] *Holzwege* Klostermann at 42 ['der Urstreit von Lichtung und Verbergung'].

<sup>82</sup> Heidegger, M *Sein und Zeit* supra note 12 at 218-19 ['die Struktur einer Übereinstimmung zwischen Erkennen und Gegenstand im Sinne einer Angleichung eines Seienden (Subjekt) an ein anderes (Objekt)'].

<sup>83</sup> Derrida, J (2003) *Béliers* Galilée at 41 ['singularité à jamais encryptée']. Cf Ballesterio, A (2015) 'Theory As Parallax and Provocation' in Boyer, D, Faubion, JD and Marcus, GE (eds) *Theory Can Be More Than It Used To Be* Cornell University Press at 177: 'While the unseeable changes from one moment to the next, it never ceases to exist'.

<sup>84</sup> Adorno, TW (1970) [1956] *Zur Metakritik der Erkenntnistheorie* Tiedemann, R (ed) Suhrkamp at 40 ['totale Überschaubarkeit (und) Bekanntheit']. Cf Chan, P (2014) 'Alternumerics FAQ' in *Selected Writings*

day; it is ever postponed or deferred. If you will, the comparatist is perpetually going towards the other, standing on the verge of otherness, not-meeting the other at otherness's edge. In time, the comparatist will learn more about anticipatory breach, *amparo* or *adat* (or perhaps will be un-learning aspects of what he has learned) so that the initial report, necessarily unfinished, will find itself supplemented. For one thing, the fact of interpretive or speculative incessancy means that, although it must always aim for justness, no account of a text can effectively ever be just. In order to be just, the report would have to ensure that not a single crease, not the slightest fold within the *interpretandum* had been left unaddressed. But an analysis can always be more detailed, which means that there will unfailingly exist an aspect of the text that interpretation or speculation cannot peer, a feature of the text that will stay inaccessible, intractable, inexpressible, indescribable, hidden, both for the interpreter himself and for his readership. Here, the other's text ultimately proves stronger than the self as it resists the regulative self and leaves a remaindering, a *restance*, over which the self, which cannot do whatever it wants, is unable to exercise its interpretive empire. Because of the textual recalcitrance that there is, for the interpreting self *the end of the text is never at hand*. Any interpretation of foreign law therefore works by effectively marking a rupture from it, from its foreignness.

In *Heller*, it is not, then, that the two Supreme Court interpretations differ because they attend to two different texts or a poorly written one. Rather, it is that the legislative text there is structurally solicits an irrepressible array of readings. Now, a more complex issue is whether these interpretations *extract* meaning from the contents of the text or whether they *impute* meaning to the text. According to the first hypothesis, the text would conceal a range of possible meanings whence various interpreters would select one that would align with the prejudicial fore-structure out of which they are projecting unto the text. The second option has the interpreter mobilizing his prejudicial fore-structure, unwittingly or not, and injecting his meaning into the text. For present purposes, it matters little however whether one is opting for extractive or imputative textual elicitation, or for a combination of the two approaches, in the sense that, whichever explanation is retained, it remains that nothing intelligible can be said about the text independently of the text-versions of it — which is the point I am keen to be making here. In either case, a text is unintelligible unless nested within some interpretive or speculative system. Again, to maintain that a text cannot mean apart from the versions of it that there are does not entail that these versions are all there is. Whatever interpretation there is of a text, it is of a text that materially exists in advance of any interpretation of it. Interpretation A, operating from the standpoint of prejudicial fore-structure PF1, thus presents TXT, the Second Amendment to the US Constitution, as featuring meaning M1. Meanwhile, Interpretation B, working from the perspective of prejudicial fore-structure PF2, presents TXT, the self-same TXT, as harbouring meaning M2. One and the same material TXT is thus being meaningfully re-presented as more

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2000-2014 Laurenz Foundation at 198: '[A]ny system that reduces a world by trying to know it in full [...] is tragic. Think Diderot's Encyclopedia. Think Socialism'.

than one M. Meanwhile, TXT materially remains what it is (no more words, no different words). Indeed, the interpretive or speculative route is *to* TXT (not *from* TXT). Of course, the interpretations are therefore about something (TXT), but unlike what the Cartesian legacy intimates (perhaps the weakest aspect of the claim for certainty), that something (TXT), once more, simply does not feature a quality of ‘as-suchness’ which would prove interpretively accessible.

Although I fully accept that the term is bound to strike an unsusceptible chord, I suggest that the word ‘invention’ well conveys the tension I am contemplating between archive and narrative.<sup>85</sup> The Second Amendment exists materially, irrespective of Justices Scalia, Stevens and Breyer. They are making their way to it. They are coming to find it, there, in the US Constitution, where it was inscribed more than two centuries ago. Etymologically, the word ‘invention’ captures this motion since in one historical 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 interpreter is unable to construct US constitutional law irrespective of the law-text in front of him, there. And he cannot deliberately transgress it. As a matter of justice, he owes fidelity to the text: there is the law of the text (and of the law-text), its injunction, so that ‘the reading [...] cannot legitimately transgress the text towards something other than itself’.<sup>86</sup> If you will, Justices Scalia, Stevens and Breyer must concede an element of recalcitrance to textuality. There is the force of the text, its retortion, its resistance: *there is what the Second Amendment wants*. This ineluctable submission, a being-made-hostage to the materiality of the law-text (meaning must contend with *these* words, there) prevents the text from coming under the totalizing epistemology of the self. It saves the interpreter from connecting only and endlessly with his own thought, which would then become, pointlessly, the exclusive focus of his theorization. And the materiality of the law-text thus preserves the interpreter from uncreditably asserting of the Second Amendment to the US Constitution that it concerns, for instance, ratemaking in international air transport (although it is the case that ‘deference to the law of the work does not exclude a violent intervention in the work’).<sup>87</sup>

Crucially, interpretation binds existential and performative claims together: as Justices Scalia, Stevens and Breyer abide by the law-text that exists before them, that they cannot forsake, they simultaneously proffer a rhetorical performance in the course of

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<sup>85</sup> Alternatively, one can refer to ‘[the] move from document to documentary’: Balsom, E and Peleg, H (2016) ‘The Documentary Attitude’ in Balsom, E and Peleg, H (eds) *Documentary Across Disciplines* MIT Press at 12.

<sup>86</sup> Derrida, J *De la grammatologie* supra note 57 at 227 [‘la lecture (...) ne peut légitimement transgresser le texte vers autre chose que lui’].

<sup>87</sup> Gasché, R *The Stelliferous Fold* supra note 73 at 5. An unduly assertive interpretive intervention may give cause to heed Sarah Wood as she urges one to ‘begin again now with rather less force, because [one] want[s] to let [foreign law-texts] speak’: Wood, S (2014) *Without Mastery: Reading and Other Forces* Edinburgh University Press at 1.

which the law-text that there is, there, takes meaningful shape. It follows that interpretive or speculative work — any interpretive or speculative work — is *not* representational, even as it retains a link with representation, no matter how tenuous (something like threshold indexicality, if you will), which is in fact indispensable for the interpreter to be able to act responsibly and *response-ably* vis-à-vis the law-text.<sup>88</sup> This contention raises the other meaning of the word ‘invention’. In a more familiar key, ‘to invent’ is ‘to create’ (as in ‘to invent gunpowder’ or ‘to invent the iPad’). While the interpreter, out of fidelity to the law-text, accounts for the words that he finds, there, he inevitably proceeds in his ‘own’ interpretive or speculative key, that is, he enacts his ‘own’ interpretive or speculative resolutions drawing on his ‘own’ sense-making resources — on his prejudicial fore-structure — not least because of the surfeit of available meaning that the text carries, a situation which forces the interpreter into a prioritization of the information that he wishes to convey about the law-text.

‘Invention’ thus helpfully encapsulates the complex task of elicitation/ascription of textual meaning. In *Heller*, Justices Scalia, Stevens and Breyer are, etymologically speaking, *inventing* the Second Amendment to the US Constitution. As they overcome the traditional opposition between ‘object’ and ‘subject’, they evince the inevitably discrepant ‘logic’ underlying the activity of interpretation as it flits between the revelation of the (foreign) law-text and the inscription of it, a vigorous torsion of irreconcilables, a nondialectical dynamics of the contraries within which, as interpreter, one is bound to live and which one must therefore acknowledge as what is the case.

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While the significance of foreign law in the United States long antedates the current wave of *soi-disant* ‘globalization’ and its attendant vertiginous techno-economic interdependencies and space-time compressions,<sup>89</sup> Justice Breyer has shown in a compelling extrajudicial argument how foreignness has become an inescapable presence on the docket of the US Supreme Court, one of the most influential judicial agents in the world.<sup>90</sup> Among the many manifestations of the increased prominence of foreign law locally, judicial cross-referencing to foreign court decisions has attracted particular attention.<sup>91</sup> Meanwhile, various scholarly publications have featured

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<sup>88</sup> Cf Gasché, R *The Wild Card of Reading* supra note 17 at 13: ‘[A] performative act, itself no longer referential[,] [...] can include within itself, as part of itself, an act of reference’. Adde: Spivak, GC (2014) ‘Book Review’ (27) *Cambridge Review of International Affairs* 184 at 186: ‘Interpretation is a responsible task’. In addition to evoking integrity, the idea of ‘responsibility’ connotes an ability to respond to something that is there.

<sup>89</sup> Eg: Calabresi, SG and Zimdahl, SD (2005) ‘The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision’ (47) *William and Mary Law Review* 743.

<sup>90</sup> Breyer, S (2015) *The Court and the World* Knopf.

<sup>91</sup> Eg: *Lawrence v Texas* 539 US 558 (2003); *Roper v Simmons* 543 US 551 (2005). For a convenient sketch of the controversy, see Posner, R (2004) ‘No Thanks, We Already Have Our Own Laws’ (July/August) *Legal Affairs* 40; Jackson, V (2004) ‘Yes Please, I’d Love to Talk With You’ (July/August) *Legal Affairs* 43. Vicki

distinguished consideration of foreign legal experience.<sup>92</sup> Illustrating somewhat dramatically the contentious aspects of the matter, many US states have now made statutory attempts to contain the relevance of foreign law.<sup>93</sup> The heightened visibility that foreign law has assumed locally is hardly a phenomenon limited to the United States. In many countries, jurists have likewise been interacting with the world's legal disparateness — which they have largely regarded as beneficial and indeed as normatively *relevant*.<sup>94</sup> In advance of empirical study, one can confidently assert that the number of legal academics purporting to have their professional identity validated as 'comparatist' — the label assigned to those addressing foreign law — is in fact unprecedented, although it remains marginal by contrast to the dense aggregation of lawyers continuing to specialize in the law on a territorial basis. It follows that the field of comparative law — a distinctive socio-intellectual and disciplinary arena featuring the usual sociological markers such as learned societies, journals, chairs, conferences, research centres, courses and postgraduate programmes — has been expanding and acquiring enhanced legitimacy.<sup>95</sup> As it is currently deployed in Europe and North America for example, comparative law — which perceptibly emerged in its institutionalized forms in the 1820s in reaction to the European codification movement and in response to what were then perceived in some academic and professional circles as isolationist proclivities — involves the appreciation, within one glance, of more than one law, one of the convoked laws having to be *foreign* to the other, the (legally) foreign consisting not in a fixed or absolute form, but in what is, in effect, not interpretively deemed to be (legally) binding on one.<sup>96</sup> Note that while distance is a precondition for

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Jackson's title is misleading. As I discuss presently, the stakes are far higher than mere conversation (to which, presumably, Richard Posner would not object) and involve ascription of normative significance.

