

FOREIGN LAW: UNDERSTANDING UNDERSTANDING

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This Article challenges the dominant epistemological model structuring the understanding of foreign law in the field of comparative legal studies. In particular, it disputes the mobilization of the ideas of 'objectivity' and 'truth'. Pursuant to a critical examination of what it means to understand foreign law, this Article deploys an alternative paradigm emphasizing the radical contingency of the comparatist's decisions against the background of the cognitive constraints within which he must approach the study of other laws. In the process, the argument underscores the creativity that comparatists enjoy and the attendant responsibility they incur. While the so-called 'civil-law' and 'common-law' traditions are this Article's archive and constitute its site of analysis, the inheritance whence it is written, the text's relevance operates beyond these configurations. As it addresses epistemological assumptions that it seeks to redress with a view to enhancing the treatment of the foreign and the creditability of the comparative endeavour, this Article contemplates readerships — in the main, academics taking a professional interest in foreign law and postgraduates wishing to incorporate it into their dissertation — not having fully succumbed to the orthodoxy and its positivist-analytical stratagems. The sedulous positivist would be a reader at once impatient and fearful, eager to cancel this claim, to nullify it, wanting to bring the matter back to his dogmatic delusions and self-delusions, unwilling to retrace his steps — a bad reader. Indeed, this argument could only aim to be understood by devoted positivists if it spoke their language, which it does not and does not purport to do. This Article is for the contracentric, egregious, comparatist-at-law, for the disobedient and the transgressor, for the dissentient and the subversive.

A Maimon Schwarzschild,
l'insigne ami pérégrin
(21.ix.11)

There is so little one can say, one says it all. All one can.
And no truth in it anywhere.

Samuel Beckett¹

More Than One Law
The Orthodoxy Exposed
An Excursus on Culture
'Objectivity' and 'Truth'
The Double Bind (I)
The Double Bind (II)
Consequences, Cursorily
Iteration
Coda
FAQ

Samuel Beckett was a man of few possessions. And although he could be famously gregarious, not many of his acquaintances were writers.² Yet, when Beckett died in 1989, his sparse library numbered no less than eleven dedication copies of Harold Pinter's books.³ Beckett, as his authorized biographer recounts, showed 'considerable respect' for the British playwright.⁴ Interestingly, Pinter's estimation of truth echoed Beckett's. Consider the lecture that Pinter delivered upon being awarded the Nobel prize for literature in 2005, three years before his own death. On that occasion, Pinter referred to a text he had written nearly half a century earlier in which he had declared as follows: 'Truth in drama is forever elusive. [...] [T]here never is any such thing as one truth to be found in dramatic art. There are many. These truths challenge each other, recoil from each other, reflect each other, ignore each other, tease each other, are blind to each other. Sometimes you feel you have the truth of a moment in your hand, then it slips through your fingers and is lost'.⁵

In this Article, I defend the pertinence of Pinter's statement beyond dramatic art. Specifically, I apply it to comparative legal studies and to its transnational structures of investigation. I have in mind, in particular, epistemology, that is, the conditions — historical, political, social, and otherwise — under which foreign law is made into knowledge, the practices marshalled to obtain that which comparatists call 'knowledge' of foreign law. In the process, I aim to contribute to the emancipation of comparative thought from certain disciplinary postulates governing the understanding of foreign law that, on account of their theory of values and conception of the self, I regard as profoundly inimicable to an

¹ Beckett, S (2006) [1961] *Happy Days in The Grove Centenary Edition* Auster, P (ed) vol III Grove Press at 300. At the end of the abstract, I draw on Derrida, J (1980) *La Carte postale* Flammarion at 8.

² See Knowlson, J (1996) *Damned to Fame* Bloomsbury at 654.

³ Id at 822 note 76.

⁴ Id at 654.

⁵ Pinter, H (2005) 'Art, Truth and Politics' http://nobelprize.org/nobel_prizes/literature/laureates/2005/pinter-lecture-e.html. The lecture was released in print by Faber and Faber in 2006.

intellectually and ethically defensible practice of comparison-at-law. In essaying a more creditable epistemology regarding the study of foreign law, I wish to foster an awareness of one of the cardinal aporias presiding over the effectuation of comparative legal studies: that the inadequacy of the comparison has always already begun because of an otherness that outstrips all possible access and holds the comparatist-at-law, at best, to adjacency or alongsideness.⁶ *While the comparatist never ceases to cross the border, he never arrives on the other side.*⁷

Bearing in mind how any 'origin' calls for its origins to be elucidated in their turn, it seems that, in reaction to the early-19th-century French-initiated codification movement and what were perceived in certain academic circles as its attendant isolationist tendencies, Heidelberg professors Karl Mittermaier and Karl Zachariä took an inaugural institutional step in 1829 by launching the *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes*, which lasted until 1856. By the time the first issue of the journal was published, Anselms von Feuerbach and Anton Thibaut, writing in 1810 and 1814 respectively, had long sounded their *cris de coeur* in favour of a comparative jurisprudence purporting to disclose a sense of hyper-responsibility in the face of foreign law's interpretive demand,⁸ while noted Hegelian scholar Eduard Gans had released the first two volumes of his four-part comparative treatise on the law of inheritance.⁹ Needless to add, these expressions of desired encounters with foreign law had been preceded by noteworthy comparisons *avant la lettre*, Montaigne's and Montesquieu's celebrated texts offering obvious illustrations of endeavours that sought — illusorily, as would be revealed — to overcome the foreign's cultural recalcitrance to familiarization.

Since the discernible institutional configurations of the 1820s, comparison-at-law has existed as a (semi-autonomous) field on the premise that the 'legal' cannot remain at home, in its abode, abidingly, since the foreign is *there*, soliciting recognition and respect and carrying inherent normative relevance — not, to be sure, as binding law, but as persuasive authority. The comparative intervention has therefore fashioned itself as the addition of strangeness to local legal discourse, that is, as the appreciation within one glance of more than one law, one of the laws in play having to be 'foreign' to the other. Although it seems wise to refrain from a vain definition and rather accept that the 'foreign' is destined to subsist as a category incessantly under construction, I want to observe that foreignness can emerge from a wide range of interruptions and fragmentations, the elaborate ways in which these manifest themselves hardly being detachable from the matter of (emotion-laden) language. In this regard, it must be borne in mind that English can be foreign to

⁶ 'Alongsideness' is a recurring motif in Martin Heidegger's philosophy. For instance, see Heidegger, M (1962) [1927] *Being and Time* Macquarrie, J and Robinson, E (trans) Blackwell at 246.

⁷ Cf Kermode, F (1979) *The Genesis of Secrecy* Harvard University Press at 126: '[O]ne may be sure of one thing, and that is disappointment'.

⁸ Von Feuerbach, A (1966) [1810] 'Blick auf die deutsche Rechtswissenschaft' in *Kleine Schriften* O Zeller at 163; Thibaut, AFJ (1814) 'Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland' in *Civilistische Abhandlungen* JCB Mohr at 433 being a re-issue of Thibaut, AFJ (1814) *Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* Mohr & Zimmer. The relevant passage does not appear in the Mohr & Zimmer release, which allows one to approach the JCB Mohr version as a second edition although not explicitly presented in these terms by Anton Thibaut. The forewords to the two texts show a close chronological proximity as the Mohr & Zimmer preface is dated 19 June 1814 (at 3) and the subsequent one August 1814 (at [iv]).

⁹ Gans, E (1824-1825) *Das Erbrecht in weltgeschichtlicher Entwicklung* vol I-II Maurer.

anglophones — ‘privacy’ in the UK is not ‘privacy’ in the US — and that an Italian jurist writing about Italian law for a French readership is engaged in precisely the kind of translational exercise that characterizes comparison-at-law (not only, then, would every handling of foreign law involve a comparison, but every re-presentation of one’s law for a foreign audience would qualify also). It seems clear, though, that in today’s globalized world, as legal polycentricity arguably asserts itself more prominently than ever before, thus constantly re-affirming the fact that there are other normative orders apart from the state’s, the classical view obtaining within the field of comparative legal studies to the effect that the foreign must be understood in terms of *that* nation-state as distinguished from *this* nation-state requires to be overcome even as the current conditions within which economic globalization is unfolding continue to confer validity to the ‘nation-state’ as the most powerful form of political and social organization. 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. Crucially, because it is not retrievable beyond the comparatist’s language and therefore not otherwise than through translation, the foreign cannot be taken to indicate a firm border between an inside (the comparatist’s ‘own’ law-world) and an outside (the other’s law-world).

This Article’s leitmotiv is that the articulation of foreignness is to be envisaged as a motion that, while purporting to negotiate meaning away from the self, to register a discontinuity — Shklovsky’s ‘ostraneniye’ or Brecht’s ‘Verfremdungseffekt’¹⁰ — from one’s ‘own’ law, never manages fully to implement the distanciation from the comparatist’s kinetic and performative role in a manner that would avoid the foreign unsurpassably finding itself reinscribed within selfness. Not only do I maintain, then, that the foreign is not to be contemplated as being strictly external to the self, but I claim that, because of the spatialization of law and the comparatist (no law and no comparatist can be aspatial) and given the cognitive constraints within which the comparatist must formulate his enunciations so that the foreign cannot be conceived independently from the self and the self’s interpretation, foreign law can never be captured *as such*. While distance is a precondition for the knowledge of *foreign* law (distance delineates otherness), it makes *knowledge* of foreign law impossible (distance delimits inaccessibility). In fact, through the selfing of the other, the foreign inevitably partakes in the very production or constitution of the self (think of how *your* gaze fashions *my* shame...). It is not, of course, that the 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 comparative research can be divorced from its instigator. Incidentally, I also defend the view that, on account of the comparatist’s participatory attributions within the comparison, political significance informs and dramatizes every treatment of foreign law.

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¹⁰ See Shklovsky, V (1965) [1917] ‘Art As Technique’ in *Russian Formalist Criticism* Lemon LT and Reis MJ (trans) University of Nebraska Press at 3-24; Brecht, B (1964) [1935] ‘Alienation Effects in Chinese Acting’ in *Brecht on Theatre* Willett, J (ed and trans) Hill and Wang at 91-99. Inspired by what he calls ‘its Russian ancestor (*ostranenia* — a “making strange”)', Fredric Jameson suggests translating ‘Verfremdungseffekt’ as ‘estrangement’: Jameson, F (1998) *Brecht and Method* Verso at 85-86, note 13. On Shklovsky’s more aesthetic and Brecht’s more political use of the idea of ‘estrangement’, see Mitchell, S (1974) ‘From Shklovsky to Brecht: Some Preliminary Remarks Towards a History of the Politicisation of Russian Formalism’ (15/2) *Screen* 74.

Neither the law's inherent characteristics — it is situated, located, emplaced — nor the comparatist's — he himself is embedded, encumbered, foreclosed — allow for the objective grounding of a specific law as *the* 'true' law, *the* correct law, or *the* better law. Rather, comparative legal studies must accept — to iterate Pinter's words — the co-existence of many 'truths' that 'challenge each other' and are 'blind to each other'. This is not to say that a comparatist-at-law cannot express a preference for a given law and call it 'true', correct, or better *in his view*, say, on the basis of criteria that *he* regards as compelling. But these two configurations must be carefully distinguished from one another. To claim that *there is the 'true' law*, which is the 'one-truth' approach being resisted by Pinter, is not the same thing as to maintain that *there is a 'true' law according to one's view of the matter*. In effect, the latter affirmation operates perspectivally and discards any pretence at 'objectivity'. It rejects the notion of access to a fixed and final result purporting apodictically to overcome or sublimate heterogeneity. Instead, it opts for a resolute engagement with contingency — the only 'truth', which is not *that* at all, thus being errancy. It concerns itself with the elucidation of the law's factual and discursive dimensions by a comparatist whose own factual and discursive dimensions it acknowledges. In other words, it accepts that no matter how much logical ink is poured over the matter (or how many logical pixels are thrown at it), the fact is that no one can attest to an encounter with the transcendent form of 'truth'. Any so-called 'truth claim' must accordingly be seen as so much 'transcendental contraband' and therefore reduced to a negotiation between a text, an interpreter, and a reader in circumstances where, needless to add, even such a deflationary or fallibilist rendition of 'truth' does not cancel the need for comparatists-at-law to behave honestly and act with integrity.¹¹

While 'truth' and the devotion to 'objectivity' that underwrites this idea suggest a restricted — and, in fact, totalitarian — semantic economy obstinately preoccupied with the effacement of multiplicity in favour of unitarity, the general semantic economy that Pinter advocates accepts, and indeed extols, the manifold. It postulates a democratic and dynamic thought that, as transposed to law, encounters the 'legal' in its constitutive complexity and, with reference to comparative studies in particular, in its insurmountable entanglements with the situated comparatist speaking of it. It assumes a thought that, having jettisoned 'any lingering attachment to such traditional shibboleths as truth [and] objectivity',¹² is willing to think *with* the law rather than purporting to detach itself from the law by claiming to make it into a mere object.

Within the field of comparative legal studies, the two views that I have mentioned, while evidently not to be taken as essentially circumscribed or unredeemably stationary, as hermetically delineated or unalterably unary, correspond to two competing frameworks of intelligibility of other laws. To be sure, all comparatists remain complicit in terms of a primordial conviction that to think beyond local law is to fight the good fight, the fulcrum of comparison being that if another law-world can be shown to be different, to be featuring different possibilities, it can then act as one's 'own' law-world's other chance and allow it, perhaps, to be made differently. Hence, the comparatist's basic commitment to the deterritorialization or detotalization of local law and his correlative pledge to the ascription of a measure of normative purchase to foreign law. Indeed, the recursivity

¹¹ Derrida, J (1974) *Glas Galilée* at 272a.

¹² Hutchinson, AC (2009) *The Province of Jurisprudence Democratized* Oxford University Press at 17.

within comparative legal studies is the *significance* of foreign law, an iridescent expression aiming to mark an interruption from the self-in-the-law.¹³ But comparatists-at-law quarrel about much else to the point where their disagreement includes the characterization of this disagreement itself. Importantly, the comparatists' antagonism extends to their understanding of 'law'. In this regard, as in many other respects, they can be seen to attest to different predilections, which can be styled, albeit disputably, 'positivist-analytical', or 'positivist' *tout court*,¹⁴ and 'culturalist'. Again, whatever name one gives them, both stances are only imaginarily unalloyed (consider the declension of positivisms advocated by John Austin, Hans Kelsen, and H.L.A. Hart, not to mention Joseph Raz and Jules Coleman) and no attempt at a binary enunciation of these predispositions could fail to be reductionist. I shall therefore be content to say that these labels aim to capture conceptions of law that, following upon a schematization developed by French philosopher Jacques Derrida, can be addressed as implementing characteristically Husserlian or Joycean projects.

The first option — 'one truth' — recalls Edmund Husserl (1859-1938) who aimed to compress language to the point where its univocal elements would appear transparent and fully transmissible. He wanted a 'scientific, mathematical, pure language'.¹⁵ The second possibility — 'more than one truth' — reminds one of James Joyce (1882-1941). It is about assuming equivocality, forthrightly situating oneself within the labyrinthine field of culture by calling on the widest arrays of its forms ('mythology, religion, sciences, arts, literature, politics, philosophy, etc.').¹⁶ It involves circulating within all these languages, actualizing their most secret resonances, and cultivating associative syntheses rather than pruning this accumulation of energies, ruling it out-of-bounds, running away from it.¹⁷ As it opposes unity and eschews the reconciliation of conflict, it also means the transformation and subversion of tradition. It is a countersite. While 'Husserlians' are mortgaged to the "'splendor of the simple'" and adhere to the idea of a privileged centre as a locus of truth that, on account of some cosmological-like warrant, would be, by definition so to speak, non-perspectival — an 'unmarked' place whence *a priori* conceptions of what law is and is not could be formulated — 'Joyceans' hold that there is no position or positioning, no posing or positing, that is not always already a displacement, a detour, a redirection. Accepting that truth is fissured by the linguistic process of signification, they advocate the 'lubriciousness of the tangled'.¹⁸ For them, culturalism, acting as 'the idiom of a politics of

¹³ Pace Philip Larkin, for whom 'there can be no elsewhere which underwrites our existence', the view that obtains within comparative legal studies is that an elsewhere *can* underwrite our (legal) existence, at least an acculturized elsewhere. I refer to Larkin, P (1988) [1955] 'The Importance of Elsewhere' in *Collected Poems* Marvell Press at 104.

¹⁴ For the view that 'positivism' and 'analytical jurisprudence' are 'interchangeable labels', see, eg, Tamanaha, BZ (2007) 'The Contemporary Relevance of Legal Positivism' (32) *Australian Journal of Legal Philosophy* 1 at 38.

¹⁵ Caputo, JD (1997) *Deconstruction in a Nutshell* Fordham University Press at 26. The words, being the transcript of a public conversation that took place at Villanova University in 1994, are Derrida's.

¹⁶ Derrida, J (1962) 'Introduction' in Husserl, E *L'Origine de la géométrie* Derrida, J (trans) Presses Universitaires de France at 104.

¹⁷ I closely track *ibid*.

¹⁸ Rorty, R (1989) *Contingency, Irony, and Solidarity* Cambridge University Press at 126. The words in double quotation marks are meant as counterpoint to a short line from a poem in Heidegger, M (2002) [1947] *Aus der Erfahrung des Denkens in Gesamtausgabe* (2nd ed) vol XIII V Klostermann at 79 [emphasis omitted]. The relevant verse could be translated as 'the splendor of the simple'.

repair or redress',¹⁹ challenges the narrative of a positivism that is — and wants to be — radically bereft of all forms of cultural edification.

Making more or less explicit reference to these two paradigms, comparatists-at-law are engaged in a fierce battle for the acquisition of intellectual influence and authority in what remains an underpopulated field, which accordingly boasts less journals, chairs, courses, postgraduate programmes, or research institutes than is the case, say, in constitutional or criminal law. As one assesses the organization of disciplinary governance in comparative legal studies, it seems uncontroversial that it continues to be dominated by comparatists, often German academics or their disciples, who approach the law as an entity that exists positively apart from discourse, as a given non-discursive composition preceding cognitive elucidation. For these comparatists, the interpretive mind comes to foreign law as mere receptivity depending strictly upon what is offered to it. Its basic connection with a foreign law-text, such as a statute or judicial decision, is ultimately one of contemplation. Refusing any reflection except on their terms and discounting any idea that their model would reveal a restricted explanatory reach, these comparatists seek to have consecrated one specific way of constructing comparative knowledge, their own. They promote their approach to comparative research as 'good' comparison, indeed as the exemplarity of comparison-at-law, and defend it with a view to excluding allegiance to alternative theories. Mobilizing the institutional framework within which they operate (for example, by way of the organization of conferences, the edition of journals, or the configuration of collective projects, but also through the withholding of speaking invitations, the refusal of publications, or the ignorance of potential disciplinary contributions), they foster a regularized practice and an ethos that serve to frame research agendas and criteria of quality whose force have become so great that they radiate an unmistakable air of *entitlement*.²⁰

The *doxa's* allegiance to a positivist understanding of law and its disciplinary palisades will be immediately recalled by readers of specialized journals and expert books in the field. While any positivist comparatist will focus on statutes or cases and propound the juxtaposition of substantive and adjectival laws within formalized classificatory schemes, comparative legal studies harbours many versions of positivism. For instance, one can distinguish, if somewhat cursorily, between the 'porous' positivism that is practiced in the US and the 'hermetic' variant to be found in continental Europe. Again, though, the diverse formulations of the positivist agenda share a certain number of epistemological characteristics. Most famously, positivism stands for the proposition that what counts as law is only what is binding as law. Also, positivists of all hues are primarily concerned with analytics, that is, with legal technique and the rationalization of legal technique. They promote 'legal dogmatics', to translate a well-established German phrase, in as much as they aim to arrange the law in the form of an orderly and systematic representation of the different texts brought into force by the state. In the process, their investigative focus remains squarely set on rules — on what has been posited by relevant officials as *what the law is* — and the authoritative renditions of these rules. According to positivist doctrine, the latter must aim to confine itself to something like a kind of white writing, that is, occur

¹⁹ Scott, D (2003) 'Culture in Political Theory' (31) *Political Theory* 92 at 94.

²⁰ Allan Hutchinson refers to 'the default theory of the legal world': Hutchinson, AC *The Province of Jurisprudence Democratized* supra note 12 at 5.

scrupulously exegetically or, if you will, as psittacistically as possible. As they seek to offer an interpretive gloss on the legal provisions in force that would be at once judicious and rational — that would explain their reach and potential, eliminate or reduce their apparent flaws, obscurities, gaps, or contradictions, formally systematize the analytic relations amongst them, and scrutinize any new idea to ensure its coherence within the logical conceptual whole — positivists subscribe to a brand of writing purporting to present itself in an unproblematic and unsituated mode and seeking to remain homogeneous with the dominant discourse's purposes as they precede (and define) it.

Aiming and claiming to show impermeability to the existential vagaries liable to afflict interpretation, positivist inscriptions want to foster exact (that is, non-perspectival or non-horizoned) assertions stating *what the law is*. It is indeed an important tenet of positivism that political commitment or personal investment should be excluded from interpretation. According to positivism, a commentary therefore requires to manifest itself in a rigidly deciphering way, obeying as much as is feasible, mimetologically or *ventriloqually*, the law of textual replication. Ultimately, a commentary is as it should be for positivists if it proves entirely repetitious, if it realizes its own redundancy (whence it derives its authority, which is, in fact, bestowed *pro tanto*: a commentary is deemed authoritative as long as it does not stray). For example, the conferment on a statute of any meaning that would be visibly exterior to it would involve a re-creation of the legislative text, which would be tantamount to a wreck-creation of it and, in any event, to an inadmissible recreation on the part of the commentator, whether a judge or textbook writer. It is, then, the discreet and reverential duplicating text-about-the-text (the judicial decision about the statute or the textbook about the judicial decision) that guarantees that the meaning of the law can stabilize itself as *the* meaning of the law with a view to proving securely and predictably repeatable as the same in any number of subsequent sets of circumstances, thus supplying the kind of reassuring certitude that accompanies fundamental immobility.²¹ Confident that any problem thought through to the end will terminate in a determinate manner, positivists incessantly pursue fixity or invariance of meaning. In sum, positivism wants to show itself as being simply 'there' *vor aller Theorie* rather than having arrived where it is through partisan processes of contestation with alternative practices. For positivism, law, and foreign law specifically, is independently ascertainable and knowable *as such*. Moreover, it can be adequately formulated in terms strictly confined to a sheer description of it.

(Two 'field-specific' features complexify the orthodox comparatist's positivism and particularize it. First, this brand of positivism extends to foreign law despite the fact that

²¹ Yet, as Jorge Luis Borges has shown through one of his inexhaustible metaphors, to repeat is always already to transform. Thus, Pierre Menard's 'admirable ambition was to produce a number of pages which coincided — word for word and line for line — with those of Miguel de Cervantes'. In the event, '[t]he Cervantes text and the Menard text are verbally identical, but the second is almost infinitely richer': Borges, JL (1998) [1944] 'Pierre Menard, Author of the *Quixote*' in *Collected Fictions* Hurley, A (ed) Penguin at 91 and 94, respectively. The motif of repetition-as-transformation is central to Derrida's oeuvre. Using the lemma 'iter' that he derives from the Sanskrit '*itara*' meaning 'other', Derrida coins the word 'iterability', a neologism connoting both 'reiteration' and 'alterity', that is, repeatability with a difference, which means that renewal of expression does not cancel singularity. See Derrida, J (1972) *Marges* Editions de Minuit at 375. For another well-known philosophical treatment of the matter along broadly analogical lines, see Deleuze, G (1968) *Différence et répétition* Presses Universitaires de France. A useful discussion is in Gendron, S (2008) *Repetition, Difference, and Knowledge in the Work of Samuel Beckett, Jacques Derrida, and Gilles Deleuze* P Lang.

it is evidently not binding locally. Secondly, this positivism typically harbours universalist ambitions in the sense at least that it aspires to uniform transnational law. As such, this kind of positivism features a meta-dimension that one associates historically with natural law. A distinction between the two frameworks would be that for positivists the universalism that is sought remains largely envisaged as an ideal while those who believe in natural law deem it to exist.)

Now, the hierarchization of discordant strategies informing comparative legal studies ensures that Pinter's argument, or the transposition thereof to the study of foreign law, remains the expression of a peripheral view by comparatists who, though as rigorously trained in the practice of comparison as their mainstream colleagues, regard orthodox thought to rest on implausible epistemological assumptions. Indeed, while ceaselessly reaffirmed pursuant to a psychological dynamic of '[c]ognitive [s]elf-[s]tabilization',²² the governing postulates continue to occupy, in the eyes of those marginal comparatists, strained or empty positions considered as inappropriable. From the point of view of established thought, however, the incredulity expressed at the field's outer edge (ascertainably nourished by contacts with individuals working in other fields) partakes not at all in an emancipatory epistemological project, but in heresy — and is arguably deserving of scorn or ostracism. As I shall illustrate presently, the orthodox comparatists' epistemological schemata, which remain obstinately attached to an institutional catechism prominently featuring 'objectivity' and 'truth' as foundational guiding parameters, would strongly dispute the merit of Pinter's contentions as a serious theoretical contribution to comparative legal studies.

On a charitable interpretation, I claim that the orthodox stance suggests an unsustainable commitment to a metaphysical topology featuring *veritas transcendentalis*, an idea exuding decidedly soteriological and theological connotations. On a less generous reading, I hold that it points to an unwarranted epistemological naïveté or disingenuousness suggesting that foreign law can be *arraigned*, that it can reliably be known, objectively and truthfully, and that such acquisition of knowledge can take place without being coloured by the comparatist's neural and sensory equipment, that knowledge of foreign law can have an identifiable existence outside of the comparative mind. Either way, the *doxa's* view stands as an epistemological obstacle to the understanding of foreign law, such that the comparatist's challenge must be steadfastly to escape the dead hand of 'good' comparison.

MORE THAN ONE LAW

At this stage, I propose to introduce an example featuring a French statute and a Canadian judicial decision in order to articulate my argument that there can exist no 'objective' comparative research and no 'true' foreign law. Rather, I claim that foreign law can only be ascribed meaning through the design of appropriately contrived configurations by the comparatist himself, that is, on account of the comparatist's signature. And I argue that only the comparatist's *desire* to make the foreign law-text hold forth beyond its apparent spatial limit through his preponderant (and political) commensurative act — his willingness to recognize the 'productive' force pertaining to that limit²³ — proves able to

²² Smith, BH (1997) *Belief and Resistance* Harvard University Press at 106.