<sup>92</sup> Eg: Ruskola, T (2014) *Legal Orientalism* Harvard University Press; Hirschl, R (2010) *Constitutional Theocracy* Harvard University Press; Ziolkowski, T (2003) *The Mirror of Justice* Princeton University Press; French, RR (1995) *The Golden Yoke* Cornell University Press; Damaška MR (1991) *The Faces of Justice and State Authority* Yale University Press; Whitman, JQ (1990) *The Legacy of Roman Law in the German Romantic Era* Princeton University Press.

<sup>93</sup> An Oklahoma statute, the first such banning initiative, was pronounced unconstitutional in *Awad v Ziriak* 966 F Supp 2d 1198 (WD Ok 2013). This decision supersedes a circuit court judgment in *Awad v Ziriak* 670 F 3d 1111 (10th Cir 2012), which concerned a preliminary injunction. For a critical examination of the various state initiatives, see Patel, F, Duss, M and Toh, A (2013) *Foreign Law Bans: Legal Uncertainties and Practical Problems* <http://www.brennancenter.org/sites/default/files/publications/ForeignLawBans.pdf> [on file].

<sup>94</sup> Eg: *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221; *White v Jones* [1995] 2 AC 207 (HL); Frankenberg, G (2016) *Comparative Law As Critique* Elgar; Hirschl, R (2014) *Comparative Matters* Oxford University Press; Glanert, S (ed) [2014] *Comparative Law — Engaging Translation* Routledge; Puchniak, DW, Baum, H and Ewing-Chow, M (eds) [2012] *The Derivative Action in Asia* Cambridge University Press; Nicholson, P and Biddulph, S (eds) [2008] *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* Nijhoff.

<sup>95</sup> While prompting an enlargement of the field, the developing earnestness to gain recognition as a comparatist carries a heavy price since the proliferation of performers provokes a predictable dilution of performing standards. The problem of adulteration that I mention finds expression in other ways also, for instance in the extraordinary institutional abasement of the chair of comparative law at Oxford since the early 2000s.

<sup>96</sup> Foreignness is contingent: it depends upon conjuncture and situation.

the knowledge of *foreign* law (distance delineates otherness), it makes *knowledge* of foreign law impossible (distance, as it avoids the perceptual blurring that accompanies too much closeness, delimits ultimate inaccessibility, thus preventing ‘objective’ or ‘true’ accounts of the foreign).<sup>97</sup>

In accord with other fields, comparative law features an orthodoxy — and one orthodoxy only — whose strategic and generative power, whose hegemonic logic, commands consent on the part of comparatists jointly and severally. Comparative law’s *doxa* has long been committed to an understanding of the legal that can fairly be termed ‘positivist-analytical’ or ‘positivist’ *tout court*.<sup>98</sup> Inevitably (and not unlike the doctrine of positivism itself), the field of comparative law harbors many positivist variations. As one problematizes positivism as the gubernatorial reason within comparative law, one can therefore distinguish, if somewhat schematically, between the ‘porous’ positivisms that are practiced in the United States and the ‘hermetic’ applications to be found in continental Europe, where positivism continues to dominate as reverentially hypostasized dogma. Yet, the diverse renditions of the positivist agenda share a certain number of basic characteristics. Thus, positivists of all hues are primarily concerned with analytics, that is, with legal technique and with the rationalization of legal technique. They foster ‘legal dogmatics’, to transpose a German phrase, in as much as they aim to fix the law in the form of an orderly, coherent and systematic re-

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<sup>97</sup> Ettinger refers to ‘permutations of distance-in-proximity’: Ettinger, B *The Matrixial Borderspace* supra note 30 at 109. For his part, Castoriadis formulates the requirement of critical distance by way of a famous illustration: ‘The ethnologist who has assimilated the world-view of the Bororos so well that he can only see it their way is no longer an ethnologist; he is a Bororo — and Bororos are not ethnologists. His purpose is not to assimilate himself to the Bororos, but to explain to Parisians, to Londoners, to New Yorkers [...] this other humankind that the Bororos represent. And this, he can only do in the *language*, in the most profound sense of the term, in the categorial system of Parisians, Londoners, etc. However, these languages are not “equivalent codes”’: Castoriadis, C (1975) *L’Institution imaginaire de la société* Editions du Seuil at 246 [‘*L’ethnologue qui a tellement bien assimilé la vue du monde des Bororos qu’il ne peut plus le voir qu’à leur façon, n’est plus un ethnologue, c’est un Bororo — et les Bororos ne sont pas des ethnologues. Sa raison d’être n’est pas de s’assimiler aux Bororos, mais d’expliquer aux Parisiens, aux Londoniens, aux New-Yorkais (...) cette autre humanité que représentent les Bororos. Et cela, il ne peut le faire que dans le langage, au sens le plus profond du terme, dans le système catégorial des Parisiens, Londoniens, etc. Or ces langages ne sont pas des “codes équivalents”*’] (emphasis original). In other words, ‘without distance, [...] there is nowhere to go’: Boyer, D and Howe, C (2015) ‘Portable Analytics and Lateral Theory’ in Boyer, D, Faubion, JD and Marcus, GE (eds) *Theory Can Be More Than It Used To Be* Cornell University Press at 16. In this regard, it is important to remark that ‘the developing affordances of digital technology’ — the new ecologies of digital information and the thickening mesh of digital connectivity — do not suppress distance: Marcus, GE (2015) ‘The Ambitions of Theory Work in the Production of Contemporary Anthropological Research’ in Boyer, D, Faubion, JD and Marcus, GE (eds) *Theory Can Be More Than It Used To Be* Cornell University Press at 56. Meanwhile, I address the mirages of ‘objectivity’ and ‘truth’ in Legrand, P (2011) ‘Foreign Law: Understanding Understanding’ (6/2) *Journal of Comparative Law* 67.

<sup>98</sup> [A]nalytical jurisprudence’ and ‘positivism’ are ‘interchangeable labels’: Tamanaha, BZ (2007) ‘The Contemporary Relevance of Legal Positivism’ (32) *Australian Journal of Legal Philosophy* 1 at 38.

presentation of the different rules in force, largely applying at the behest of the state.<sup>99</sup> Throughout, positivist investigations remain squarely set on rules — on what has been posited by officials as ‘what the law is’<sup>100</sup> — and on the formulation of authoritative accounts of these rules, whether judicial or academic, which are typically offered as veritistic. In Frederick Schauer’s terms, ‘the description of law’ stands ‘at the heart of the positivist outlook’.<sup>101</sup>

I have said that jurists undisputably preoccupy themselves with the interpretation of texts. And I think it hardly more eventful to observe that comparatists, for their part, habitually concern themselves with the interpretation of *foreign* law-texts. Now, according to positivist tenets interpretation must optimally function as a kind of white writing. Ideally, it ought to act scrupulously exegetically or, if you will, as psittacistically as possible. From the standpoint of positivism, a commentary — whether it be the judge’s analyzing the statute or the textbook writer’s discussing the judicial decision — must require to manifest itself in what is ultimately a rigidly deciphering way, obeying as much as possible the dictates of (assertional) textual repetition. In other words, as they seek to promote an interpretive commentary on the legal provisions in force — which would be doggedly conceptual and rational, which would explain the law-texts’ reach and their potential, which would eliminate or reduce apparent textual flaws, obscurities, hiatuses or contradictions — positivists adhere to a brand of writing purporting to unfold in a largely unproblematic and unsituated mode, to show impermeability to the range of existential vagaries liable to afflict interpretation, to foster exact (that is, non-perspectival or non-horizoned) statements of ‘what the law is’. The investment of a statute, say, with any meaning that would appear visibly exterior to it would indeed involve a re-creation of the legislative text that would be deemed tantamount to a wreck-creation of it and, in any event, to an inadmissible recreation on the part of the commentator acting as expositor. In a perfect law-world, the statute, the judicial

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<sup>99</sup> In today’s glocalized world, as legal polycentricity arguably asserts itself in unprecedented ways, constantly re-affirming the fact that there are other normative orders apart from the state’s and pointing to an erosion of national-sovereignty prerogatives in specific respects, the view that the foreign must be understood in terms of *that* nation-state as distinguished from *this* nation-state requires to be overcome. Simply put, the foreign can no longer be approached as a bounded, stable, fixed form of knowledge (if it ever could). Indeed, its contours are constantly being re-traced as even the state is now working under conditions of enhanced cosmopolitan openness and international engagement. It remains that the current conditions within which economic glocalization is unfolding continue to confer validity to the ‘nation-state’ as the most powerful form of political and social organization. Eg: Elkins, J (2011) ‘Beyond “Beyond the State”: Rethinking Law and Globalization’ in Sarat, A, Douglas, L and Umphrey, MM (eds) *Law Without Nations* Stanford University Press at 52: ‘[T]here is no reason to think *in general* that legal globalization inherently involves a net loss of state authority. [...] [I]n important ways globalization may involve not a general loss of state authority but a *reconstruction* of the identity of states’ [emphasis original]. See generally Helfand, MA (ed) [2015] *Negotiating State and Non-State Law* Cambridge University Press.

<sup>100</sup> Eg: Kelsen, H (1934) *Reine Rechtslehre* Deuticke at 64: ‘The law counts only as positive law, that is, as legislated law’ [‘*Das Recht gilt nur als positives Recht, das heißt: als gesetztes Recht*’]. Hans Kelsen cast his model as ‘the theory of positive law’: Id at 38 [‘*die Theorie des Rechtspositivismus*’].

<sup>101</sup> Schauer, F (2015) *The Force of Law* Harvard University Press at 12.

opinion and the textbook would be whitewashed in an indivisible sameness: *the* law. Confident that any difficulty addressed analytically can be resolved analytically, positivists incessantly strive for the brand of fixity or invariance of meaning that is more readily associated with the Pythagorean theorem or the laws on thermodynamics.

Over time, deferential reprises of law-texts through judicial decisions or textbooks purport to operate the stabilization of the meaning of law as *the* meaning of law, thus supplying the kind of reassuring certitude that accompanies fundamental immobility. It is indeed a crucial assumption of positivism that political commitment or personal investment on the part of interpretive authorities should be minimized so as not to contaminate the interpretive attitude and in order not to prevent interpretation from supplying the *scientific* access to law-texts-as-they-are that it is assumed to be able to achieve. For positivism, then, law must be independently identifiable and knowable *as such*. Moreover, it must be properly expressed in terms that would be strictly confined to a sheer description of it. Because of the positivist's concern, some information is banished from the sphere of significance and various epistemic issues are made never to arise, therefore allowing for a purportedly immaculate conceptual prising over the life-world and also for a purportedly immaculate development of internal heuristic processes generating purportedly immaculate *legal*, if not scientific, results. In effect, positivism is a self-referential epistemic regime implementing a specific inclination of the legal mind. As they assert their predilection, positivists promote a sense of the sole 'reality' of their point of view and of its endurance. They also assume progress towards the (conceptual) perfectibility of law through the self-regulatory and teleologically ordained use of the posited.

The quotations that follow, which I regard as exemplary of comparative law's orthodoxy (and whose incensing terms I refrain from italicizing), readily remind one of what established comparatists consider as sound interpretive practice, as good positivist manners. Along the way, these excerpts illustrate how the *doxa* is eager to suggest tranquillized epistemic obviousness.

'The basis of any meaningful rules-oriented comparative legal work is, of course, the obtaining of correct information about the rules to be compared'.<sup>102</sup>

'[Reports] should be objective, that is, free from any critical evaluation'.<sup>103</sup>

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<sup>102</sup> Bogdan, M (2004) 'On the Value and Method of Rule-Comparison in Comparative Law' in *Festschrift für Erik Jayme Mansel*, H-P et al (eds) Sellier at 1237.

<sup>103</sup> Zweigert, K and Kötz, H (1998) *Introduction to Comparative Law* (3d ed) Weir, T (trans) Oxford University Press at 43. On the same page, there is also a reference to '[t]he objective report'. Konrad Zweigert and Hein Kötz are technicians (if I were not inclined to be charitable, as is my wont, I would say 'mere technicians'). Yet, they wrote from an influential institutional vantage and produced what has long been widely regarded as the leading contemporary text within the field of comparative law. While having come under epistemic attack from various quarters, it remains that this ageing book continues to provide the 'theoretical' framework within which much of the work on foreign law is being conducted. Quite apart

[Comparative lawyers] [...] know that they must cut themselves loose from their own doctrinal and juridical preconceptions and liberate themselves from their own cultural context in order to discover “neutral” concepts with which to describe [...] problems’.<sup>104</sup>

The law being drafted as the outcome of a comparative enterprise can/must be ‘impartial’, ‘dispassionate’ and ‘neutral’.<sup>105</sup>

‘I am concerned with what the law [i]s’.<sup>106</sup>

‘[An] explanation must encompass the law as a whole, but nothing beyond the law’.<sup>107</sup>

‘[One] must remain within the law [...] because culture and its relation to the legal rules and institutions are unclear’.<sup>108</sup>

“‘If the picture presented by a scholar is coloured by his background or education, international collaboration will correct it’”.<sup>109</sup>

When these various comparatists (strikingly undaunted by the reductive character of their hypnotizing system and its grim grooves) announce that they want, ‘of course, [...] correct information’ about foreign law, or *ortho-representations*, in other words information that is ‘free from any critical evaluation’, when they claim that their focus is ‘what the law [i]s’ and ‘nothing beyond the law’, when they state that ‘culture’ must remain outside their investigative purview since it is ‘unclear’ and because culture’s interaction with law is also ‘unclear’ — which is effectively a contention that legal analysis must be kept pure (*Reine Rechtslehre* rides again!) — and when they assert that they can/must ‘liberate themselves from their own cultural context’ and thus operate

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from wanting to seize the opportunity to honour Tony Weir’s work, I deliberately refer to the English translation on account of its widespread currency (and because Kötz himself was implicated in the writing of it).

<sup>104</sup> Id at 10.

<sup>105</sup> Von Bar, C and Lando, O (2002) ‘Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code’ (10) *European Review of Private Law* 183 at 222, 222 and 228, respectively. If Zweigert and Kötz are technicians or mere technicians (supra note 103), then Christian von Bar and Ole Lando are hacks. These two academics assumed temporary visibility in Europe on account of their self-appointment at the helm of hand-picked task forces once loquaciously devoted to the formulation of Principles of European Contract Law or the drafting of a European Civil Code, which would have applied across Member States within the European Union.

<sup>106</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.

<sup>107</sup> Michaels, R (2006) ‘Two Paradigms of Jurisdiction’ (27) *Michigan Journal of International Law* 1003 at 1017.

<sup>108</sup> Ibid.

<sup>109</sup> Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 103 at 47. These co-authors borrow this excerpt from Ernst Rabel’s and quote it approvingly.

‘impartial[ly]’, ‘dispassionate[ly]’ and ‘neutral[ly]’, without their account of foreign law being ‘coloured by [...] background or education’, they are effectively gesturing towards the basic interpretive positivist doctrine, that is, *adæquatio* between (legal) world and (legal) word.<sup>110</sup> Observe that orthodox comparatists are embracing this receptary at once descriptively (this is what we do, what we can do) and prescriptively (this is what we must do, what we ought to do). In the process, with a view to preserving legal positivism’s epistemic sovereignty (note the unexamined equation between ‘the law’ and ‘the legal rules and institutions’),<sup>111</sup> its imperial and unsurpassable order, these comparatists are excluding from their epistemic purview the prejudicial fore-structure, that is, they are effacing the medium anterior to the delimitation of any interpretation, that to which interpretation inevitably responds and whose finitude renders any interpretation oblique or perspectival rather than veridictive, that which irreducibly encloses interpretation, that which is always already acting as a performative within an epistemic economy of power. Likewise, these comparatists are behaving as if matters of inscription — inevitably subsequent to the ‘fieldwork’ (even if their terrain often consists only of library stacks or web sites, research into foreign law now including screenwork) — were devoid of any consequential epistemic import.

Over against the (perverse) persistence within positivism of metaphysical obsessions such as the compulsion for duplicating description coupled with the ambition for totalizing conceptualization of pure law (‘No Culture Please, We’re Jurists!’), not to mention other tedious and suspect undertakings like an abiding allegiance to *Wertfreiheit* (a positivist does not accept that he is involved in a project but believes himself ‘to be motivated by the pure will to truth as the reflection of the structure of things “out there”’),<sup>112</sup> ‘the question *who* always seems to me the great question’.<sup>113</sup> In particular, I want to argue that it simply cannot be that even the comparatist most ideologically committed to the strongest form of positivism imaginable — for example, not even a Hamburg or Hamburg-trained comparatist — can escape the epistemically constitutive role of the prejudicial fore-structure or eschew the process of invention that characterizes the interpreter’s interaction with law-texts. Again, there is no conceivable reason whatsoever why, when it comes to foreign law, to foreign law-texts and to foreign law-texts’ interpretation, the comparatist should somehow enjoy a form of epistemic immunity from the prejudicial fore-structure and from the process of

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<sup>110</sup> This motion instantiates the Cartesian pledge to intellectual inquiry proceeding from pure thought and the conviction that an identity between world and thought is both a worthy and an achievable goal. I discuss the interface between comparative law’s orthodoxy and Cartesianism in Legrand, P (2005) ‘Paradoxically, Derrida: For a Comparative Legal Studies’ (27) *Cardozo Law Review* 631 at 645-54.

<sup>111</sup> *Supra* text at note 108.

<sup>112</sup> Vattimo, G *Della realtà* *supra* note 3 at 89 [‘*di essere mosso dalla pura volontà di verità come rispecchiamento della struttura “là fuori” delle cose*’].

<sup>113</sup> Derrida, J and Ferraris, M (1997) [1994] *‘Il gusto del segreto’* Laterza at 38 [‘*la domanda chi mi sembra sempre la grande domanda*’] (emphasis original). The words are Derrida’s and the translation from the French is Maurizio Ferraris’s. This Italian translation stands as the ‘original’ publication of Derrida’s argument. Derrida’s text remains unavailable in French, the language in which it was initially enunciated.

invention. While I defend the view that the foreign makes especial demands on one — there is a *Verfremdungseffekt* — and that for the English reader, say, the poetry of René Char in French or of Celan in German creates an interpretive situation challenging him in a manner that differs from the way in which WH Auden's or Philip Larkin's poetry interpellates him (if only because the solicitation is far from being strictly about language and also implies, in the broadest sense of the term, culture — yes, *culture!*),<sup>114</sup> it remains that from an ontological standpoint, there is nothing to distinguish the texthood of a foreign judicial decision from that of a local case. Both documents materially consist of words, sentences and paragraphs, and foreign words are as structurally labile as local words. Indeed, this argument must obtain since, again, no judicial decision is intrinsically foreign: while a French case is foreign from the point of view of a Singaporean comparatist, the self-same judgment is local for a French jurist. An analogous claim can be made as regards the interpreter. To be sure, the epistemic configuration within which a Belgian interpreter operates vis-à-vis Belgian law differs in crucial respects from the case involving a Belgian interpreter facing Australian law. In both instances, however, the interpreter is the self-same person. Clearly, it cannot be credible to hold that in one scenario the interpreter would have to contend with the prejudicial fore-structure and the process of invention while in the other he would mysteriously morph into an individual capable of 'liberat[ing] [himself] from [his] own cultural context' and of operating 'impartial[ly]', 'dispassionate[ly]' and 'neutral[ly]'. Imagine a Belgian interpreter working on Belgian law on a given Thursday morning and on Australian law later in the afternoon. Would the epistemic morphing happen over the waterzooi lunch, just after the second glass of Chassagne-Montrachet perhaps?

My contention, then, is that very much like any interpreter of the world, a comparatist must bring to bear a prejudicial fore-structure on any exercise in ascription of meaning, and my further claim is that a comparatist, just like any local lawyer working on local law-texts in local language, implements a process of invention as he purports to make sense of the foreign law before him. To enunciate the matter pointedly (and to do so, deliberately, in the singular form of the first person), 'I can no longer act as though I had not fallen into this, my situation'.<sup>115</sup> I now want to complete my analysis by introducing the argument that as he interprets foreign law out of the prejudicial fore-structure and through invention, the comparatist is inevitably injecting autobiographical elements into his reading of foreign law, which are inextricably woven into the foreign law that he is re-presenting and which, given their primordially, cannot be dissociated from that foreign-law-as-re-presented. Even as the study of foreign law wants to conceal its ties to comparatists' lives, the epistemic fact of the matter is that as he researches foreign law, as he assembles the details he has harvested into a new formation, the authorial self

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<sup>114</sup> For the benefit of comparatists and with specific reference to foreign law, I probe 'culture' in Legrand, P (2006) 'Comparative Legal Studies and the Matter of Authenticity' (1) *Journal of Comparative Law* 365 at 374-93.