²³ For a discussion of this idea with specific reference to Heidegger, see Mitchell, AJ (2010) *Heidegger Among the*

sustain the pretense that law can be separated from locality and reconstructed within a 'common' metric to allow a comparison with another, disparate, law. Along the way, I defend the related contention, to quote Pinter again, that '[t]here never is any such thing as one truth'. In particular, I advocate the view that there is no cognitive ingress to foreign law except through 'interpretation', which excludes 'truth' (what one calls 'true' is that which one is willing to interpret thus);²⁴ in fact, interpretation cannot be separated from the prejudices, whether attributable to enculturation or personality, that one brings into play as one purports to engage in ascription of meaning.²⁵ And I make the further claim that because that which is named 'truth' is inevitably the result of an agent's interpretive and prejudiced evaluation, the idea that anyone would be in a position 'objectively' to identify 'the true', that 'the true' — as in 'the true law' — would somehow be present, there, available, within one's reach, *as object*, cannot be maintained.²⁶ In brief, I argue for pervasive perspectivalism as a serious theoretical position to behold (a view, of course, that is itself perspectival).

On 15 March 2004, a statute — more specifically, and not at all insignificantly, a '*loi*' — came into force in France pursuant to which (in my English translation) '[i]n primary and secondary public schools, the wearing of signs or clothes whereby students conspicuously express a religious affiliation is prohibited'.²⁷ This enactment offers an application of the constitutional principle of laicity, or '*laïcité*'.²⁸ Nowadays regarded in France as a pillar of French republicanism, the idea harks back in other guises to Enlightenment discourse. Moreover, it can be traced to the 1598 Edict of Nantes and to 14th-century frictions between the French king and the Pope. Significantly, the 2004 statute was adopted in each of the two legislative houses by more than 93% of parliamentarians. These huge majorities, cutting well across party political lines, attest to the resolve of the French people's representatives that the French public school should be constructed as a religion-free space. Since the fall of 2004, when the statute was initially implemented, French newspapers have been reporting

Sculptors Stanford University Press at 62.

²⁴ Cf Vattimo, G (2011) [2009] *A Farewell to Truth* McCuaig, W (trans) Columbia University Press at 64: 'There is no experience of truth that is not interpretive'.

²⁵ Kermode, F *The Genesis of Secrecy* supra note 7 at 68: '[A]ll interpretation proceeds from prejudice, and without prejudice there can be no interpretation'. This appreciation iterates the work of Hans-Georg Gadamer. Most importantly, see Gadamer, H-G (2004) [1986] *Truth and Method* (2nd rev Eng ed) Weinsheimer, J and Marshall, DG (trans) Continuum passim.

²⁶ While the refutation of the idea that the comparatist's mind is cognitively unconstrained has implications for the way of thinking and talking about 'truth', this claim is not about 'truth' taken as an autonomous 'entity'. To say, as I do, that whatever is accessible regarding foreign law can only be accessed through interpretation is not to argue that foreign law's existence is wholly subordinated to the deployment of interpretive resources by the comparatist aiming to know it. For another formulation of the distinction that I am drawing here, see Smith, BH (2011) 'The Chimera of Relativism' (17) *Common Knowledge* 1 at 14.

²⁷ 'Statute No 2004-228 Dated 15 March 2004 Regulating, in Application of the Principle of Secularism, the Wearing of Signs or Clothes Expressing a Religious Affiliation in Public Primary Schools, Junior and Senior High Schools' [*Loi no 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*] article 1 *Journal officiel* 17 March 2004 at 5190. This reference is to France's official gazette where all statutes are published.

²⁸ In France, '*laïcité*' carries a local cultural nuance that 'secularism' fails to convey. Indeed, the French language also has words like '*séculier*' and '*sécularité*'. These terms, however, are not used in France in matters concerning the churches and the state. In sum, there exists a specifically French version of secularism bearing a specific appellation.

that students, principally Muslim girls refusing to renounce the *hijab*, or headscarf, have been expelled from school.²⁹

Slightly less than two years after the French statute had come into force, the Supreme Court of Canada voted unanimously on 2 March 2006, in the case of *Multani v Commission scolaire Marguerite-Bourgeoys*,³⁰ to allow a 12-year-old orthodox Sikh boy to wear a *kirpan* at school in conformity with the dictates of his faith compelling him to have this 20-cm metal dagger on him at all times. The Court, which imposed certain practical conditions relating to the wearing of the *kirpan*, held that the absolute prohibition by the school board infringed the boy's freedom of religion, that the interference effectively deprived him of his right to attend a public school, and that even though the decision was motivated by a desire to ensure safety at school, it could not be warranted pursuant to the *Canadian Charter of Rights and Freedoms*. The Court said that '[the prohibition was] disrespectful to believers in the Sikh religion and d[id] not take into account Canadian values based on multiculturalism'.³¹ It found that 'accommodating [the plaintiff] [...] demonstrate[d] the importance that [Canadian] society attache[d] to protecting freedom of religion and to showing respect for its minorities'.³²

It seems hard to escape the view that the French and Canadian law-texts are making different factual claims as regards 'religious attire at school' — to construct a connector that will 'glue' the two discourses 'together'. (I am deliberately framing the matter so that a given issue can be said to be manifesting itself in the two jurisdictions without undue interpretive strain, thus allowing for threshold comparability, despite the fact that the French and Canadians each have their own way of making a situation matter. Orthodox comparatists-at-law would say, rather sumptuously, that I am formulating a '*tertium comparationis*' — the Latin no doubt serving to invest the deed with suitable intellectual *gravitas*.) In fact, this situation, whereby two different law-texts hailing from two different countries take two different stances with respect to 'one' given question, is habitual. Consider, by way of further illustrations (if they be needed), issues of contract law whether having to do, for instance, with the requirements of acceptance, the treatment of mistake, or the doctrine of anticipatory breach. Should a comparatist examine, say, French and English law as they address any of these concerns, he would ascertain, as he unfolds these laws, that they each frame the problem differently. Any number of examples could be offered to support the contention that different laws attend to given difficulties differently, that different laws are, well, different: plea bargain in France and the US or transfer of ownership in Germany and England or the legal organization of the corporation in Australia and Norway come to mind.

But let us revert to the foreign law-texts that I have indicated. In my view, the interest that the French statute and Canadian judicial decision hold for comparative legal studies far exceeds what positivists would regard as admissible legal knowledge (positivism being inherently *eliminative* or *purgative* — a smothering). To illustrate the point by reference to French law, positivism would focus its examination on the distinctions between the statute and the judicial decisions of the *Conseil d'Etat* (the highest administrative-law 'court' in

²⁹ Eg: *Le Monde* (Paris) 21 October 2004 at 1; *Le Monde* (Paris) 22 October 2004 at 12; *Libération* (Paris) 18-19 December 2004 at 15.

³⁰ *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256.

³¹ *Id* at §71.

³² *Id* at §81.

France) that the legislative text was meant to circumvent. And it would search for *the* meaning having been ascribed to words like 'schools', 'signs', or 'conspicuously' by the relevant interpretive authorities, whether in the *Conseil d'Etat* or law faculties. In sum, the positivist would act qua 'lawyer-as-such'.³³ He would ignore 'ethical, political, [or] economic considerations'.³⁴

Yet, the fact remains that both the French statute and Canadian judicial decision give effect to different legal discourses *constitutively* featuring different historical configurations, different political rationalities, different social logics, different epistemological assumptions, and so forth, that is, different appreciations of the spaces, persons, matters, and objects to be governed. I emphasize that such historical, political, social, and epistemological discourses being effectuated by the statute or judicial decision are not to be regarded as external to the law-text or contextual vis-à-vis it, that is, as some sort of parergon pertaining to the realm of non-law. Rather, these discourses, or rather these discourses as survivancies (that is, as the remaining of them that went into the writing of the statute or judicial decision), partake of the very texture of the law-text, such that the law-text exists *as* the interface where these various discursive threads have interlaced to be absorbed and transformed in order to be made to *speak legally*. Without wanting to grant undue privilege to etymology and resisting any idea that, through the etymon, one would be able to recover some original linguistic 'truth', let us remind ourselves that in Rome a '*textor*' was a weaver and '*texere*' was 'to weave'. A text, then, is indeed a fabric (consider the word 'textile'). In the text, 'a thousand threads of different sources intersect'.³⁵ In other words, the French and Canadian law-texts, like any foreign law-text, exist as *intertextual* (and *intrawordly*) matrices.

Drawing on a major insight in Derrida's work, one can helpfully think of law-texts as being constituted out of arrays of *traces*,³⁶ themselves the remaining of the historical configurations, political rationalities, social logics, epistemological assumptions, and so forth, having manifested themselves in advance of the formulation of the statute or judicial decision and having informed this process. In other words (and in ways that can, with more or less difficulty, be related empirically back to the historical, political, social, and epistemological discourses having preceded them), law-texts reveal a vestigial presence. Borrowing the spectral metaphor, one of the leading tropes in Derrida's work on texts and interpretation, it can be said that the various traces *haunt* the law. In Derrida's terms, 'the spectral structure is the law here'.³⁷ Again, '[i]t is a matter of heteronomy, of a law come from the other — of the other in [the text], an other greater and older than [the text]'.³⁸

³³ Windscheid, B (1904) [1884] 'Die Aufgaben der Rechtswissenschaft' in *Gesammelte Reden und Abhandlungen* Duncker & Humblot at 111. Bernhard Windscheid was a professor of law who made a significant contribution to the drafting of the 1896 German civil code and continues to be ascribed institutional eminence in Germany.

³⁴ Id at 112.

³⁵ Kofman, S (1984) *Lectures de Derrida* Galilée at 16.

³⁶ 'Trace' is 'a key Derridean word': Miller, JH (2011) 'Trace' in Gaston, S and Maclachlan, I (eds) *Reading Derrida's Of Grammatology* Continuum at 48. Derrida himself credits the notion of 'trace' to Emmanuel Levinas. For such an acknowledgement, see Derrida, J (1967) *De la grammatologie* Editions de Minuit at 102-03. See generally Bernasconi, R (1988) 'The Trace of Levinas in Derrida' in Wood, D and Bernasconi, R (eds) *Derrida and Différance* Northwestern University Press at 13-29. Robert Bernasconi observes that Levinas introduced 'trace' in 1963: see id at 15. Derrida also notes the recourse to 'trace' ('*Spur*') in Heidegger: Derrida, J *Marges* supra note 21 at 73-78. As befits the idea of 'trace', it can also be linked to Freud and to Nietzsche and to...

³⁷ Derrida, J (2001) *Papier machine* Galilée at 307.

³⁸ Derrida, J (2003) *Voyous* Galilée at 123.

There is 'the non-legal or pre-legal origin of the legal'.³⁹ Importantly, it is not that the traces form a network that would constitute the law's context so that they would exist, if you will, besides the law. Crucially, the traces are *not* contextual vis-à-vis the text. Rather, through a practice of encryption, they innervate the law-text to which they are, so to speak, 'sutured',⁴⁰ to the point where they *are* the law-text itself and make it, in effect, a polytext. Since they have been '[b]uried alive' as constitutive elements of the text,⁴¹ because they are not out of the law-text or the law, the traces cannot justifiably — as a matter of justice — be out-lawed. To relegate them to the exteriority of the text is to institute an 'artificial exteriority'.⁴² They are the text's textness itself.

There is more, for each trace is traceable to a further trace that in turn interlaces with another trace, itself being intertwined with yet another trace, to the extent that this concatenation of traces calls to be approached in terms of structural infinity. For example, the 2004 French statute can be traced to the heightened visibility and growing assertion of Islam in France, which can be traced to French post-colonial policy, which can be traced to French colonial policy, all of these traces being interlaced with the trace of a perceived irreconcilability between French republicanism and Islam and the trace of a fear of Islam (or Islamophobia), which themselves can be traced to immigration patterns, to the revival of Islamic militancy in Algeria, and to '9/11' (not to mention the subsequent terrorist attack in Madrid on 11 March 2004). In all rigour, there is an ever-nextness to the trace so that one could pursue the tracing of the law-text endlessly. The trace's fissiparous and rhizomatic features indeed prompt Derrida to observe that 'it is impossible absolutely to justify a point of departure'.⁴³ There is 'above all no originary trace', which, importantly, entails that '*there is no absolute origin of meaning in general*'.⁴⁴ In other words, *the law incessantly divides into itself*.⁴⁵ (Note how the fact that the finitude is interminable does not make it transcendental. Indeed, the involvement of a comparatist in the configuration of the tracing and, therefore, the input of a comparatist's finitude, prevents the syntax of the trace from falling prey to any idealizing tendency.) It follows that whatever gathering of the text's constitutive traces the comparatist undertakes to re-present (out of the countless possible gatherings, all of them different from one another) can never be exhaustive and therefore always escapes finality. No trace being recovered or made manifest will feature a full presence that would have been mastered because such trace also refers back to constitutive traces of its own, each of which also harks back to constitutive traces, each of which... At the very least, then, there will remain something untraced, something other still at issue, something yet to come,

³⁹ Derrida, J (1994) *Politiques de l'amitié* Galilée at 176.

⁴⁰ Hillis Miller reports that there are two English meanings of the word 'trace' that suggest 'connection', one having to do with the straps or chain attaching a horse to a wagon or farm implement, the other concerning a bar that transfers movement from one part of a machine to another. In Miller's terms, '[t]he trace is a hinge': Miller, JH 'Trace' supra note 36 at 51.

⁴¹ Wigley, M (1993) *The Architecture of Deconstruction* MIT Press at 169.

⁴² Derrida, J *De la grammatologie* supra note 36 at 52.

⁴³ Id at 233. There is no reason why tracing would stop at 'French' history or 'French' politics. Of course, there are discussions of Islam in Copenhagen and political issues arising in the Vatican that have an impact on France. I wish to thank Professor Ralf Michaels for addressing this question in conversation.