<sup>115</sup> Sloterdijk, P (2001) *Nicht gerettet: Versuche nach Heidegger* Suhrkamp at 32 ['Ich kann nicht länger so tun, als sei ich nicht in diese meine Situation gefallen'].

textualizes itself: it inscribes itself — it writes itself — into the text about foreign law, it disseminates itself throughout the text and therefore through the foreign-law-as-represented, if often in barely discernible ways although, I maintain, the orientational features of the self's intervention, as they structurally issue from the place of utterance,<sup>116</sup> carry effects that are in principle ultimately disclosable. For the same reasons that I have outlined already, note that interpretation-as-autobiography cannot characterize comparative law only and must apply to situations involving interpretations of the world in the wider sense, for example to arrangements where the interpretive focus is specifically on local law — which means that the word 'foreign' could be subtracted from the title I have assigned to this essay. However, since a host of circumstances, many beyond my control, have long prompted me to inhabit the world and the law primarily as a comparatist, the rest of my critique spontaneously addresses comparatism, that is, situations where, for whatever reason, a jurist is having *to make sense of foreign law*. (The words 'to make sense of foreign law' appositely capture the two facets of the process of invention I am envisaging: one fashions the meaning pertaining to a textual entity materially existing outside of one.)

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To frame the matter economically, my thesis is that no foreign law is retrievable beyond the comparatist's re-presentation of it and therefore not otherwise than as the comparatist's translation of it in the comparatist's language (this last term being marshalled in the broadest sense). Observe that translation manifests itself at two stages so that it effectively bookends the research into foreign law. Anticipatorily, as he approaches foreign law, the comparatist must resort to his categories, conceptions and words in order to make his epistemic way. Thus, as the US lawyer comes to French judicial opinions, he inevitably, if perhaps unwittingly, draws on his knowledge of US judicial opinions (what is a court rather than a legislative assembly, what is a judge rather than a priest, what is a judgment rather than a poem). And at the end of the investigation, the comparatist must mobilize his categories, conceptions and words once more — the only categories, conceptions and words that he has at his disposal — so as to be able to write about foreign law. In other terms, one can say of foreign law what Gadamer writes of the humanities in general, which is that 'the knowledge [out of it] always has something of self-knowledge about it',<sup>117</sup> or what David Rodowick maintains of interpretation broadly understood, which is that 'every interpretation involves a degree of self-interpretation embedded in a stream of action'.<sup>118</sup> It follows that the

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<sup>116</sup> 'We must begin *somewhere where we are*', '[s]omewhere where we are: within a text already where we believe we are': Derrida, J *De la grammatologie* supra note 57 at 233 ['*Il faut commencer quelque part où nous sommes*']/(quelque part où nous sommes: *en un texte déjà où nous croyons être*) (emphasis original).

<sup>117</sup> Gadamer, H-G (1986) [1953] 'Wahrheit in den Geisteswissenschaften' in *Gesammelte Werke* vol II Mohr Siebeck at 40 ['*Geisteswissenschaftliche Erkenntnis hat immer etwas von Selbsterkenntnis an sich*'].

<sup>118</sup> Rodowick, DN (2013) 'The Value of Being Disagreeable' (39) *Critical Inquiry* 592 at 608.

identification of the foreign cannot be taken to indicate a firm border between an outside (the other's law-world) and an inside (the comparatist's 'own' law-world).

The foreign irrevocably bears the imprint of the self for at least one other reason, which is that there can be no end-independent examination of foreign law. Whenever the comparatist proceeds to identify, interpret and enunciate foreign law, he is *interested*, that is, he has an interest in as much as, at the minimum, he is coming to foreign law for a reason. And this reason is *his* reason, which means that the comparatist has his reason for directing himself towards foreign law, and that his life will be unfolding into his understanding of foreign law on account of this reason. Otherwise said, even as he turns to foreign law, the comparatist, perhaps counter-intuitively, is acting for-himself in such an elemental manner that the configuration of foreign law that he inscribes proves undetachable from the pursuit of his interest, a fact which is in principle empirically verifiable through textual analysis. It is not, of course, that an investigation of foreign law collapses into an inquiry about the being of the comparatist (potentially leading to a posture of narcissistic self-contemplation), but that no inscription of any research output as regards foreign law can be divorced from a self-performance on the part of its instigator.<sup>119</sup> Note that the integration between foreign law and the comparatist's self runs deeper than co-extension, which assumes separability, measurability, divisibility and identifiability. It is not that selfhood and texthood parallel or succeed each other, but that they tessellate each other, that they mingle — an arrangement which can prove conspicuous,<sup>120</sup> but which can also appear furtive,<sup>121</sup> not to say veiled.<sup>122</sup> However, this summary of the selfing of foreign law warrants a more complete explanation.

It is not that the other law is unnarratable. Nor is it that a description of the other law will inevitably *reduce* it to the self. Instead, I am saying that the other law, as it comes to discursivity, for instance as it happens in language, inevitably irrupts in the self or through the self who has gone towards it. Importantly, this is so because the language in

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<sup>119</sup> Cf Derrida, J (1994) *Force de loi* Galilée at 59: '[E]very constative utterance itself rel(ies) on a performative structure at least implicit' [*Tout énoncé constatif repos(e) lui-même sur une structure performative au moins implicite*].

<sup>120</sup> Eg: Gordley, J (2006) *Foundations of Private Law* Oxford University Press at 239: '[C]ivil law systems are more inclined to allow one to recover for any infringement of dignity and reputation. [...] The reason, I believe, is a difference in the way these rights are regarded'. The words 'I believe' openly reveal a personal proclivity inserting itself into the account of foreign law.

<sup>121</sup> Eg: Id at 258: 'To my mind, many of the differences would disappear if American courts would agree that there are clear cases in which a disclosure which hurts someone is of little or no value to the public, and if civil law courts would agree that the press should be able to print matters which harm no one, even if they contribute little or nothing to public education'. The words 'To my mind, many of the differences would disappear' surreptitiously disclose a dissatisfaction with the judicial decisions having been considered. Again, this disagreement becomes an integral part of the report on foreign law.

<sup>122</sup> Eg: Id at 230: 'One can see a remarkable degree of continuity in the civil law'. The words 'a remarkable degree of continuity', while presented assertorily, effectively consist in a personal interpretation of the materials that the comparatist has elected to consider. Once more, the comparatist's input finds itself integrated into his report on foreign law.

which the other law emerges is that of the self, not in the sense in which it would be owned by the self (language, understood as a system of signs, does not belong, or at least one belongs to language more than language belongs to one),<sup>123</sup> but in the way it is mobilized by the self as an extension of self. Because the other law is told, and can only be told, in the discourse that the self employs as a means of self-expression, legal otherness is necessarily subjected to this particular manifestation of selfness. And any ethically inflected discourse regarding foreign law must recognize the fact that as the other law unfolds in the self's language, this language, no matter how hospitable it wishes to be, cannot make it possible to preserve otherness impeccably: absolute hospitality cannot materialize. Even as it purports to grant recognition to the other and to show respect for the other, the self's language enacts the very experience of unrecognizability and disrespect as it brings the other into its ascendancy. The self-projection characterizing the study of foreign law thus ensures that whatever the comparatist presents as 'foreign law' is, in effect, his 'own' presentation, in his 'own' language, inevitably different from whatever presentation may have come before in the other's 'own' law — again, a re-presentation, an iteration, a neo-graphism, a necessarily singular reprise which can, in fact, more aptly be envisaged as an invention. (Observe, though, that the persistence of the self, the irreducibility of the self's presence within the work on foreign law, must be seen to qualify the critical or emancipatory potential of any foray into the foreign. No examination of foreign law can therefore be celebrated as the unqualified antidote to parochialism that has been assumed.)

To say that the other law exists in the self's language must therefore mean that, once it has moved across languages, the other law exists — and is doomed to exist — in distorted discursive form. To use the French '*contrat*' to discuss, in French, the English 'contract' is indeed to import, to domesticate, to indigenize and therefore to distort English law,<sup>124</sup> even if the 'distortion is experientially undetectable within the received framework of interpretation since [...] [this framework] is capable of accommodating any evidence, textual or otherwise, within itself'.<sup>125</sup> It is to 'yok[e] [foreign law] by force into a frame of reference alien to [it]',<sup>126</sup> to *similarize* it. The fact is that even as the word '*contrat*' makes possible the passage of 'contract' from grammatical structure to meaning, it also, at once, always already, makes it impossible for this crossing to take place in a way that is epistemically reliable or stable vis-à-vis the source language. Indeed, 'language *is* monologue', it speaks '*lonesomely*' — which, within comparative

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<sup>123</sup> See Derrida, J (2005†) *Apprendre à vivre enfin* Birnbaum, J (ed) Galilée at 39. For an analogous claim with specific reference to literature, see Barthes, R (1964) *Essais critiques* Editions du Seuil at 14. Roland Barthes argues that the raw material of literature is not the unnamable but the named, since language is always anterior to any writing.

<sup>124</sup> Cf Beckett, S (2009) [1981] *Ill Seen Ill Said in Company/Ill Seen Ill Said/Worstward Ho/Stirrings Still* Van Hulle, D (ed) Faber and Faber at 51: '[W]hat is the word? What the wrong word?'

<sup>125</sup> Vitkin, M (1995) 'The "Fusion of Horizons" on Knowledge and Alterity' (21) *Philosophy and Social Criticism* 57 at 75 not 8.

<sup>126</sup> *Id* at 58.

law, indicates a linguistic recalcitrance to the reception of otherness profounder than difficulty.<sup>127</sup>

As he turns his mind to a law that is extraneous to the law into which he has been socialized, a law he claims to be foreign to 'his' law (then assumed to be non-foreign), as he considers that the foreign law thus coming under his scrutiny can be encountered as texts that are disclosable or unconcealable, as texts that can be uncovered and attained, as texts that can be appreciated and yield revelatory insights about the other's law or otherness-in-the-law, as he expects that he can 'lear[n] to learn from the singular',<sup>128</sup> as he is convinced of the productive use to which the study of incommensurable difference across laws can be put although remaining aware that no assemblage (or *agencement*) of information about foreign law will ever be adequate to it, accepting ultimately that the best one can do is to generate an emergent understanding of the other law in one's own words (that is, in the words available within one's language) — and seeing value in this task — the comparatist is always already directing his study towards a substratal end, which is *the edification of his self*. At the most rudimental level, the comparatist is driven by desire. The facilitating and structuring disposition of the drive carries a transfer of psychical energy, whether it be directed to the assuagement of a lust for learning, the making of a favorable impression on one's peers, the opportunity to establish oneself as an authority (or at least as an inescapable reference), the fostering of certain political values to which one is committed, the amelioration of one's chances of promotion or *whatever else*. Whether one appreciates this fact or not, every comparatist is engaging foreign law in a manner that is, basally, self-relating or first-personal, that is aimed at the betterment of the self: the fulfillment of desire is not a matter of objective reality, it does not depend on an object, it is not object-oriented or intransitive; rather, desire turns on one's capacity to satisfy oneself, it pertains to pleasure. Desire is for-oneself — a condition which obtains even if the comparatist deliberately eschews any attempt at subordinating, domesticating and reducing the foreign law-text that he is reading with a view to fitting it within his own presupposed model. The drive — the text-drive — towards foreign law being the expression of a desire, one can affirm of research into foreign law what Heidegger claims of understanding, which is that it is 'never free-floating but always attuned'.<sup>129</sup> Not even when so deeply immersed into the intricacies of the foreign does the self fully relinquish the *Bildungsprozess* under deployment, which is to say that in effect the comparatist's self never withdraws from the scene where he himself is staging the foreign law, where he is projecting and articulating it in terms of his discursive assemblage (or

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<sup>127</sup> Heidegger, M (1959) *Unterwegs zur Sprache* Neske at 265 [*die Sprache ist Monolog*/'einsam'] (emphasis original). While I focus on comparatism, one could also emphasize a local configuration and exclaim: '[W]e speak the same language, and yet I do not understand you...': Deleuze, G and Guattari, F (1991) *Qu'est-ce que la philosophie?* Editions de Minuit at 105 [*(N)ous parlons la même langue, et pourtant je ne vous comprends pas...*].

<sup>128</sup> Spivak, GC (1999) *A Critique of Postcolonial Reason* Harvard University Press at 145 not 49.

<sup>129</sup> Heidegger, M *Sein und Zeit* supra note 12 at 339 [*nie freischwebend, sondern immer befindliches*].

agencement).<sup>130</sup> The comparatist cannot not think desirously; if you will, 'desire shows necessity, lends it a name, a voice'.<sup>131</sup> It is the case, however, that this exercise in self-satisfaction (which is also a manifestation of self-sovereignty over the other) effectively prevents the self from being thoroughly hospitable to the other law.

Complicatedly, despite the fact that comparative research's entire project purports to vaunt otherness — that it is geared towards the other, that it features an openness vis-à-vis the other, welcomes the other, indeed seeks to validate the other — while the study of foreign law is intrinsically anti-solipsist, yet it finds itself being inextricably woven with the self. Indeed, '[b]ehind the seeming generosity of comparison, there always lurks the aggression of a thesis': some form of epistemic violence is always being perpetrated.<sup>132</sup> No injection of empathy, no matter how substantial — irrespective of how much the self is willing to be rendered precarious and vulnerable by the gaze of the other sitting in judgment of him, regardless of how much the self is willing to be compearing — can allow for a strictly other-oriented thinking. Even when the self is attempting to think as if *he* were the other, selfhood's self-interest assumes precedence over otherness. Indeed, not only is one's comparative research about the self, but the comparatist can be said to be writing *to* the self — he is operating in an internal vocative mode, so to speak. Every comparative account is thus meaningfully informed by self-colloquy. (It is therefore important as one considers the comparatist's inscription that the alleged referentiality of the foreign law-text not be simply replaced by the self-referentiality of the comparatist. His reading must itself be deconstructed — the mechanics of his expository strategy exposed to a meta-critique — lest a self-constructed process of self-vindication be allowed to assert itself.)

Selfness, then, must be seen to be sutured, at times near-seamlessly, to whatever foreign law the comparatist generates. In the end, foreign law simply cannot be weaned away from the hegemony of the self, which means that every study of foreign law must be understood as being informed by an autobiographical drag upon itself. An important implication is that the foreign law that is formulated at the end of the interpretive process is necessarily not impartial, objective, neutral or anything of the kind. A further crucial entailment is that foreign law being imbricated with the comparing self, the law-text on the foreign being *incarnational*, the so-called 'foreign' is not so foreign to the

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<sup>130</sup> Supra text at note 60.

<sup>131</sup> Wood, S *Without Mastery: Reading and Other Forces* supra note 87 at 31.

<sup>132</sup> Radhakrishnan, R (2013) 'Why Compare?' in Felski, R and Friedman, SS (eds) *Comparison* Johns Hopkins University Press at 16. As is often the case, comparative law here sharpens one's discernment of problematics that range further afield. Consider Heidegger: 'Certainly, in order to wring from what the words say, what it is they want to say, every interpretation must necessarily use violence. Such violence, however, cannot be roving arbitrariness': Heidegger, M (2010 [1929]) *Kant und das Problem der Metaphysik* Klostermann at 202 ['Um freilich dem, was die Worte sagen, dasjenige abzuringen, was sie sagen wollen, muß jede Interpretation notwendig Gewalt brauchen. Solche Gewalt aber kann nicht schweifende Willkür sein'].

comparatist after all. This fact can be lost on him as the autobiographical trait within his inscription, while inevitably present, may feature a presence which proves less than ostentatious and which therefore falls short of full consciousness. It may well be that the ascertainment of the comparatist's autobiographical input — the decipherment of autobiographical traces (of a psychobiographical character) — requires *reading between the lines*.<sup>133</sup>

Now, the haunting presence of desire within the captured and within the subsequently stated foreign law — again, I claim that desire cannot not haunt every possible cognizance or expression of foreign law — must be seen as a fatal impediment to the achievement by positivism of its abiding ideal, which stands as the pure description of the law in force as pure law. If it could have its way, positivism would in fact countenance the disappearance of the comparatist even as he is fulfilling the task that makes him a comparatist. For positivism, the comparatist ought to sacrifice himself or, if you will, to abandon himself to the foreign law that he is researching in order to keep that foreign law immaculate, untainted by any interpretive input on his part. From positivism's standpoint, the comparatist can only legitimately exist within the comparative situation to the extent that he vanishes from it, that he does not leave his contingent mark on it. But if the comparatist were to disappear, who would be recounting foreign law? I hold that the presence of the comparatist is necessary to any appreciation or inscription of the foreign. And since desire necessarily features a spectral presence within the comparatist and thus within the delineation and re-presentation of foreign law that the comparatist produces, that he generates as an extension of self, it follows that desire's presence inevitably infracts upon the process of invention of foreign law. As it cancels any neat distinction between subject and object,

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<sup>133</sup> Somewhat unthinkingly, the identity of a text is usually predicated upon a conception of presence as visibility. Derrida challenges our habitual understanding that the presence of a text — what is present as text — can be confined in this fashion to the text's graphical dimension. In the process, he calls for a different politics of reading (and of memory). Simply put, the notion of 'presence' is more elaborate than has been assumed. What is visible is, of course, present. Thus, the words on the page are evidently an important part of the presence of the text. But graphematic substance is not all there is to the presence of a text. The text, if you will, does not coincide with its graphic surface. Specifically, something *can* be present as text — and indeed be a fully-fledged, constitutive part of a text — even though not graphically present. Derrida's claim is that a text consists of its visible dimension — this would be the graphical part of it — and that it is also made of an invisible aspect. This imperceptible element, at least equally constitutive of textuality, he calls the 'trace'. In addition to its graphical features, a text, being always already inscribed in the world (no one can even imagine a text existing 'in the air'), is therefore fabricated out of a unique if intricate gathering of an infinite number of traces. To be sure, these heterogeneous traces assembled — this singular plural — do not leap to the interpreter's eye, but they are there, if spectrally: they, too, are the text. And it behoves the interpreter (say, the comparatist) to trace the text (say, foreign law) to the invisible threads that partake in its fabric. It is a matter of making sense of the text in a meaningful way and of doing justice to it. In Catherine Belsey's words, 'interpretation will require a familiarity with as many as is humanly possible of those traces that make up the difference — the uniqueness — [...] of the text': Belsey, C *Criticism* supra note 63 at 116. I explore the matter of textual presence at greater length in Legrand, P (2011) 'Siting Foreign Law: How Derrida Can Help' (21) *Duke Journal of Comparative and International Law* 595.

the chiasmatic assemblage or the synergitic plaiting between desire and reprise unavoidably consigns positivism to failure. While foreign law as it exists bears a signature — it has been fabricated by individuals (say, members of legislative assemblies or judges) — the comparatist's report appears as a counter-signature. I claim that desire's counter-signature is in effect required for an account — for any account — of foreign law. The comparatist's desire thus exists as an ineliminable feature within any configuration of foreign law even as the comparatist accords foreign law his utmost loyalty and as he deliberately seeks to avoid any transgression of it at all. Note that the ambulation and divagation inherent to the fact that the comparatist is acting from within his concrete lifeworld (including 'his' language) is not free from anxiety. Indeed, Barthes refers to 'painful difficulties', a predicament which he details as follows: 'Deliberations, decisions incomplete, difficult, tribulations of the will and of desire, doubts, discouragements, trials, blocages, obscurities [—] quite a *peregrination*'.<sup>134</sup>

Positivism craves fixity of meaning, while all that a comparatist can produce is interpretive undecidability, that is, *an undecidable*. Again, any foreign law-text solicits elucidation. However, a human being — a comparatist acting as an interpreter of foreign law *is* a human being — is obviously unable to occupy a transcendental stance allowing him to formulate a reading of the foreign law-text that would not be informed by his desirous being-in-the-world as he em-bodies or in-corporates this existential condition. Consider Heidegger's explanation in his early correspondence: 'I actually work factually out of my "I am" — out of my spiritual, indeed factual origin — my environment — my life connections, from what is, from there, accessible to me as living experience, from that within which I live'.<sup>135</sup> As the comparatist embarks on his strategy of invention of textual meaning, he brings to bear — he can *only* bring to bear and indeed *must* bring to bear — his prejudicial fore-structure. It is he — say, a francophone French jurist trained in Paris — who will actively purport to make sense of, say, English law. It is he, and not anyone else. But since the meaning that will be ascribed to English law cannot antedate the act of interpretation, because English law awaits interpretation in order to mean, given that meaning is formulated through interpretation, it must matter who the formulator is. How could an act of interpretation be imagined that would not feature, at some basic level, the person (and the circumstances) of the interpreter? As regards the act of interpretation, if I may make my point by resorting to

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<sup>134</sup> Barthes, R (2003 [1978-1980]) *La Préparation du roman* Léger, N (ed) Editions du Seuil at 235 ['*douloureuses difficultés*'] (*D*)*élibérations, décisions partielles, difficiles, tribulations de la volonté et du désir, doutes, découragements, épreuves, blocages, obscurités [—] toute une pérégrination*'] (emphasis original). This book transcribes the courses and seminars Barthes delivered at the Collège de France.