⁴⁴ Id at 90 and 95, respectively [emphasis original]. Cf Beckett, S (2006) [1958] *The Unnamable* in *The Grove Centenary Edition* Auster, P (ed) vol II Grove Press at 383: 'Set aside once and for all [...] all idea of beginning and end'. This novel was initially written in French and subsequently re-written in English by Beckett himself.

⁴⁵ Cf Beckett, S (2006) [1958] *Malone Dies* in *The Grove Centenary Edition* Auster, P (ed) vol II Grove Press at 176. This novel was initially written in French and subsequently re-written in English by Beckett himself.

another trace to be interpreted. Since it is structurally partial and provisional, any account of foreign law can be said to be subtractive in that it necessarily operates as 't-1'. In other words, it will always feature less than the whole of the foreign law that there is. Inevitably, an interpreter of foreign law will be, at the minimum, one trace short of the foreign law's full presence, which means that there is a feature of foreign law, no matter how thorough the interpretation of the law on offer, that will remain undisclosed. Unavoidably, because the text is unmasterable in that it cannot be coerced into full presence, there is an aspect of foreign law that will stay secret, both for the comparatist and his readership.⁴⁶

One crucial implication resulting from this understanding of law-texts — 'the elaboration of a concept of the text that does not leave "reality" outside and does not reduce itself to the graphy on the page and in the book'⁴⁷, that is not logocentric — is the appreciation that, contrary to what positivism holds, the exclusionary 'legal' text *never was*. While for positivists '[an] explanation must encompass the law as a whole, but nothing beyond the law',⁴⁸ the fact is that there is, and that there can be, no such thing as 'pure' law. Any idea of a 'legal' *proprium* is, in effect, out of place. Indeed, on account of its traces, every foreign law-text is singularly plural or features a plural singularity. What has classically been understood as other-than-law (history, politics, society, epistemology, and so forth) is, through the law-text's structuring spectral principle, revealed to be very much present *as* the law-text: the self exists as the other — which means, in more challenging philosophical language, that 'the same is the same only in affecting itself of the other, by becoming the other of the same'.⁴⁹ As applied to a foreign law-text, Derrida's point is that the foreign law-text is the foreign law-text that it is on account of being imbued or infused by otherness — specifically, by other discourses. In other words, the foreign law-text's authentic self is other than a pure self. It is a more complicated self than the pure self it has been said to be by positivists. And it is precisely on account of the fact that the trace attenuates the opposition between the self and the other, given that the trace is 'where the relation to the other inscribes itself',⁵⁰ or because the trace effaces the metaphysical distinction between the inside and outside of the law (and of the law-text), that the idea of law being fully present as something that would be only the 'legal' *stricto sensu* (whatever that may have been held to mean) is shown to be fatally flawed. As '[a] fabric of differences, [the text] is always heterogeneous'.⁵¹

As the time-honoured binary distinction between the inside and outside of the law-text is deposed in favour of an economy of survival or inheritance (a trace is that which lives *on*), the traces require to be mobilized as an interpretive lever by the comparatist seeking, through tenacious attention to the matter of signification, to bring forth a meaning of the foreign law-text by disentangling or unfolding textuality. By way of a more sophisticated epistemological appreciation, the different discourses that have classically been said simply to lie outside of the law are recoded, or re-presented, as not existing outside of it

⁴⁶ Cf Mallarmé, [S] (2003) [1897] *Divagations* in *Oeuvres complètes* Marchal, B (ed) vol II Gallimard at 217: '[T]here is no Present, no — a present does not exist'.

⁴⁷ Derrida, J (2011) [1993] *Politique et amitié* Springer, M (ed) Galilée at 106.

⁴⁸ Michaels, R (2006) 'Two Paradigms of Jurisdiction' (27) *Michigan Journal of International Law* 1003 at 1017.

⁴⁹ Derrida, J (1967) *La Voix et le phénomène* Presses Universitaires de France at 95.

⁵⁰ Derrida, J *De la grammatologie* supra note 36 at 69.

⁵¹ Kofman, S *Lectures de Derrida* supra note 35 at 16. Cf Beckett, S (2006) [1953] *Watt* in *The Grove Centenary Edition* Auster, P (ed) vol I Grove Press at 203: 'Everything that happened happened inside it, and at the same time everything that happened happened outside it. I trust I make myself plain'.

after all, but as being *of* it. It is crucial to note that the fact that history or philosophy are *of* the law does not mean that these discourses lose all individuality so as to disappear or dissolve themselves into law. Again, one must think in terms of trace. The point is that history or philosophy have left their trace within the law, *say*, as a constitutive feature of a statute or judicial decision. If you will, at the same time as they are *of* the law, history or philosophy are *supplemental* to it.⁵² The 'legal' is thus seen to be always already constitutively 'exceeded' by an instilled supplementarity that, as it is traced, cancels any orthodox pretense at ontologization.

Acknowledging that a foreign law-text exists irreducibly as plurality and assuming responsibility vis-à-vis such discursive variegation with a view to doing *justice* to the law-text, the comparatist-at-law, discerning that 'remainder effects [...] have presence effects',⁵³ that the text's presence constitutively consists in significant ways of a past that was once present,⁵⁴ purports to unconceal the so-called 'exteriority' dwelling within the textuality of the law-text, recover what has been repressed, that which the systematic exclusiveness of positivism has sought to eliminate in order to avoid any 'contamination' of the 'legal' in the hope of preserving order within a comfortable, if artificial, system of disciplinary knowledge. On account of the making-manifest of what has been censorially effaced — because of the unconcealment of the law-text existing also as history, politics, and so forth — the law is, in effect, *paradoxically*, seen to exist also as what it is not, or at least as what it has not been wanted to be positivistically speaking. (Note that positivism itself also exists as other than what it has claimed itself to be in the sense that while it defines itself as pure, uncompromised by other discourses, insulated from political values, protected, it very much operates as 'purposive advocacy',⁵⁵ a fact that, on reflection, cannot be surprising since even exegesis is committed to certain, ascertainable, political values.)

Without a doubt, as it seeks to get the comparatist-at-law at once further away from what the law-text is said to be according to positivist dogma and closer to what the law-text effectively exists as, because it disrupts habitualization, since it allows for the recognition of a multiplicity of knowledges as law, this articulation of the 'legal', which 'exceeds the tranquil relation of a subject to an object',⁵⁶ this tracing of the foreign law-text, endows interpretation with more edifying insights into the 'legal' and gives the comparative intervention concrete cultural and political significance: it *re-signifies* comparison-at-law.⁵⁷

⁵² Derrida accepts that '[t]his structure of supplementarity is very complex': Derrida, J *De la grammatologie* supra note 36 at 99.

⁵³ Derrida, J *Papier machine* supra note 37 at 385.

⁵⁴ Cf Miller, JH 'Trace' supra note 36 at 49: '[T]he trace undoes the metaphysical [...] concept of time as made up of a present which is present here and now [and] a past which was once present'. In Heidegger's parlance, the text '[is]-as-having-been': Heidegger, M *Being and Time* supra note 6 at 373 [emphasis original].

⁵⁵ Hutchinson, AC *The Province of Jurisprudence Democratized* supra note 12 at 34.

⁵⁶ Derrida, J (1999) *Donner la mort* Galilée at 48.

⁵⁷ According to 'systems theory' or 'autopoiesis', society consists of communication systems — one of these being law (others would be politics, the economy, the arts, religion, science, etc.). Each communication system has a distinctive identity. It functions according to its own discursive logic. Indeed, it is hermetically sealed within its own protocols of invention and interpretation. While one system (such as law) may be coupled with another (say, the economy), the systems do not merge, no matter how tight the coupling: law remains law (it speaks of the legal and the illegal) and the economy remains the economy (it speaks of the profitable and the unprofitable). Though autopoiesis wishes to resist both positivism, in the way in which it detaches law from society, and sociologism (which would include culturalism), because of the manner in which it would suggest that the legal is determined by the social (or the cultural), it stands as a structural model purporting to operate in stark contrast to interpretive approaches. To the extent that autopoiesis tracks the ideas of fragmentation,

I propose, then, that comparison-at-law must signify otherwise (differently) or, more accurately, *other-wise* (that is, in a manner that shows attunement to foreign law, that is adapted to the other law, its complexity, its singularity). In recognition of the inherently allogeneous character of the foreign law-text, I argue for 'the necessity [...] to elaborate this new concept of text',⁵⁸ for the assignment of an immense critical capacity to the trace, in sum, for a heterodidactic comparison-at-law.

Concerning the comparatist's response to the *fragmentary demand*, that is, to the interpellation made by the fragmentary or the traces as textual fragments, it must be emphasized that while traces are to be seen as providing a crucial interpretive resource, they cannot, on their own, whether explicitly or implicitly, determine an exact understanding. Indeed, comparative legal studies is about otherness (an other discourse-in-the-law and an other's law) far more than it is about correctness. Very much, then, will depend on the intervention of the comparatist and, specifically, on the aims he pursues, not to mention the available resources at his disposal. It is the comparatist's predilections that will preside over his selection of traces (and of traces of traces) within the available knowledge network and orient his insistence on particular constitutive features of the law-text in the light of his competence and interests. And it is the comparatist who will provide the ligature between the various traces in order to structure a narrative regarding foreign law. Indeed, the trace — the event of the other-in-the-law — will not emerge of its own accord; rather, it must be induced, prodded, supported, constructed. The trace is never simply encountered as object, in the form of brute empirical data. Instead, there is always an interpretive insinuation of the comparatist that, at the very moment of decidability, inevitably means a transformation of the law-text, a mutation that will be inscribed through the act of representation.

As it orients dissemination of meaning, as it chooses to disclose and arrange specific aspects of the singularity of a foreign law-text and, inevitably, not to realize some of its other interpretive possibilities (such that, strictly speaking, the singularity of the text will never be fully present in the comparison),⁵⁹ any tracing will therefore prove a singular act of commingling and *bricolage*. In the final analysis, no intervention on a foreign law-

incommunicability, irritation, non-programmability of effects, and disappointed expectations, it supplies useful ingredients for a heuristics of comparison-at-law. But the system-theoretic paradigm's formalistico-mechanistic, abstracto-speculative, and rigidly analytico-categorical features make it unconvincing on the issue of epistemological impermeability. Indeed, the 'legal' *proprium* being defended pertains to law's account of itself. Of course, one wants to be attentive to law's and lawyers' self-understanding. But it is another matter altogether to base one's inquiry exclusively on that ground and apprehend law as a hermetic conceptual world on the basis of the lawyers' cognitive limitations. Specifically, even if lawyers reject interdiscursivity and claim hermeticity to other discourses, it cannot follow that as an interpreter of legal discourse, I ought to be bound by those self-understandings. In any event, the strong ontological commitment to law's purity that comes with autopoiesis — the absolutization of law's autonomy through other discourses being made external to it — suggests at the very least a disturbing positivist remnant at work within the model. Unsurprisingly, then, since positivism 'pride[s] itself on maintaining an indifferent or neutral stance on the political schemes of governance within which law functions' (Hutchinson, AC *The Province of Jurisprudence Democratized* supra note 12 at 10), autopoiesis offers no reform programme. It is about sustaining and perpetuating the systems, which makes it at once conservative and conformist. Autopoiesis fails to understand that the challenge is to think singularity and plurality as haunting each other. Any singular law is configured as a plurality of traces and each plurality of traces makes for a singular law. (I cannot resist one final observation in the form of a question. If every system, including law, is trapped into epistemic blindness vis-à-vis other systems, how can autopoiesis, as a system in its own right, claim to provide a reading of a system such as law purporting to capture how it operates?)

⁵⁸ Derrida, J *Politique et amitié* supra note 47 at 107.

⁵⁹ Cf id at 85: 'Everything plays out in this paradox [...]: that singularity is never *present*' [emphasis original].

text by a comparatist can be plausibly dissociated from its autobiographical connotations (if you will, the comparison always already contains the comparatist's judgment about himself).⁶⁰ A comparatist's investment is to re-produce instead of to reproduce; his motion is inherently non-mimetic. In effect, the radical necessity of indecision therefore precedes, traverses, and survives comparison. Not only, therefore, is tracing an infinite sequence ('[o]ne wants to go back from the supplement to the source; one must recognize that there is a supplement at the source'),⁶¹ but it is also an indefinite process entailing that one can compare 'until one loses one's sight and one's voice'.⁶² Apply to the comparatist-at-law, then, what Walter Benjamin says of the playwright: "'It can happen this way, but it can also happen quite a different way'" — that is the fundamental attitude of one who writes for epic theatre'.⁶³ In the face of foreign law-texts as with heroic deeds, no single answer is possible, only singular ones.

Interpretation — or more accurately the desire called 'interpretation' — is accordingly pivotal. Only through (fully-fledged) interpretation can the foreign law-text escape the positivist strait jacket and find itself being deployed meaningfully (or 'full' of its meanings) within comparative discourse, by reference to its depth, thickness, texture, or immanence, that is, by advertence to its heterogeneous complexity. Only if interpretation is understood thus — that is, as a complicated exercise in anamnesis allowing for the return of repressed traces — can it attest to the way in which the lifeworld is at work within the foreign law-text (that is itself at work within the lifeworld). Only on account of interpretation, then, can the law-text be made to exist in a manner that begins to do justice to its intricacy (the unwritten conjecture being that this brand of justice is a value worthy of realization not as some sort of sanitized and congealed ideal, but as an active 'always-under-construction' constellation of identity markers).