<sup>135</sup> Heidegger, M (1990 [1921]) (Letter to K Löwith) in *Zur philosophischen Aktualität Heideggers* vol II Papenfuss, D and Pöggeler, O (eds) Klostermann at 29 ['*Ich arbeite konkret faktisch aus meinem "ich bin" — aus meiner geistigen überhaupt faktischen Herkunft — Milieu — Lebenszusammenhängen, aus dem, was mir von da zugänglich ist als lebendige Erfahrung, worin ich lebe*']. Heidegger acknowledges that even 'the ontological investigation that [he] is now conducting is determined by its historical situation': Heidegger, M (2005 [1927]) *Die Grundprobleme der Phänomenologie* Von Herrmann, F-W (ed) Klostermann at 31 ['*die ontologische Untersuchung, die (e)r jetzt vollzieh(t), ist durch ihre geschichtliche Lage bestimmt*'].

a familiar expression, the *interpretandum* and the *interpretans* are in this matter together.<sup>136</sup>

Because the interpreter is an interpreter-in-situation, since he does not exist nowhere, given that his situation is bound to inform his interpretation — recall Acosta! — the foreign law as it appears in the comparatist's commentary will therefore exist as a foreign law that is thoroughly affected by the self. Importantly — and this is where the move away from positivism proves to be so strong — the comparatist's account of foreign law cannot be envisaged as a report where, as positivism would have it, one term (foreign law) would somehow manage to obliterate the other (the comparatist). It is not that there is a surpassing or an uplifting of heterogeneity whereby an account of foreign law would prove able to dissolve into oneness (there would now be only the foreign law-text, only the other, to the exclusion of the comparatist, the interpreter, the self). Rather, the comparative account, far from eliminating one of the two terms, introduces a third. Specifically, the third element of the structure (the account), instead of annihilating the self, mediates between the self (the comparatist) and the other (the foreign law), that is, the account keeps both terms alive even as the chiasmus at work effectively blurs the distinction between them.<sup>137</sup> But at no time does the self (the comparatist) disappear before the other (the foreign law-text). The comparatist's report thus gathers the self and the other even as the two terms continue to prove distinctive, indeed irreconcilable (the self cannot be the other or vice versa). If you will, *the account reconciles the irreconcilable*. In other words, even the connection between self (the comparatist) and other (the foreign law-text) that the account allows cannot avoid the insistent disconnection between the two interacting terms: the conjunction cannot erase the disjunction. As the boundary between self and other is shattered, as the habitual *idea* of the boundary between self and other finds itself smattered, there takes place a '[c]risis of the *versus*'.<sup>138</sup> In sum, the comparatist's report is not resolvable as the foreign law-text only — or indeed as the comparatist only (evidently, the comparatist cannot do what he wants with foreign law: there is *that* foreign law, *those* words, *there*, to constrain him). Nor is the text on foreign law such as to reveal where, within it, the presence of the foreign law begins and that of the comparatist ends. Otherwise said, there takes place a queering of the binary, 'a calling into question of the very nature of two-ness, and ultimately of one-ness as well. [...] One is too few, two is too many'.<sup>139</sup>

Consider the three illustrations that I have offered: in each case, the comparatist's account is the *comparatist's-account-of-foreign-law*, which is *the comparatist's-account-of-foreign-law*.<sup>140</sup> The delineation between the zones of influence pertaining to foreign

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<sup>136</sup> Peter Sloterdijk articulates this assemblage in compelling terms. For a detailed discussion, see Legrand, P (2015) 'Negative Comparative Law' (10/2) *Journal of Comparative Law* 405 at 414-16.

<sup>137</sup> Cf Belsey, C *Criticism* supra note 63 at 115: '[U]ndecidability keeps the text alive'.

<sup>138</sup> Derrida, J *La Dissémination* supra note 38 at 35 ['(c)rise du versus'] (emphasis original).

<sup>139</sup> Barad, K (2010) 'Quantum Entanglements and Hauntological Relations of Inheritance: Dis/continuities, SpaceTime Enfoldings, and Justice-to-Come' (3) *Derrida Today* 240 at 251.

<sup>140</sup> Supra notes 120-122.

law and to the comparatist is, properly speaking, undecidable. Within the report, instead of any synthesis, there persists an antagonism, a war even, as the other-directed facet of the account competes for interpretive supremacy with the self-directed aspect of it. The situation evokes Derrida's 'pharmakon', which is at once a remedy and a poison.<sup>141</sup> The comparatist's report is remedial vis-à-vis foreign law in as much as it allows foreign law to live on through deterritorialization, to be unfolded beyond its assigned province, to enjoy a transmissional life. But the comparatist's text is also poisonous for foreign law because as the comparatist desirously deploys it, he destroys the foreign, not least through the very fact of stating it in a language that is not foreign law's. Inevitably, every act of enunciation, without which nothing happens, transforms, assimilates and so attacks what it registers.<sup>142</sup>

And what about the words 'One can see a remarkable degree of continuity in the civil law'?<sup>143</sup> The expression 'a remarkable degree of continuity' features an axiological commitment which typically involves a conversation with oneself inseparable from an ethical evaluation of the other-in-the-law, an exchange which is experience-dependent and purports to extend the comparatist's grip on (his appreciation of) the civil law, an interpretive process which is thoroughly encultured. Note how the words institute what they enunciate, how the civil law becomes 'remarkable' or 'continuous' as the comparatist calls it such. The phrase 'a remarkable degree of continuity', then, is not not 'the civil law', but it is not 'the civil law' either. The halo of indeterminacy surrounding these five words means that there is neither a 'neither/nor' interpretive situation nor an 'either/or' one; otherwise said, 'there is no way of coming "to terms" with the undecidable'.<sup>144</sup> The autobiographical, which is not made explicit as an import ascription, is nonetheless intimately and intricately woven into the re-presentation of foreign law purporting to account for foreign law as it exists in advance of the comparatist, aiming to confine the matter of re-presentation to an adequation between (law-)world and (law-)words. But the expressive character of the report challenges the avowedly designative character of it: in effect, the account consists of an assemblage (or *agencement*) which can never be decisively fixed either as self-expression or other-designation. How much of the 'remarkable degree of continuity' that would be the civil law's is in fact the comparatist's? Is the word 'remarkable' the apt 'descriptive' term? Is there an ascertainable isomorphic link between 'the civil law' and the accepted semantic extension of the word 'remarkable' (assuming such received meaning to exist)? And why 'continuity'? Whose 'continuity': the civil law's or the comparatist's?

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<sup>141</sup> Eg: Derrida, J *La Dissémination* supra note 38 at 108-33.

<sup>142</sup> In Theodor Adorno's formulation, '[t]he interpretation of given reality and its abolition are connected to each other': Adorno, TW (1973) [1931] 'Die Aktualität der Philosophie' in *Philosophische Frühschriften* Tiedemann, R (ed) Suhrkamp at 338 ['(d)ie Deutung der vorgefundenen Wirklichkeit und ihre Aufhebung sind auf einander bezogen']. Cf Fleming, J (2016) *Cultural Graphology* University of Chicago Press at 106: 'The problem with preservation is that it destroys what it saves. However you do it, and whatever you call it, you cannot enjoy fresh local produce out of season'.

<sup>143</sup> Supra note 122.

<sup>144</sup> Hamacher, W 'To Leave the Word to Someone Else', supra note 5 at 172.

How much 'continuity' is enough 'continuity' for there to be 'continuity' according to the comparatist?<sup>145</sup> As he channels his prejudicial fore-structure, his anterior and irreducible interpretive finitude, what does the comparatist understand by the word 'continuity' in any event? What does 'continuity' mean to him? And does his appreciation correspond to the civil law as it shows itself? (Incidentally, what is 'the civil law'? What is the semantic extension of this expression as its author uses it?) The impossibility of supplying a decisive answer to these illustrative questions confirms how a key operative feature of the comparative account is its undecidability. Indeed, the comparatist's text is an undecidable in as much as it resists any decisive tracking of the full magnitude of selfhood within texthood (or of the manner in which texthood imposes itself on selfhood), any identification of the extent to which, in any given instance, texthood is constituted as a manifestation of selfhood (or vice-versa).<sup>146</sup> Think of autobiographics as a supplement, very much in Derrida's complex sense: selfhood comes to foreign law and even as it adds itself to it as a surplus or as an excess of presence, it insinuates itself in the place of foreign law, it substitutes itself for the foreign, although without effacing foreignness.<sup>147</sup> It is therefore at once outside of foreign law (it advenes to it from elsewhere) and inside of it (it inscribes itself in the very ascertainment and in the very writing of foreign law, in its invention) — thus Beckett: 'Everything that happened happened inside it, and at the same time everything that happened happened outside it. I trust I make myself plain'.<sup>148</sup> What seems clear, at any rate, is that because it features at once an outsideinness and an insideoutness, the comparatist's account is bereft of a center. It is located where the intra-textual meets the extra-textual, where *the self is drawing the (self-) portrait of the other*, and this is everywhere within the report. While selfhood and texthood are notionally identifiable as two discrete entities, every comparatist addressing foreign law lives in both dimensions at every instant, at one and the same time a being-for-the-self, first and foremost, but also a being-for-the-text. Given the impossibility of uncoupling texthood and selfhood, and because of the further impossibility of operating a synthesis between texthood and selfhood,<sup>149</sup> the comparatist's invention of foreign law is 'irreducibly [...] not-simple'.<sup>150</sup>

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<sup>145</sup> Cf Fleming, J *Cultural Graphology* supra note 142 at 127: 'Who knows what a word is, of what size or density, how far it can be stretched, what void it can fill? Who knows what lies beneath its surface [...]?' See also id at 128: 'Words are burrows, tunnels, funnels, passages, expanding territories, and folding stars. It is a wonder that any of us can read'.

<sup>146</sup> Cf Derrida J *Positions* supra note 35 at 54-64.

<sup>147</sup> Eg: Derrida, J *De la grammatologie* supra note 57 at 208.

<sup>148</sup> Cf Beckett, S (2009) [1953] *Watt* Ackerley, CJ (ed) Faber and Faber at 35. For a further meditation on the outside/inside interface, consider Adorno's remark to the effect that '[n]othing can be interpreted out of something that would not be interpreted into it at the same time': Adorno, TW (1974) [1958] 'Der Essay als Form' in *Noten zur Literatur* Tiedemann, R (ed) Suhrkamp at 11 ['(n)ichts läßt sich herausinterpretieren, was nicht zugleich hineininterpretiert wäre'].