Of course, no interpretation is definitive, that is, no interpretation is ever the last interpretation. In this regard, the striving to ascribe meaning to a law-text hardly differs from an interpretive endeavour bearing on *Romeo and Juliet*. And because a given interpretation emphasizes these traces rather than those (again, it is the comparatist who *possibilizes* singularity), the law-text is made to differ at once from itself (that is, from what it was said to mean on account of earlier interpretations) and to differ anew from other texts. In other words, each time the foreign law-text is subjected to another interpretation, to another authorial inscription — each time an interpretation or inscription is defeated — the text is made to overcome any fixed identity it might have been thought to hold. If A is a text and A' an interpretation thereof, there simply can never be a situation whereby A=A'. The law-text exists, if you will, as a moving target. It exists not as that which is posited

⁶⁰ For a striking metaphorical expression of the ineliminability of the self's inscription, see Borges, JL (1998) [1960] 'The Maker' in *Collected Fictions* Hurley, A (ed) Penguin at 327: 'A man assigns himself the task of drawing the world. As the years go by, he peoples a space with images of provinces, kingdoms, mountains, bays, ships, islands, fishes, rooms, instruments, stars, horses, and individuals. A short time before he dies, he discovers that that patient labyrinth of lines traces the reflection of his face'. Cf Beckett, S *The Unnamable* supra note 44 at 365-66: 'I on whom all dangles, better still, about whom, much better, all turns'.

⁶¹ Derrida, J *De la grammatologie* supra note 36 at 429 [emphasis original]. Resorting to the idea of 'supplement', Derrida is again making the point that there is no originary trace. Though one may think one has reached the ultimate trace, there is always another constitutive trace within that trace.

⁶² Kofman, S *Lectures de Derrida* supra note 35 at 26. The untranslatable French idiomatic expression is '*à perte de vue et de voix*'.

⁶³ Benjamin, W (1998) [1931] *Understanding Brecht* Bostock, A (trans) Verso at 8. I refer to the first of the two known versions of Benjamin's text.

or positioned, but as something under way, always on the edge of itself. To those who wonder whether there is ever an end to this process, my answer is that interpretation is at once incessant and interminable. The definitive interpretation is always to come. Writing with specific reference to the interpretation of judicial decisions, Michel Rosenfeld puts the matter in suitably evocative terms: '[T]he final formulation [...] must always be postponed until the dusk will have settled on the last of the future adjudications'.⁶⁴ As much as one would want to keep things in place, play — not what is fun, but the semantic movement acknowledging ambiguity of meaning on account of the structural plasticity of language — cannot be kept away or put 'out of play'.⁶⁵ Comparison-at-law, rather than approach the trace as some improper miscegenation that the purely exegetical act of a Platonizing positivist would disambiguate, acquiesces — indeed, *surrenders* — to the restlessness of insurmountable indeterminacy. It asserts at once the comparatist's power vis-à-vis foreign law (he can/will trace it) and his powerlessness (he cannot/will not trace it to the end). Ultimately, comparison-at-law is riven by a contradiction that it cannot resolve: it harbours within itself the necessity of its own impotence.

As is well known, Susan Sontag denounced how to interpret is to inform against the singularity of art. She argued that the over-intellectualization of art disenfranchises the authenticity of the work.⁶⁶ But the situation obtaining in the field of comparative legal studies — certainly amongst orthodox comparatists — presents us with the obverse of the practice that Sontag was decrying. What has characterized the study of foreign law is interpretive under-intellectualization rather than the over-intellectualization that she was chastising. While Sontag claimed that sophisticated interpreters lead us to forget about the art before our eyes, when it comes to comparison-at-law it is the lack of interpretive erudition that has led comparatists to lose sight of the law-text before them, to forget its density. Having said this, I agree with those who argue that the creditability of any interpretation ultimately depends to a certain extent on the 'raw' materials themselves — the words, the sentences, the paragraphs. While not in a situation of interdependence vis-à-vis the text, interpretation is, let us say, 'interdependent' (or *alone together*) in connection with it. As such, what styles itself 'interpretation' must accept that no text is infinitely expandable (if only because there is — and there must be — *this* text and, at some point, *that* text). Interpretation cannot evade or renounce the contents of the text and must certainly never envisage the text as mere pretext allowing for the deliberate transgression of it (ideologically or otherwise): '[T]he reading [...] cannot legitimately transgress the text towards something other than itself',⁶⁷ for *there is the law of the text* and '[n]ot to evade this law is thus to do everything not to betray, not to betray either the law or the other'.⁶⁸ Still, interpretation will inevitably (and indeterminably) emerge as conjectural on account of the unbridgeable distance between *interpretans* and *interpretandum*. As often,

⁶⁴ Rosenfeld, M (1998) *Just Interpretations* University of California Press at 32.

⁶⁵ Derrida, J *De la grammatologie* supra note 36 at 439.

⁶⁶ Sontag, S (1966) [1964] 'Against Interpretation' in *Against Interpretation and Other Essays* Farrar, Straus and Giroux at 3-14.

⁶⁷ Derrida, J *De la grammatologie* supra note 36 at 227. See also Rorty, R (1992) 'The Pragmatist's Progress' in Collini, S (ed) *Interpretation and Overinterpretation* Cambridge University Press at 95.

⁶⁸ Derrida, J (2004) [2000] 'Countersignature' Hanrahan, M (trans) (27/2) *Paragraph* 7 at 29. At this writing, this text remains unpublished in French.

I am reminded of Beckett: 'What can one do but speculate, speculate, until one hits on the happy speculation?'.⁶⁹

To return to the illustration that I am tracking, the comparatist-at-law takes paradigmatic diversity as a spur to comparison. He proceeds on the assumption that '[a]cts of commensuration facilitate comparative measurement across vast differences of sentiment, person, kind, culture, and nation' — not to mention law.⁷⁰ As he engages into 'the transformation of different qualities into a common metric',⁷¹ that is, while he constructs the commensurability that will allow him to bring 'together' the different law-texts that he has made into the focus of his study, he confirms '[t]he [...] crucial [...] point about the comparisons being made [...] — namely, that no common ground need be summoned', for it is he, the comparatist, who constructs what he measures.⁷² Having woven into his narrative his selection of traces constituting the law-texts under scrutiny, he is led to conclude, predictably, that the French and Canadian law-texts implement different structures of understanding as to what should be done, by whom, and how. In other terms, and no doubt aporetically, the commensurability that the comparatist fabricates — after all, laws do not compare themselves — attests to the laws' incommensurability since even in its performative capacity, this constructed 'commonality' fails to overcome the estrangements of spatial/temporal dislocation. Like translation, comparison is 'a practice producing difference out of incommensurability (rather than equivalence out of difference)'.⁷³ To be sure, because one cannot commensurate more than one text without distortion, the fashioning of any purported 'homogeneity' simply cannot rest on the non-violent commensuration of different epistemologies, which means that any exercise at commensuration is always already a threat to the integrity of that which is being commensurated. In the words of Isabelle Stengers, '[c]ommensurability is created and it is never neutral, always relative to an aim'.⁷⁴ Yet, despite the need to understand commensuration as 'a calculus of power',⁷⁵ it remains that what is at stake can be called 'a minimal form of incommensurability, which produces a generative dislocation without silencing discourse or marking the limit of knowledge'.⁷⁶

This brand of incommensurability, therefore, does not foreclose comparison. In fact, such a conclusion is key if one wishes to avoid a theoretical impasse and allow for a transaction despite the ultimate impossibility of measure against a 'common' standard. In other words, '[i]ncommensurability [...] is [...] no[t] an ontologically immutable relation between isolated systems of thought, [...] but a contingent, experiential relation between historically and institutionally situated conceptual/discursive practices'.⁷⁷ It follows that *incommensurables are comparable*. From a French vantage point, for example, the French statute appears most sensible to the extent that it inscribes an inverse correlation between

⁶⁹ Beckett, S *The Unnamable* supra note 44 at 363.

⁷⁰ Espeland, WN and Stevens, ML (1998) 'Commensuration As a Social Process' (24) *Annual Review of Sociology* 313 at 339.

⁷¹ Id at 314.

⁷² Strathern, M (2011) 'Binary License' (17) *Common Knowledge* 87 at 97 [emphasis added].

⁷³ Morris, M (1997) 'Foreword' in Sakai, N *Translation and Subjectivity* University of Minnesota Press at xiii. See also Chakrabarty, D (2008) *Provincializing Europe* (2nd ed) Princeton University Press at 17.

⁷⁴ Stengers, I (2011) 'Comparison As a Matter of Concern' (17) *Common Knowledge* 48 at 55.

⁷⁵ Espeland, WN and Stevens, ML (1998) 'Commensuration As a Social Process' supra note 70 at 331.

⁷⁶ Melas, N (2007) *All the Difference in the World* Stanford University Press at 31.

⁷⁷ Smith, BH *Belief and Resistance* supra note 22 at 152.

French citizenship and religious visibility: *part of what it is to be French is to accede to the view that the deployment of religious allegiance ought to be excluded from the public sphere, regardless of one's personal commitments.* Meanwhile, from a Canadian perspective, the Canadian judicial decision looks most reasonable as it marks a direct correlation between Canadian citizenship and religious visibility: *part of what it is to be Canadian is to accede to the view that the deployment of religious allegiance ought to be allowed in the public sphere, regardless of one's personal commitments.* In the face of incommensurability, the comparison — more accurately, a given comparatist's given comparison — holds.

The fact that the French and Canadian law-texts should differ in the way they approach the question of 'religious attire at school' was foreseeable. I have in mind Leibniz's argument for the inevitability of what I call 'differential co-presence': 'By virtue of imperceptible variations, he wrote (in French, as it happens), two individual things cannot be perfectly similar'.⁷⁸ Often labelled 'Leibniz's Law', this statement 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 we have X and Y, X is at least minimally something that exists as not-Y). Alfred North Whitehead famously extended Leibniz's formulation to contend that '[n]o two occasions can have identical actual worlds' — his claim being that no matter how faithfully situation B purports to mimic situation A, the fact is that when B comes along A has already taken place, which entails that event B features as one of its constitutive elements the pastness of event A and therefore, if on that ground alone, differs from event A.⁷⁹

For my part, I find it helpful to refine Leibniz's postulate with specific reference to law, and to foreign law in particular, by arguing that *the co-presence of more than one law — which means that there is not one law only anymore — must assume difference between them.*⁸⁰ Indeed, I argue that this differend characterizes law-worlds in co-presence. It is *what there is*. This differend is the very 'there-iness' of laws-in-co-presence. As such, it is 'irreducible'.⁸¹ It is the matter of fact. Importantly, this site of immanence does not exist only within human awareness, so to speak, and is not to be reduced to the psychological texture of my own experience qua comparatist-at-law. Rather, this differend acts as an interpellation in advance of any concern, appropriation, construction, and deployment by a comparatist-at-law as he decides at what level of differentiation he plans to conduct his archeological probing and genealogical unconcealment. To be sure, as I have mentioned, such work of excavation and elicitation intervenes *performatively* in the sense that the comparatist, as he mobilizes his alertness to the differend, as he intervenes as enabler of meaning bringing the laws into interpretive existence, as he inscribes specific captures and framings of laws, always enacts a re-presentation or a cascade of re-presentations, all of them presentations anew, of the differend that there is (imagine the comparatist reading Jacques-Ghestin-in-his-textbook reading Georges-Rouhette-in-his-doctoral-dissertation reading a French judicial decision reading a French statute reading a French political initiative reading

⁷⁸ [Leibniz, GW] (1960) [1704] *Nouveaux essais sur l'entendement* in *Die philosophischen Schriften von Gottfried Wilhelm Leibniz* Gerhardt, CJ (ed) vol V G Olms at 49.

⁷⁹ Whitehead, AN (1978) [1929] *Process and Reality* Free Press at 210.

⁸⁰ I draw on Derrida, J *Memoires* (2nd ed) Lindsay, C (trans) University of Minnesota Press at 15. Here, the English translation, which was released before the French text, is more specific than the French version.

⁸¹ Derrida, J *Limited Inc* (1990) Galilée at 253. I borrow the word 'differend' from the English translation of Lyotard, J-F *The Differend* (1988) [1984] Van Den Abbelee, G (trans) University of Minnesota Press.

French society). Yet, it remains that the comparatist comes *to* the differend, which exists and is not a figment of his imagination.

It must be clear that the strategy that I defend is to the effect that differential comparison is a regulative idea that will not determine a particular solution in advance of the comparative negotiation taking place. To be sure, the acknowledgement of the differend and the correlative implementation of a differencing interpretation (recall that there is no reading of the law *as such*...) operate to foreground the epistemological framework within which decisions by the comparatist-at-law can be made. But while differentiation is the impelling intellectual force, it does not prefigure the re-presentations that will arise out of the comparison, which is best envisaged as an open-ended process of individuation being conducted by the comparatist himself in a context where the limits he sets to his cognitive enterprise cannot be known in advance and where his organizational decisions in this regard are anything but negligible. In particular, as further differencing — the differentiation of differences — continues to specify specificity (in other words, as tracing proceeds), it simultaneously dismantles any idea of a fixed (or objective) singularity.