<sup>149</sup> Cf Derrida, J *La Dissémination* supra note 38 at 271: 'An undecidable proposition [...] is a proposition [...] without synthesis' ['Une proposition indécidable (...) est une proposition (...) sans synthèse'].

<sup>150</sup> Derrida, J (1972) *Marges* Editions de Minuit at 14 ['irréductiblement non-simple'].

Let me emphasize that even when James Gordley proclaims that he is only interested in ‘what the law [i]s’,<sup>151</sup> selfhood emphatically remains a feature of texthood — despite positivism’s long tradition of oblivion with respect to the self’s presence, irrespective of ‘the proper obfuscatory gravitas of the black letter of law’.<sup>152</sup> Notwithstanding all positivist efforts to keep the two notions separate, there must indeed be an ineliminable trace of selfhood in every indication of texthood. The interruptive effect of selfhood remains immanent to any designation of texthood itself: it is always already at work within any manifestation of texthood; it is inextricably interlaced within it. Desire thus does not remain locked inside the limits of the site whence it emanates, but extends into the textual site where it is effective (let us refer to the effect of affect). Note that selfhood-as-striving (or is it striving-as-selfhood?) makes sense only as an operation *within* texthood, not as one opposed to it. It acts as a force of dislocation innervating the system of positivism, fissuring it and confining it. It intervenes as a force of signification, as a counter-signature also. Importantly, it is not about prioritizing selfhood over texthood for if one were to engage in such ranking one would be remaining within the classical system of thought and within the oppositions and hierarchies that constitute it and that are held at the critic’s disposal as if they were his only options. One must escape these simplistic preprogrammed choices, which are effectively not choices at all. Moving beyond the unexamined distinction between text and self also allows one to appreciate that when James Whitman argues how Fascism informs the German law of privacy, he stands as a comparatist-who-discerns-traces-of-Fascism-haunting-the-German-law-of-privacy.<sup>153</sup> In other words, he is an interpreter who, even as he projects himself into the text out of the prejudicial fore-structure that he arrays, at once ‘expose[s] himself to the text and receive[s] from it a more ample self’; indeed, ‘the self is constituted by the “matter” of the text’, so that one does not remain the same after one has entered into a knowing encounter with foreign law.<sup>154</sup>

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Even leaving aside the usual detractors’ predictable detractions, I am painfully aware that ‘[o]ne may be understood, [...] but never understood *well*’.<sup>155</sup> Let me insist, then, that I am exposing a blind spot plaguing research into foreign law made seemingly ineradicable by the vapidness of positivism: that comparative epistemology would be denotative instead of enactive. My argument indeed purports to make foreign-law investigation — its assessments, its ascriptions and its commitments — more

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<sup>151</sup> Gordley, J ‘When Is the Use of Foreign Law Possible? A Hard Case: The Protection of Privacy in Europe and the United States’ *supra* note 106 at 1081.

<sup>152</sup> Goodrich, P (2017) ‘Proboscations: Excavations in Comedy and Law’ (43) *Critical Inquiry* 361 at 383.

<sup>153</sup> See Whitman, JQ (2004) ‘The Two Western Cultures of Privacy: Dignity Versus Liberty’ (113) *Yale Law Journal* 1151 at 1166 and 1188.

<sup>154</sup> Ricœur, P (2013) [1972] *Cinq études herméneutiques* Labor et Fides at 73 [‘s’expos(e) au texte et re(çoit) de lui un soi plus vaste’/‘le soi est constitué par la “chose” du texte’] (emphasis omitted).

<sup>155</sup> Latour, B (2001) ‘Irréductions’ in *Pasteur: guerre et paix des microbes* (2nd ed) La Découverte at 274 [‘(o)n peut être compris, (...) mais jamais bien compris’] (emphasis original).

transparent in a context where the comparatist largely ignores the constraints associated with knowledge-making and very much tends to behave as if such limitations did not exist. Positivistically formatted as he is, the comparatist little notices how no interpretation of foreign law can emerge but for his desirous intervention, how there is always already a for-the-sake-of-which dimension to his foreign-law research, how a foreign law-text's meaning cannot be guaranteed by the text's contents, how ascription of meaning to foreign law-texts implements the enactment of his self (as framed by the constitutive role of cultural normativity), how interpretation of foreign law channels his existence, how interpretation and existence are indistinguishably conjoined so that any idea that he could uncover The-One-True-Meaning of a foreign-law text pertains to a futile and unsustainable indulgence in transcendentalism. Instead, the comparatist takes foreign law to be 'real', to be what it is, to be what it is in itself, to be 'detached and distinct in its thereness and waiting to be interpreted'.<sup>156</sup> And he assumes his description of foreign law 'really' to be able to capture foreign law revealing itself with undistorted immediacy, in the absence of any gap between language and law 'itself': there would take place a genuine tautology, there would be pure identity. But because the framework of significance being imposed on foreign law goes largely unnoticed, the comparatist fails to realize that foreign law cannot exist but as it exists for him, as what he means it to mean. While the comparatist is prone to thinking that foreign law imposes itself on him, in effect meaning is in significant and ineradicable ways ascribed from the comparatist to foreign law (again, whether through an extractive or imputative strategy). Rather than deploying itself from the 'inside out' (foreign law meaning *suo motu* and impressing its meaning on the comparative mind), the process follows an 'outside in' epistemic trajectory (the comparative mind applies its reading to foreign law). I claim that the self-oriented epistemic framework within which meaning emerges is irreducible. It simply cannot be circumvented. Indeed, it acts as a condition of the possibility of any meaning being ascribed to foreign law which, as I have been explaining, is instantaneously unforeignized as it is recast in the interpreter's terms. The situation is, properly speaking, aporetic — and no amount of imagination or wishful thinking can overcome the aporia: the agential cannot be meaningfully separated from the biographical.

With this essay, this exercise in phenomenological scrutiny, which I write even as the orthodoxy pursues its orthodox work about foreign law as if all was epistemically unequivocal, I want to improve the comparatist's view of foreign law and the comparatist's view of himself viewing foreign law as it becomes self-evident that not much concerning the writing of foreign law is self-evident anymore (to say it Adorno's way). And by offering my argument in a public space, I choose to constitute a social venue for further discussion. At present, I claim that the comparatist cannot overcome the epistemic limits he faces as he undertakes desirously to interpret foreign law for he is inevitably in-situation: no addressability of texts without desire! But the comparatist can at least face his limits and learn to live in the light of them. Meanwhile, my

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<sup>156</sup> Hutchinson, *AC Toward an Informal Account of Legal Interpretation* supra note 62 at 97.

conclusions mean that the positivist excerpts I have collected extolling objectivity, neutrality, impartiality and purity are all profoundly fallacious as epistemic statements, which entails that there are innumerable comparatists who will have been misled by them.<sup>157</sup> To put the matter bluntly, because of the entanglement and encryption of the self's desire within the collected information about foreign law and within the self's report on the foreign (I do not talk of 'data' because, precisely, the information regarding foreign law exists as non-datum: it is not given in the sense that it is not simply there, waiting to be grasped, irrespective of any exploitation on the part of the comparatist),<sup>158</sup> an account of foreign law is 'inevitably tendentious, didactic, competitive, and prescriptive',<sup>159</sup> 'always positioned, never politically neutral, never innocent'<sup>160</sup> — although, to be sure, the self is often operating inconspicuously, if not unconsciously. Yet, it must be seen that knowledge — understood here in the (Cartesian) sense of what represents an entity to-be-known existing 'out there', facing the 'knower' — is effectively secondary. That which one calls 'knowledge' of foreign law is, in fact, information that is parasitical upon a more primordial pre-understanding or, in the etymological sense of the term, a prejudice. What one claims as knowledge of foreign law is in effect what one 'knows' of the other law through the anticipatory strategy that one deploys towards it. The comparatist never meets the foreign law-text apart from his desirous self. Even though he may seek to still or restrain his basic thrust of predilections and interests, even if he deliberately attempts to loosen, to suspend, to rest these to the extent that it is possible to do so, the vantage thus reached upon curtailment of the projection will still not constitute 'knowledge of foreign law', at least in the habitual sense that orthodox comparatists readily lend to the expression. It is a misunderstanding to think otherwise: even if I aim to eliminate all my aims, I simply cannot move the foreign law I handle out of any (dis)relation to myself. From the moment one identifies something as 'foreign law', one is always already involved with it, one is always already involved in it, which means that one is no longer external to it — even as there is the inappropriable exteriority of foreign law. Paradoxically, while the comparatist cannot remain external to the foreign law that he enunciates (there is no dissociation, and his writing tells 'his' foreign law), the foreign law that obviously exists in advance of the comparatist, that is there without him and irrespective of him, thus stays out of his epistemic reach, it resists him and his interpretive forays (there is no possible identification, and his writing only tells 'his' foreign law). Such is the comparatist's double bind: not to be in a position to make himself external to any re-statement of foreign law means that he is effectively keeping foreign law external to

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<sup>157</sup> Supra at notes 102-109. In this regard, the cozenage informing Zweigert and Kötz's model is particularly striking. Even as these authors assert that the comparatist must eradicate the preconceptions of his native legal system (supra note 103 at 35), they forcefully propound an approach to comparative law ascertainably derived from characteristically German assumptions (and German references).

<sup>158</sup> To paraphrase Clifford Geertz, 'what [comparatists] call [their] data are really [their] own constructions of other [lawyers'] constructions of what they and their compatriots are up to': Geertz, C (1973), *The Interpretation of Cultures* Basic Books at 9.

<sup>159</sup> Radhakrishnan, R 'Why Compare?' supra note 132 at 454.

<sup>160</sup> Gal, S (2015) 'Politics of Translation' (44) *Annual Review of Anthropology* 225 at 236.

him. It is not that the comparatist's interpretive authority finds itself disqualified, but that his authority is confined to his interpretive yield thus excluding any claim to objectivity (or truth). Meanwhile, the comparatist's foreign law — his 'cuttings, repetitions, suction, sections, suspensions, selections, stitchings, grafts, postiches'<sup>161</sup> — is *unforeign*.

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Quite apart from the fact that the comparatist cannot neutralize his desire as he engages foreign law, he must acknowledge how his legal language possesses no logical tool enabling it to negate itself determinately enough, making it possible for it to leave itself out of the process of 'knowing' in the way any and every 'knower' would need to do in order to monitor the results of any 'knowledge' experiment. Because *there is* the inability of comparative law to construct a reliable metalanguage,<sup>162</sup> there is the impossibility of ascertaining with confidence that the comparatist's legal language is not subject to structures that overdetermine its 'relation' to any foreign law and that thereby prohibit it from ever arresting its focus of study, that is, from defining the foreign, drawing its borders sufficiently and securely enough, away from itself, to be able to say that it *knows* foreign law. And *there is* therefore the comparatist's incapacity, out of the language he brings to the study of foreign law, to identify and delimit the borders of the foreign, to be able controllingly to leave himself out of the process and thereby safely position himself as the knower of a foreign law that could be distinguished with certainty.<sup>163</sup>

The only model appropriate to the appraisal of a foreign discourse would, of course, have to be a self-authenticating foreign model. The comparatist's deployment of himself, his mobilization of local language and his use of local law in order to understand something that is, by definition as it were, made of the foreign, must mean that he has to fail. However much one may try to face foreign law, one must face the fact that one will never be foreign enough, and that whatever one will say will ultimately locate itself, at best, on the verge of foreignness. Comparative law thus fails, and it cannot eschew failure — which emphatically does not mean that it must not happen, but which entails that, not unlike translation, it must be possible as that which is impossible.<sup>164</sup> To frame

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<sup>161</sup> Derrida, J (1974), *Glas Galilée* at 189b [*'coupures, répétitions, succions, sections, suspensions, sélections, coutures, greffes, postiches'*].

<sup>162</sup> Cf Derrida, J (1996) *Le Monolinguisme de l'autre Galilée* at 43: '[A]bsolute impossibility of a metalanguage. Impossibility of an absolute metalanguage' [*'(I)mpossibilité absolue de métalangage. Impossibilité d'un métalangage absolu'*].

<sup>163</sup> Cf Wittgenstein, L (1972) [c1950] *On Certainty* (bilingual ed) Anscombe, GEM and Von Wright, GH (eds) Paul, D and Anscombe, GEM (trans) Harper & Row at 25 (§174): 'I act with *complete* certainty. But this certainty is my own' [*'Ich handle mit voller Gewißheit. Aber diese Gewißheit ist meine eigene'*] (emphasis original).

<sup>164</sup> Eg: Derrida, J (1993) *Sauf le nom Galilée* at 32, who refers to 'the very experience of the (impossible) possibility of the impossible' [*'l'expérience même de la possibilité (impossible) de l'impossible'*].

the matter in other terms, the writing of the report — that which is possible, that which the comparatist can effectively do (he can *write* the other law) — will be inscribing the impossible, that which the comparatist cannot do, in effect (he cannot write *the other law*). It follows that the widespread yet unexamined assumption of an accessibility to the foreign and of an ability to account for the foreign's singularity on the foreign's own terms must be revisited, not unlike the postulate that the comparatist can somehow efface his desire from the investigation and subsequent inscription processes.

The comparatist's report on foreign law, then, will be characterized at once by the fact that it defers anything that would be *the* meaning of foreign law and that it differs from anything that would be *the* meaning of foreign law. From the vantage of the comparatist accounting for foreign law, anything like *the* meaning of foreign law is always to come.<sup>165</sup> Nonetheless, the self's wandering eyes find themselves being addressed by the other over time, even as the self is probing otherness, which shows the foreign to prove self-transformative. Foreign law — or the comparatist's purported likeness of it — must therefore be seen as an element of the constitution of the comparatist himself, the point being that '*all [...] understanding is ultimately a self-understanding*'.<sup>166</sup> The comparatist thus becomes the comparatist that he is by re-presenting foreign law to himself and by inscribing for himself the foreign law that he delineates. In fact, the comparatist cannot become himself as comparatist apart from an engagement with foreign law, which means that his research on foreign law is in thralldom to his existentialist longing for what he regards as his own meaningful selfhood. Remark that because the autobiographical comparatist is ultimately constituted by otherness (an other that is now *his* other, that is now the self's other), since the self's interiority is invaded by exteriority, the self's homogeneity is an illusion that must be relinquished. (This is not to say that the comparatist was not always already divided from himself in so far as he consists partly of an unconscious that is inaccessible to him. Total autobiography, which would assume full access to the mind and exhaustive self-knowledge of it as one's private domain of experience, is thus impossible.) Derrida's arresting terms emphasize how the self is structurally constituted through a harbouring of otherness within, a being other-affected, a heteroaffection: '[T]he same is the same only by affecting itself with the other'.<sup>167</sup> I read Derrida to be asserting that the self can be the self that it is only by way of otherness playing a structural role within selfhood.<sup>168</sup>

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<sup>165</sup> I channel Derrida's idea of '*différance*' ('differance') which, not least through its idiosyncratic spelling, wants to capture both the notions of 'deferment' and 'differentiation' at once. Eg: Derrida, J *Marges* supra note 148 at 1-29.

<sup>166</sup> Gadamer, H-G *Wahrheit und Methode* supra note 7 at 265 ['alles (...) Verstehen (ist) am Ende ein Sichverstehen'] (emphasis original). Cf Xie, M (2011) *Conditions of Comparison* Bloomsbury at 11, who refers to 'comparativity as self-reflexivity'.

<sup>167</sup> Derrida, J (1967) *La Voix et le phénomène* Presses Universitaires de France at 95 ['(L)e même n'est le même qu'en s'affectant de l'autre'].

<sup>168</sup> To complexify matters, the constitutive other is not always foreign and may adopt the form of an institution within own's own law-world. Consider French legal culture. As regards epistemic governance, the micro-intimacies pertaining to individual academics and their aspirations or commitments intercalate with institutional macrostructures like the university, the *Conseil national des universités* (an extremely

The comparatist thus exists as an intertext, which means that the language of subject and object is overwhelmed. As autobiography therefore unfolds not only as the self projecting into otherness but likewise as a process of becoming-oneself-through-otherness, it also stands as autoheterography. A seamster, the comparatist involves himself in a task of tailoring: he cuts into foreign law, then to sew the piece he has carved into a new place, to stitch it to his text, to his account of the foreign, to himself.<sup>169</sup> Etymologically, 'speculation' relates to the '*speculum*': interpretation is indeed about the self looking into the mirror.

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*'Amat qui scribet pedicatur qui leget'*: He who writes loves, he who reads is sodomized. *'Ego qui lego pedicor'*: I, who read, am sodomized. Jesper Svenbro indicates that Latin and (earlier) Greek inscriptions analogizing the relationship between writer and reader to that between pederast and adolescent partner were 'a veritable commonplace'.<sup>170</sup> The gist of the analogy is that 'the reader is at the service of the writer' — he is passive vis-à-vis the active, dominating, triumphant writer — in the way the boy submits to the sexual act.<sup>171</sup> In effect, '[t]o read is to lend one's body to a writer'.<sup>172</sup> Along these lines,<sup>173</sup> the comparatist would be at the service of foreign law's texts. But the claim that there is no foreign law meaningfully existing as a pre-interpretive matter, the argument from the inevitability of an enactive as opposed to a denotative comparative epistemology — that is, the inescapability of an invention permanently arising from the comparatist's prejudicial fore-structure — and the ensuing fact of the necessary autobiographization of any foreign law being iterated and inscribed move the deeds of reading, understanding and reporting well away from a reactive to a proactive mode. As his desire prompts him to include or exclude foreign information, as he problematizes

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influential structuring structure) and the state. Individual agency is thus over-determined by these other institutional logics and processes: there is what institutions will prohibit in terms of individual investments or idiosyncrasies, what institutional counterparts and counterpoints operating hierarchically will disallow. Note that in a country like France, the weight of institutional structures is such that the individual possibility of meaningfully impacting institutional enframement from an epistemic perspective is well-nigh inexistent. To add a further layer, in crucial ways the institutional logics and processes that I mention will shape the individual into the kind of comparatist he will be and will therefore fashion the brand of comparatism that will be practiced. There are *French* comparatists, and there is *French* comparatism. Cf Derrida, J (1990) [1984] *Du droit à la philosophie* Galilée 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' [*L'institution, ce ne sont pas seulement des murs et des structures extérieures qui entourent, protègent, garantissent ou contraignent la liberté de notre travail, c'est aussi et déjà la structure de notre interprétation*].

<sup>169</sup> Within comparative law, too, 'I is another' (*'Je est un autre'*): Rimbaud, [A.] (2009) [1871] [Letter to G. Izambard] in *Œuvres complètes* A. Guyaux (ed) Gallimard at 340.

<sup>170</sup> Svenbro, J (1988) *Phrasikleia La Découverte* at 210 [*'un véritable topos'*].

<sup>171</sup> Id at 211 [*'le lecteur est au service du scribeur'*].

<sup>172</sup> Id at 213 [*'(l)ire, c'est prêter son corps à un scribeur'*].

<sup>173</sup> See generally id at 207-38.

the foreign, the comparatist requires to be recognized as an *opificer* (in Latin, an *opifex* is a person who makes or constructs something).

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As the comparatist texts foreign law, as he makes foreign law into his text, the words that he elects to apply out of 'his' language are never innocent of the burden of selfhood so that whatever is edifying about the comparatist's account will have to contend with the deflation that comes with undecidability — a conclusion as diffident (there is indeterminacy) as it is confident (there is agency). It follows that the positivist house of cards cannot hold except, of course, through the imperious, violent imposition of texthood as pure texthood, the forcible delimitation of what is in effect structurally undelimitable. Meanwhile, a comparatist who, when attempting to respond to the singularity of foreign law, remains constantly aware that there is 'the process of a defeat' unfurling — 'I overstand you, you understand'<sup>174</sup> — and who, in search of epistemic dignity, deploys the fecund thought of the finite and of the flawed as heuristic pediments of his trade, is not easily mistaken for someone who is not so conscious and who does not so operate.<sup>175</sup>

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<sup>174</sup> Joyce, J (2012) [1939] *Finnegans Wake* Henkes, R-J et al (eds) Oxford University Press at 444.

<sup>175</sup> The remark about confoundedness is in Borges JL (2008) [1947], 'La busca de Averroes', in *El Aleph* Alianza Editorial at 116 ['*el proceso de una derrota*']. Jorge Luis Borges's Averroes fails to associate Aristotle's use of 'tragedy' with narrative poems 'dealing with sorrowful or disastrous events' (I borrow from the electronic edition of the *Oxford English Dictionary*) and moves instead incongruously to link the term to panegyrics. Borges explains that drama was unknown to XIIIth-century Islamic Spain, and that Averroes therefore did not have the epistemic equipment at his disposal that would have allowed him to make sense of Aristotle's world on Aristotle's terms. The thesis that Borges advocates is effectively that given his enculturation Averroes was always already prevented from having interpretive access to Aristotle's text as it existed before he came to it to ascribe meaning to it. To say it like Derrida, Averroes and Aristotle's text were 'islands': Derrida, *J La Bête et le souverain* supra note 38 at 31.