Writing in 1893 that '[t]o exist is to differ',⁸² French sociologist and philosopher Gabriel Tarde, Emile Durkheim's leading *contradicteur*, offered two examples to sustain his argument, which continue to be relevant. Before the telescope and the microscope, he noted, stars and molecules were considered to be homogeneous. As more powerful telescopes became available — to pursue this particular illustration —, the unconcealment of the singularity of each star reached deeper. Again, it is not that astronomers 'created' the differend that there is when more than one star are in co-presence. *The differend was there*. What astronomers did, as they came to the differend through the use of increasingly sophisticated telescopes, was to unconceal more of it, to configure more of the singularity characteristic of each star (bearing in mind that even an advanced technical tool, of course, leaves it to astronomers to interpret the data it 'delivers'). Tarde's claim is that 'wherever a scholar digs underneath apparent indistinction, he discovers a wealth of unexpected distinctions'.⁸³ Again, though, the commitment to differentialism cannot, in and of itself, allow one to predict the outcome of trials of strength pursuant to which some differences will be made to eclipse others. Because the differend's effectuation is very much in the hands of the comparatist-at-law,⁸⁴ it cannot be possible for anyone coming to the comparatist's report (or indeed for the comparatist himself) to assume that foreign law is such as to be in a position ever to mean fixedly or permanently. Always, no matter how exhaustive he purports to be, the comparatist-at-law appropriates law's singularity selectively. This fact entails — a point to which I will return — that there always remains more singularity to be appropriated (singularity, as I have indicated, is never fully present...). In effect, for the comparatist, not all 'differences [...] "make" a difference'.⁸⁵ On the occasion of every comparison, basic questions therefore arise. What assemblage of differences will the comparatist-at-law emphasize? How will he diagnose or problematize the different

⁸² Tarde, G (1999) [1893] *Monadologie et sociologie* in *Oeuvres* Alliez, E (ed) vol I Institut Synthélabo at 72. Cf Benveniste, E (1974) [1967] *Problèmes de linguistique générale* vol II Gallimard at 223: 'To be distinctive, to be significative, this is the same thing'.

⁸³ Tarde, G *Monadologie et sociologie* supra note 82 at 72.

⁸⁴ Cf Whitehead, AN, *Process and Reality* supra note 79 at 233: '[T]he subjective form cannot be absolutely disjoined from the pattern of the objective datum'.

⁸⁵ Bernstein, RJ (1992) *The New Constellation* MIT Press at 219.

law-texts detaining him? How far will he trace them? In resistance or in deference to what orthodox institutions, oppressive practices, suffocating reductionism, or sycophantic comparatists-at-law, then, will he marshal, perhaps irreverently, specific differences?

As an authenticating motion, differential comparison allows each law-text to manifest itself as something singular, as an inherently different entity, through the comparatist's act of *invention*, which is also a translation. The idea of 'invention' is key. Etymologically, it accounts for the fact that the comparatist at once finds and creates foreign law, that he simultaneously discovers and configures it. It carries the further, and crucial, implication that he is therefore not extraneous to the operation that consists in re-presenting foreign law. Indeed, no interpretation is simply a bringing-to-presence of meaning since, as an understanding of law-texts-as-traces reveals, there is no present (in the sense of 'fully-present') meaning to be deciphered in the first place. Rather, every interpretation is complementary to the text it interprets. But it is a necessary complement for it is added to a foreign law-text in order to let meaning appear and act as a placeholder of meaning, which entails that it cannot be regarded as being external to what it effectuates. As the comparatist engages in a bringing-closer of what he finds significant within the foreign law-text, he is shown not to possess a status that would be fully independent of the comparison. And very much as the singularity of foreign law is elucidated, the plurality of the law-text is conveyed also. In effect, the rendition of the law-text by the comparatist having decided to inflect it in order to show this or that aspect of the differend awaiting performative elucidation becomes increasingly helpful the more interpretive depth he brings to bear on the text's singular plurality/plural singularity. In other terms, the more sophisticated the interpretive framework being applied to a foreign law-text, the more the singularity of that law-text comes to light in its complexity and the more the differend marking that law-text from another law-text in co-presence finds itself being enunciated. In the words of Theodor Adorno, '[t]he force that shatters the appearance of identity is the force of thinking itself'.⁸⁶ And this is why differential comparison-at-law can be characterized by 'a gnawing sense of unfulfilledness, [an] endemic dissatisfaction with itself'; it cannot but be tormented by the suspicion that it is never differential *enough*.⁸⁷ As comparatists-at-law strive to account for the difference that different kinds of differences across laws make in actual or potential practice, as they refer to distinctions of identity, variations in belief or behaviour, or fine discrepancies in the expression of the foreign, as they engage in close reading and hearkening, as they *trace*, a two-hundred-word summary elicits so much of the differend, a two-hundred-line essay more of it, and a two-hundred-page dissertation more still.

For differentialism to act as a governing principle of invention of meaningful meaning (as distinguished, say, from superficial meaning), close reading, and more generally hearkening, intervene as the comparatist-at-law's basic protocols of interpretation. What does reading demand if it is to be *reading*? What makes *reading* possible? I have in mind redoubled textual attention with a view, insightfully and imaginatively, to tracing subtle semantic connections and intricate discursive associations, but not at all the morose and formalistic exegesis that would exclude, programmatically, institutional factors, the

⁸⁶ Adorno, TW (1973) [1966] *Negative Dialectics* Ashton, EB (trans) Routledge at 149. I have modified the translation.

⁸⁷ I adopt and adapt Bauman, Z (1993) *Postmodern Ethics* Blackwell at 80.

reader's predispositions, ideology, and so forth. And I am thinking of the learning (not least in terms of 'street smarts'), industry, and patience that must go into the edification of scrupulous explanation. In addition, the treatment of foreign law that I foster requires one to hearken to the law-text. In this regard, I heed Rudolf Bultmann, one of Martin Heidegger's colleagues and influential disciples, who advocates 'listening to [the] claim [of the text]'.⁸⁸ Along with Kierkegaard, who also enjoins the interpreter to listen — 'Hasten, oh! hasten to listen' —,⁸⁹ who argues that 'everything ends with hearing',⁹⁰ and in line with Derrida, who agrees that 'indefatigably at issue is the ear',⁹¹ I find that when it comes to foreign law, there is a 'speaking-to-us' ('*Zuspruch*') at work.⁹² Accordingly, it behooves comparatists-at-law to engage in the kind of comparative work that manifests itself as 'otology'.⁹³

As he comes to close reading and hearkening, the comparatist's 'selfhood' is situated, such that his agency manifests itself in important ways as the ever-unfolding outcome of a specific process of formation through institutions, norms, and conventions beyond his control whereby his intent has found itself being disciplined, that is, chastised and instructed. Within comparative legal studies also, 'I is another' ('*Je est un autre*')⁹⁴ — which is another way of saying that the comparatist comes to law-texts haunted by his own specters. Not only, then, is he 'a spectral machine' in the sense that he must mobilize the traces haunting the law-texts, but also in as much as he himself is haunted.⁹⁵

In effect, therefore, the French and Canadian law-texts, to track my principal example of comparison-at-law, hold an infinite complexity, the exploration of which never ceases to challenge the frontiers of re-presentation (understood here as a form of Beckettian speculation). Ultimately, the differentiability of a law-text — its singularity — can never be narrated completely if only because, as I have indicated, it is never completely present. This structural limitation is well worth emphasizing. Even as it is disclosed in the experience that the comparatist has of it and in the course of the (subsequent) analysis that he makes of his experience, foreign law's singularity remains *unsaturable*, a diachronic claim entailing that full cognitive mastery is beyond the revelatory reach of any inquiry. Foreign law is thus seen to exist as *excess*, the idea of 'excess' gesturing towards the primacy of the other over the self, and the account of it as *decurtation*. There is only so much that one can say — so little, ultimately. Accordingly, the law-text being interpreted can never be ascribed all the meaning that it solicits since something more could always be written about it. In the apt

⁸⁸ Bultmann, R (1952) [1950] 'Das Problem der Hermeneutik' in *Glauben und Verstehen* vol II JCB Mohr at 228.

⁸⁹ Kierkegaard, S *Four Upbuilding Discourses* in *Eighteen Upbuilding Discourses* Hong, HV and Hong, EH (eds and trans) Princeton University Press at 138.

⁹⁰ *Søren Kierkegaard's Journals and Papers* (1978) [1936] Hong, HV and Hong, EH (eds and trans) vol V Princeton University Press at 74. The standard international reference to the *Papirer* is 'IA 235'.

⁹¹ Derrida, J *Marges* supra note 21 at x. See also Derrida, J (2003) *Béliers* Galilée at 37-38: '[To keep] forever attention in suspense, that is, alive, awake, vigilant, ready to go into any other road, to let come, lending an ear, listening to it faithfully, the other word, hanging on the breath of the other word and of the other's word — right there where it could still seem unintelligible, inaudible, untranslatable'.

⁹² For this translation from Heidegger's philosophical vocabulary, see Lyon, JK (2006) *Paul Celan and Martin Heidegger* Johns Hopkins University Press at 223 note 14. The reference is to Heidegger, M (1977) [1950] *Holzwege* in *Gesamtausgabe* vol V V Klostermann at 369.

⁹³ Derrida, J *Politiques de l'amitié* supra note 39 410.

⁹⁴ Rimbaud, A (2009) [1871] [Letter to G Izambard] in *Oeuvres complètes* Guyaux, A (ed) Gallimard at 340.

⁹⁵ Derrida, J *Papier machine* supra note 37 at 147.

counsel of Beckett, '*il y a toujours à écouter*' ('there is always something more to listen to').⁹⁶ Because no understanding and no narrative ever capture the whole of the foreign law-text, interpretation is revealed to be not only an act of memory (meaning is recoverable), but also an act of mourning (some meaning is irrecoverably lost). Arguably, then, '[a] good [account] should trigger in a good reader this reaction: "Please, more details, I want more details"'.⁹⁷

Once he takes the view that he has made his case for what he (wants to) discern in the laws in co-presence, at the moment when he feels that those he is addressing can be convinced — in not insignificant ways, this appreciation being a matter of perceived rhetorical efficacy — or perhaps for pragmatic reasons like an impending deadline, a strict word-limit, or the exhaustion of local bibliographical resources, the comparatist brings his discussion of foreign law to a (provisional and ever-provisional) end. Access to the foreign thus inevitably finds itself interrupted. Interpretation of the foreign is deferred. It remains *to come*. (Observe without further ado how the fact that, if the comparatist's report holds, it may ultimately be said to be 'true' cannot be taken to mean that the report is 'true' because it holds.)

Consider Tarde once more. What to answer to the argument that all stars are *stars*, that when there is more than one there is a set and therefore sameness? In reply, I am minded to move from stars to stones and quote Paul Celan: 'When a "stone" is mentioned in a poem, it is, of course, important what can be meant by "stones"; but what matters in the poem is *this* stone, the one the poem mentions'.⁹⁸ In addition, I claim that the enunciation of a 'shared' feature by the comparatist-at-law, which takes us back to the so-called '*tertium comparationis*', cannot do more than mark the necessary construction of a connector by the comparatist himself, which can then act as the indispensable point of entry allowing the comparative enterprise to unfold. (I emphasize that even differential analysis has a need of this point of entry.) Assume, therefore, that a comparatist who, being aware that his 'comparison [...] must not be conducted in the language of just one of the parties',⁹⁹ that one cannot resort to a predatory approach and impose on others words or definitions or categories that do not concern them, articulates an interface between '*Schuld*' in the German law of divorce and 'fault' in the California law of divorce around, say, the (non-unilateralist) notion of 'transgression'. Now, this commensuration, very much prompted by a desire to engage foreign law, can be seen as 'a system for discarding information and organizing what remains into new forms',¹⁰⁰ or, if you will, as a device for conferring formal similarity across the differend. What 'commonality' is asserted inevitably remains, however, the speculative outcome of the comparatist's own translations/transactions.

⁹⁶ Juliet, C (1999) [1973] *Rencontres avec Samuel Beckett* Editions POL at 49. The words are Beckett's.

⁹⁷ Latour, B (2005) *Reassembling the Social* Oxford University Press at 137. It is noteworthy that Vladimir Nabokov, a foremost comparatist in the field of literary studies, was a tireless advocate of the significance of details. For instance, see Boyd, B (1991) [1948] *Vladimir Nabokov: The American Years* Princeton University Press at 133: 'I am not concerned with generalities [...]. I am concerned with the specific text'. The words are Nabokov's. See also Nabokov, V (1990) [1971] *Strong Opinions* Vintage at 168: '[D]etail is everything'; Dormergues, P (1968) 'Entretien avec Vladimir Nabokov' (62/1) *Les Langues modernes* at 97: '[E]verything is in the detail'. The French reads, '*le détail, tout est là*'. The words are Nabokov's.

⁹⁸ The passage is recalled in an interview featured in *Hans-Georg Gadamer on Education, Poetry, and History* (1992) [1985-1986] Misgeld, D and Nicholson, G (eds) Schmidt, L and Reuss, M (trans) SUNY Press at 70 [emphasis original]. The words are Gadamer's.

⁹⁹ Stengers, I 'Comparison As a Matter of Concern' supra note 74 at 56.

¹⁰⁰ Espeland, WN and Stevens, ML (1998) 'Commensuration As a Social Process' supra note 70 at 317.

It is very much the comparatist himself, then, who is engaging in a construction of the comparable. Since, across different law-worlds, no law can, in and of itself, reduce itself to another, the comparatist, as he purports to effectuate the kind of 'fusion of horizons' that will afford him a comparative opportunity,¹⁰¹ must do violence to the laws in co-presence. He engages in formulaic reductions by striving to channel these laws through a process of framed subsumption (or is it strategic 'cheating?').¹⁰² Whatever label one wants to assign to this 'doctoring' (the doctor's doctoring...), there takes place a manifestation of violence that demands to be acknowledged: 'Commensuration refracts power in many ways'.¹⁰³

Given that the comparatist is effectively 'negotiat[ing] with the non-negotiable' and fostering a relation, which is but a non-relation or a disrelation (think of something like a state '0' of relation),¹⁰⁴ commonness cannot be allowed to conduct more work than the very minimum that it must ineradicably do, which is to provide the semblance of commonality that can plausibly act as the launching pad into the comparison. But lest the laws being compared have their specificity put under erasure for the sake of a generalization that would then rapidly turn into a hegemonic and totalizing dissimulation of what happens rather than a disclosure of it, the analysis should imperatively and swiftly move beyond the constructed intersect and, bringing to bear heightened epistemological vigilance, sharpen into the production of the critical insights that comparative legal studies is meant to generate out of the differend across laws. In other terms, commonness is a moment that is crucial to the deployment of a comparison that must rapidly — and just as crucially — move beyond it. The 'constitut[ion] or stabiliz[ation]' of a commonality is thus at once 'provisional' and 'precarious'.¹⁰⁵ It must make its necessity felt and accept its prompt displacement. In sum, it has to be there, but there is no place for it.

What takes place, therefore, is a *thirthing* of legal knowledge.¹⁰⁶ Think of the interface as a third space 'siting' the dynamics between the more-than-one laws being brought 'together' by the comparatist — not, of course, as a space that can be physically entered or left, but, metaphorically speaking, as a space of contestation and transaction, a translational space where meanings are dismantled or deconstructed. Indeed, it can be said that one *constitutes* oneself as a comparatist by rejecting the fixity of homogenized understandings and by marking a third location that is neither one nor the other but, contesting the territories of both, something else besides. The third space — in my example, the delineation of a third sphere of meaning by the comparatist-at-law through the notion of 'transgression' — is distinguishable from the laws being compared (it is neither outside or astride these laws) while not being reducible to a composite of the pre-existing laws. In the third space, there takes place a re-articulation projecting meaning beyond any signification obtaining in the situated laws. The third space can properly be regarded as effectuating an othering of these

¹⁰¹ The idea of 'fusion of horizons' ('*Horizontverschmelzung*'), of Hegelian inspiration, is in Gadamer, H-G *Truth and Method* supra note 25 passim.

¹⁰² Cf Whitehead, AN *Process and Reality* supra note 79 at 228: 'What are ordinarily termed "relations" are abstractions from contrasts'.

¹⁰³ Espeland, WN and Stevens, ML (1998) 'Commensuration As a Social Process' supra note 70 at 332.

¹⁰⁴ Derrida, J (2000) *Etats d'âme de la psychanalyse* Galilée at 83.

¹⁰⁵ Derrida, J *Politique et amitié* supra note 47 at 112.

¹⁰⁶ In many respects, I closely track Soja, EW (1996) *Thirdspace* Blackwell at 61 and passim who fulsomely acknowledges his debt to Lefebvre, H *La Production de l'espace* (1974) Anthropos. See also Bhabha, H 'The Third Space' in Rutherford, J (ed) *Identity* Lawrence & Wishart 1990 at 207-21.

laws beyond any straightforward logic of exclusion or inclusion. Yes. In effect, the third space introduces another other to the comparison-at-law (when it comes to comparison, one plus one makes three). Indeed, emerging beyond any antecedent information, beyond any 'either/or' or 'both/and' scenario ('transgression' is neither '*Schuld*' nor 'fault' and it is not both '*Schuld*' and 'fault'), the third space promotes a reconstitution that not only disrupts each law's assumed totalization, but acts as a powerful site of meaning productivity. In the third space, new knowledge is fabricated. It is therefore important not to think of the third space as a dialectical arrangement à la Hegel, which would be much too strongly predicated on ideal temporal sequencing and on the no less ideal unfolding of the thesis/antithesis/synthesis scheme suggesting the termination of a process. Instead, what we have in the third space is a *heterothesis*.

To be sure, I accept that the recompositions being constructed out of preceding laws generate a certain continuity of knowledge. To that extent, then, the third space can legitimately be seen as an ordering that is not fully autonomous. In fact, this consonance acts as an antidote to any 'anything-goes' philosophy and helps ensure that comparatists-at-law do not confuse the epistemological openness characteristic of the third space with anarchy. But the third space does not resolve the differend (think of a French translation of *Hamlet*: whatever there is in the third space is neither the original Shakespeare in 16th-century English nor a French piece of literature). Within the third space, one indeed remains 'confronted with at least two divergent systems of belongings that cannot be reconciled'.¹⁰⁷ Despite what a word like 'transgression' may suggest on a superficial reading, the 'negotiation of incommensurable differences' that intervenes in the third space fails to engender an economy of the same.¹⁰⁸ Not only is it the fact, therefore, that no idea of 'transgression' can overcome the differend, but the staging of the third space generates even more difference — for instance, the differences between '*Schuld*' and 'transgression' and between 'fault' and 'transgression', both arrays of them irreducible (or, to return to the translation of *Hamlet*, the differences between *Hamlet* and the translation, on the one hand, and between the translation and French literature, on the other). For this reason, a notion such as 'transgression' in my example has been called 'transdifferential': while it purports to 'bracket' the differend between the situated laws, it finds itself effectively acting as a multiplier of difference.¹⁰⁹ The result of intercultural tension, the third space becomes the source of further intercultural tension (think how 'transgression' 'contains at least echoes of' 'fault', which '*Schuld*' does not, and how 'transgression' 'contains at least echoes of' '*Schuld*', which 'fault' does not).¹¹⁰ In sum, the comparison requires comparatists-at-law to think *trialectically*. Note that although the structure of power being deployed within the trialectic may prove difficult to read, it is never erased; indeed, the comparatist-at-law's 'intervention in the here and now' through the edification of a third space is never an innocuous act.¹¹¹

¹⁰⁷ Kalscheuer, B (2009) 'Encounters in the Third Space' in Ikas, K and Wagner, G (eds) *Communicating in the Third Space* Routledge at 42.

¹⁰⁸ Bhabha, HK (1994) *The Location of Culture* Routledge at 218.

¹⁰⁹ For an introduction to 'transdifference', see Breinig, H and Lösch, K (2006) 'Transdifference' (13) *Journal for the Study of British Cultures* 105. The authors insist that '[transdifference] fills an important gap by not pointing in the direction of an overcoming of difference': id at 106.

¹¹⁰ Id at 112 who emphasize that the transdifferential term 'contains at least echoes of the other's voice'.

¹¹¹ Bhabha, HK *The Location of Culture* supra note 108 at 7. Cf Radhakrishnan, R (2009) 'Why Compare?' (40) *New Literary History* 453 at 454: '[C]omparisons are never neutral: they are inevitably tendentious, didactic,

THE ORTHODOXY EXPOSED

Negating what a discipline affirms, operating as what Adorno's aesthetics of negativity styles a '*Nicht-Mitmachen*' (a not-playing-along or a non-participation),¹¹² adopting a critical mode of reflection, the approach valorizing the differend and 'defend[ing] it *against* semblance and disguise' remains marginal within the field of comparative legal studies.¹¹³ Indeed, largely ignoring the argument for differentialism, orthodox comparatists-at-law, as they articulate their comparisons more or less expressly by reference to the notion of 'truth', somewhat assiduously promote a hostile outlook on difference. A typical expression of this antagonism chastises a 'focus on differences in the wording of similar texts, on different national experiences' as 'a position of "hyperparticularity"' and opines that 'hyperparticularity is too pessimistic a view of the possibilities of learning'.¹¹⁴ (I am moved to ask what can these words *mean*. What can it *mean* to assert that, say, an insistence on the specificity of French law, that is, an attempt to enunciate as thoroughly as possible the singularity of French law, can be denying 'the possibilities of learning'? Does specifying a law or one's knowledge of a law, that is, deepening or augmenting the extent of the available information with respect to a law, not illustrate precisely a resolute commitment *to* learning? I return to the notion of 'hyperparticularity' below.) For the *doxa*, differential comparison is what must be scandalized and difference what must be repressed. The governing idea, then, is two-fold: that the comparatist-at-law's insistence on the differend is misguided; and that distinctions across laws, to the extent that they exist, are superficial and can be said to hide more profound, or at least more pertinent, commonalities that, if one will set one's mind and others' money to it, can be 'unearth[ed]'.¹¹⁵

As I just mentioned, denigration of difference across laws and the correlative extolment of similarity can readily be identified as hallmarks of orthodox comparative legal studies. The dominant paradigm is nowhere more influentially expressed than in the work of Hein Kötz, an esteemed German law professor whose treatise has acted as the leading source of inspiration for comparative legal studies since the 1960s and provided the principal structuring system organizing comparative production around the world (the early editions were co-written with Konrad Zweigert who, in fact, supplied much of the theoretical input). In his book, seemingly keen to frame the field's knowledge economy as

competitive, and prescriptive'.

¹¹² For instance, see Adorno, TW (1998) [1969] *Critical Models* Pickford, HW (trans) Columbia University Press at 289-93. Cf Beckett, S (2006) [1931] *Proust* in *The Grove Centenary Edition* Auster, P (ed) vol IV Grove Press at 539: 'The artist is active, but negatively'. According to Adorno, such attitude '[i]s absolutely necessary in order to keep alive the capacity for experience of the nonidentical': Buck-Morss, S (1977) *The Origin of Negative Dialectics* Free Press at 189. Non-attunement is also capital for Derrida who holds that not being part of 'a linguistic community, a national community, a political party, [...] any group or clique whatsoever, [...] any philosophical or literary school' is 'the condition [...] for entering into relation with the singularity and alterity of others': Derrida, J and Ferraris, M (2001) [1993] *A Taste for the Secret* Denis, G and Webb, D (eds) Denis, G (trans) Polity at 27. The words are Derrida's. Although they were spoken in French, the original transcript remains unpublished at this writing. Cf Beckett, S (2009) [1939] *The Letters of Samuel Beckett* Fehsenfeld, MD and Overbeck, LM (eds) vol I Cambridge University Press at 660: '[A]ll groups are horrible'.

¹¹³ Heidegger, M *Being and Time* supra note 6 at 165.

¹¹⁴ Jackson, VC (2010) *Constitutional Engagement in a Transnational Era* Oxford University Press at 179.

¹¹⁵ Bussani, M and Mattei, U (1997-1998) 'The Common Core Approach to European Private Law' (3) *Columbia Journal of European Law* 339 at 340.

a vast equivalency-producing machine, Kötz formulates a '*praesumptio similitudinis*' to the effect that laws are similar 'even as to detail',¹¹⁶ declares the 'immaterial[ity] of differences' across laws,¹¹⁷ and proclaims the existence of a 'unitary sense of justice'.¹¹⁸ It is not an exaggeration to say that these views, refusing/defusing/fusing law-worlds, are echoed by scores of comparatists-at-law who, likewise in pursuit of dialectical unity between contradictories, remain trapped within a (conservative and conformist) semantic economy founded on identity, familiarity, and duplication — the fate of foreign law then being domestication, normalization, and reduction to the expectation of the already-known.

Writing about cases in Germany, France, and the US and heralding, in a remarkably self-confident tone, an uncompromisingly outcome-oriented approach to adjudication pursuant to which '[w]hat counts for the purpose of comparison is the fact of a solution and not the ideas, concepts, or legal arguments that support the solution',¹¹⁹ James Gordley, a distinguished US comparatist, thus states that '[t]here [is] nothing distinctively German, French or American about the [judicial] decisions themselves'.¹²⁰ For his part, Alan Watson, arguably one of the field's most famous names, affirms that '[t]he private law of the countries of the [European Union] is not all that different'¹²¹. He adds that 'it would be a relatively easy task to frame a single basic code of private law to operate throughout [the whole of the western world]'.¹²²

In the same vein, Rudolf Schlesinger, the author of what was once the leading US casebook in the field (and since his death in the 1990s, the frequent recipient of unseemly hagiography by some Italian positivists), having expressed the view that '[t]he method of the comparatist [is] somewhat similar to that of a mathematician who seeks to ascertain the lowest common denominator',¹²³ declared, making specific reference to the laws governing the formation of contractual relationships, that '[w]hile its etiology may not yet be fully explored, the *existence* of some kind of a "common core" is hardly challenged today'.¹²⁴

¹¹⁶ Zweigert, K and Kötz, H (1998) [1996] *Introduction to Comparative Law* (3rd ed) Weir, T (trans) Oxford University Press at 40 and 39, respectively.

¹¹⁷ Id at 62.

¹¹⁸ Id at 3.

¹¹⁹ Fletcher, GP (1987) 'The Universal and the Particular in Legal Discourse' *Brigham Young University Law Review* 335 at 335.

¹²⁰ Gordley, J (1995) 'Comparative Legal Research: Its Function in the Development of Harmonized Law' (43) *American Journal of Comparative Law* 555 at 563. See also Gordley, J (1991) *The Philosophical Origins of Modern Contract Doctrine* Oxford University Press at 1: '[T]he problem of whether a boy is liable for injuring a playfellow or a seller is liable for defects in his merchandise is analysed in much the same way in Hamburg, Montpellier, Manchester, and Tucson, or for that matter in New Delhi, Tel Aviv, Tokyo, and Jakarta'.

¹²¹ Watson, A (2000) 'Legal Transplants and European Private Law' (4/4) *Electronic Journal of Comparative Law* <http://www.ejcl.org/44/art44-2.html> sub 'V'.

¹²² Watson, A (1993) *Legal Transplants* (2nd ed) University of Georgia Press at 100-01. For an analogous statement with specific reference to the advocacy of a civil code for the European Union, see Ramberg, C (2004) 'E-commerce' in Hartkamp, A et al (eds) *Towards a European Civil Code* (3rd ed) Kluwer at 244: '[I]t is surprisingly easy to overcome the differences in national law and formulate common rules for Europe'.

¹²³ Schlesinger, R (1961) 'The Common Core of Legal Systems [:] An Emerging Subject of Comparative Study' in *XXth Century Comparative and Conflicts Law [:] Legal Essays in Honor of Hessel E. Yntema* Sijthoff at 75.

¹²⁴ Id at 66 [emphasis original]. This specific statement is unsupported. One may, however, wish to regard it as expressing some sort of conclusion to a brief argument developed over two earlier paragraphs. The references in the four notes at 65-66 could then be seen to act as authority. But these hardly evidence 'the *existence* of some kind of a "common core"' across laws with specific reference to the formation of contractual relationships. In the four relevant notes, Schlesinger enters two citations to a 1958 book by Wilfred Jenks, an international lawyer who worked for the International Labour Organization for over 40 years as of 1931 and two references to a 1960 publication by one Ignaz Seidl-Hohenveldern, an Austrian professor of international law specializing in the law

In order to defend this bold stance, it no doubt helped to think, as did Schlesinger — if extraordinarily — that ‘several [...] events, even though they have occurred in different places, are similar to each other if ordinary language describes them in similar terms’.¹²⁵ In effect, Schlesinger’s commitment to the idea of ‘common core’ was such that when, in the course of his research project, institutions did not prove ‘sufficiently comparable so that a meaningful common core of legal principles and rules [...] c[ould] be ascertained’,¹²⁶ they were simply abandoned along the way. Ultimately, Schlesinger’s goal was to formulate ‘universally understandable terms’ that ‘carry the same meaning to lawyers brought up in various legal systems’.¹²⁷

At times, the argument in favour of the similarity of laws can veer into the treacherous waters of arrant ethnocentrism as when a German academic exalts the European character of English law. This pronouncement offers a striking example of the kind of glib projective identification or epistemological self-privileging whereby the ever-problematic relationship between self and other is resolved by letting the first absorb the second through the attribution to the other of features that one proudly associates with oneself. The other being conveniently made to look like the self, any challenge to the assumed explanatory power of the self’s categories is, of course, avoided. The allegation does not escape a profound contradiction, however. As it suggests that the other would be there to confirm the self, it raises the possibility that the other could be *necessary* to the self.¹²⁸

In their pursuit of the ‘similarization’ of laws, many comparatists, taking their cue from Kötz, frame the laws that they make into their ‘object’ of study according to a method

of international organizations. He also mentions five texts released between 1937 and 1960 by Hessel Yntema, a comparatist, and adds a self-reference to a contribution from 1957. In effect, then, Schlesinger’s assertion appears to rely on the opinions of three scholars, two of whom were internationalists who could reasonably be expected to argue the case for commonality across laws and just as plausibly be assumed not to have taken a specific interest in the formation of contractual relationships. On closer analysis, therefore, the only potentially *relevant* authority appears to be Yntema. Is his warrant enough to legitimize Schlesinger’s contention that ‘the existence of some kind of a “common core” [across laws] is hardly challenged today? For an analogous claim on a different scale, also unsupported, see von Bar, C (1999) ‘The Study Group on a European Civil Code’ in von Bar, C et al *Study of the Systems of Private Law in the EU with Regard to Discrimination and the Creation of a European Civil Code* European Parliament (Directorate General for Research) Working Paper (Legal Affairs Series) JURI 103 EN at 131 who, making reference to ‘a set of principles based primarily on a common core of legal philosophy’, asserts that ‘the *ius commune Europaeum* really does exist’ [emphasis original].

¹²⁵ Schlesinger, RB ‘Introduction’ in Schlesinger, RB (ed) *Formation of Contracts [:] A Study of the Common Core of Legal Systems* vol I Oceana Publications at 32.

¹²⁶ Schlesinger, R ‘The Common Core of Legal Systems [:] An Emerging Subject of Comparative Study’ supra note 123 at 70.

¹²⁷ Id at 78.

¹²⁸ See Zimmermann, R (1993) ‘Der europäische Charakter des englischen Rechts’ (1) *Zeitschrift für Europäisches Privatrecht* 4. The discreditability of this allegation purporting to turn the other into a cipher of the self readily emerges from a perusal of the work of two leading historians of the common-law tradition. See Kelley, DR (1993) ‘Elizabethan Political Thought’ in Pocock, JGA (ed) *The Varieties of British Political Thought, 1500-1800* Cambridge University Press at 64-65: ‘There never was a serious threat of a “reception” of Roman law [in England], and its political associations [with absolutism and popery] ensured that common lawyers would continue to resist its influence’; Baker, JH (2003) *The Oxford History of the Laws of England* vol VI Oxford University Press at 12: ‘There could be no Reception here’. Baker insists on the ‘almost completely effective resistance to Romanizing influences’: id. Even Richard Helmholz, a historian more sympathetic than many to the idea that English common law shows signs of Roman influence, holds that ‘it is undeniable that fundamental differences between procedure of the common law and that of the *ius commune* had come into existence before the thirteenth century and continued long afterwards’: Helmholz, RH (2004) *The Oxford History of the Laws of England* vol I Oxford University Press at 312-13 [emphasis original]. Once it is fully appreciated that for centuries English common law was primordially procedural, it is hard to overstate the significance of Helmholz’s observation.

known to comparative legal studies as 'functionalism'.¹²⁹ As far as Kötz is concerned, functionalism is '[t]he basic methodological principle of all comparative law', such that '[t]he question to which any comparative study is devoted must be posed in purely functional terms'.¹³⁰ Inescapably political, as any method must be (if only because a method is always someone's method and therefore a vehicle for an identifiable political agenda), functionalism — which, incidentally, ought not even to be called that¹³¹ — is marred by serious and numerous deficiencies. Consider, for example, the way in which this approach compels an *ab initio* recasting of the different laws in co-presence in terms that deliberately erase the laws' singularity and seek most purposefully to re-present them as being similar. Not only, then, are laws deemed to be similar pursuant to the '*praesumptio similitudinis*', but their analysis is subordinated to a terminally authoritative methodology whose very *raison d'être* is to showcase them as being similar. Thus, the English 'consideration' and the French '*cause*' are to be re-posed as evidencing a similar function, which can be, according to Kötz, to provide an 'indicia of earnestness' allowing the law to distinguish between legally enforceable and unenforceable commitments.¹³² In the process, both the English and French notions are, in Kötz's own words, 'cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function'.¹³³ In other terms, the discontinuities, diffractions, and dissonances across laws are 'similarized' on account of their appropriation by the functionalist apparatus best apprehended as a brand of meaning-making semiotic technology producing mock togetherness. Along the way, each law is made into the dedifferentiated double of the other. In the meantime, difference is meticulously marginalized or excluded as it is felt to disrupt and threaten the planned conceptual grid (Kötz indeed refers to the need for comparatists-at-law 'to build a system').¹³⁴ This deracinating strategy is, in effect, taking sublation to such spurious lengths that if one were to ask either English or French lawyers about the 'indicia of earnestness' in their law, neither would know what the question purports to address. In this sense, to say that comparatists-at-law 'frame' foreign laws in functional terms, as I have mentioned, is to use the verb not only to connote the idea of 'giving shape to the laws', but also, according to a more colloquial use, that of 'concocting something about the laws'.

¹²⁹ An examination of the factors that, through Kötz's treatise, have contributed to the fixation of functionalism as a central item of knowledge within the field of comparative legal studies would include the author's institutional authority as director of the famous (and famously wealthy) *Max-Planck-Institut für ausländisches und internationales Privatrecht* in Hamburg; the translator's intellectual standing (not to mention his institutional connections with Trinity College and the University of Cambridge); and the publisher's prestige (whether, in terms of its law list at any rate, such reputation is warranted or not). Of course, one would also want to consider the circumstances under which this argument was read and, specifically, analyze the reasons why it met its readership's expectations in the successful way it did. These would involve the lack of any competing theoretical statement in the erstwhile leading text in the field that Kötz displaced — David, R *Les Grands systèmes de droit contemporains* (11th ed) Jauffret-Spinozi, C (ed) Dalloz 2002, available in English translation as David, R and Brierley, JEC (1985) *Major Legal Systems in the World Today* (3rd ed) Stevens. For the leading defense of functionalism, see Michaels, R (2006) 'The Functional Method of Comparative Law' in Reimann, M and Zimmermann, R (eds) *The Oxford Handbook of Comparative Law* Oxford University Press at 339-82.

¹³⁰ Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 116 at 34.

¹³¹ See Hyland, R (2010) *Gifts* Oxford University Press at 63.

¹³² Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 116 at 388-99. I have modified the translation.

¹³³ Id at 44.

¹³⁴ Ibid.

Even comparatists who appear to cast doubt on the existence of similarities across laws at the descriptive level argue the case for progress *in simile*. These comparatists also take the view that foreign law can only matter when enough has been done to detach it from local agendas. Not only does a comparatist therefore contend that 'we must try [...] to show that foreign law is not very different from ours but only appears to be so',¹³⁵ but the same individual remarks on 'how similar our laws on tort [...] can be made to look with the help of some skilful (and well-meaning) manipulation' (the word is indeed 'manipulation', which at least has the virtue of being explicit about the governing strategy).¹³⁶

The argument for similarity in the face of difference can, once again, follow flagrantly ethnocentric lines pursuant to which the other is readily castigated as an under-developed version of the self. Upon observing that English law differs from German law as regards statutory interpretation, the same German academic who had previously written about the European character of English law (without, apparently, reserving the case of statutory interpretation) holds that the benighted English model must evolve in order to be more like the law in Germany where there prevails a 'refined and liberal approach to statutory interpretation [that] constitutes a considerable advance in legal culture',¹³⁷ a fact that, according to the author, 'can hardly be disputed'.¹³⁸ This individual adds how it is time for English law to learn the 'lesson [that] has been learnt in Germany [and] [that] explains the great success of the German Civil Code'.¹³⁹ Indeed, he concludes that '[i]t is hard to understand why the courts in England should not be able, in a similar manner [to German courts], imaginatively to develop and elaborate the statutory law'.¹⁴⁰ Here, the common law would be withdrawn from its history in order to be inserted into the German model of statutory interpretation that is, narcissistically, taken as a bench-mark — supremacy being assigned *a priori* without the felt need for any justification (one could also mention the problematic fact that for the author, German 'legal culture' appears to consist of a homogeneous construct uninhabited by difference: there is, it seems, but *one* view of statutory interpretation obtaining in Germany). Through a hegemonic and derogatory rhetoric advocating the mimicry of the self, there takes place a disavowal of the common law. Via the expression of a pretension for a reformed, assimilated, other, the common law is encouraged to lose its power to signify, to abdicate its own discourse.

Now, even as one acknowledges that English law cannot be maintained in total exteriority by he who thinks it, accepts that otherness cannot be absolved of mediation, admits that the other is inevitably 'other than', the suggestion that the (English) other-in-the-law is but an imperfect rendition of the (German) self-in-the-law is simply not an appropriate language of re-presentation. Unacceptably, this configuration is working to

¹³⁵ Markesinis, BS (1993) 'The Destructive and Constructive Role of the Comparative Lawyer' (57) *RabelsZ* 438 at 443.

¹³⁶ Markesinis, BS (1997) 'Why a Code Is Not the Best Way to Advance the Cause of European Legal Unity' (5) *European Review of Private Law* 519 at 520. See also Schlesinger, RB 'Introduction' supra note 125 at 35 who observed that national reports 'had to be revised, and sometimes re-organized, in order to make them responsive to, and supportive of, the General Reports' — these, needless to add, expressing the major ideological orientations of the research project.

¹³⁷ Zimmermann, R (1997) '*Statuta sunt stricte interpretanda?* Statutes and the Common Law: A Continental Perspective' *Cambridge Law Journal* 315 at 321.

¹³⁸ *Ibid.*

¹³⁹ *Id* at 326.

¹⁴⁰ *Id* at 328.

the undue advantage of the self who is made to occupy a place of foundation. In fact, the language being used amounts to a strong gesture of (unnegotiable) violence for the self imposes itself to the other rather than allow the other to expose itself to it: it wants to teach the other rather than learn from it.¹⁴¹ Indeed, as long as the other-in-the-law is regarded as but an inferior vis-à-vis the self-in-the-law, ethnocentrism remains intact. No doubt such simplistic assertions as these under discussion hark back in important ways to the view that the comparatist-at-law should only be concerned with 'the existence of similar rules' and 'not with how [they] operat[e] within [...] society'.¹⁴²

That the attempt at an understanding of a foreign law-text has come to be overtaken by the instrumentalization of the law — for example, by its formulation 'in terms of precise and narrow rules'¹⁴³ — with a view to fitting foreign law within the uniformizing discourse that is currently ideologically fashionable can easily be illustrated further. Consider the fact that some academics feel able to devote more than 700 pages to an argument in favour of the similarity of European laws with respect to good faith in contractual relationships while ignoring a lead article by a leading scholar in a leading journal that develops a sophisticated interdisciplinary argument to the effect that German and English laws on point differ and can only differ.¹⁴⁴ Likewise, a chapter purporting to 'examine [...] how the concept of objective good faith is understood in the various [European] countries' and claiming by way of conclusion that 'a good faith clause [...] may be of particular importance for a new [civil or contract] code for Europe' elected not to refer to the 1992 House of Lords decision in *Walford v Miles* in which the court took the view that in English law a doctrine of good faith is 'unworkable in practice' since it is 'inherently repugnant to the adversarial position of the parties'.¹⁴⁵ Nowhere in the chapter's 31 pages or 154 notes is the case even mentioned.¹⁴⁶

Along converging lines, Vicki Jackson, a noted US constitutionalist, has released a substantial book to make the case for '[c]omparability in the sense of *similarity*' in order to reassure a US constituency, in particular its more conservative elements, that judicial references to foreign law are not to be feared since, well, foreign law is not so different from US law after all.¹⁴⁷ In support of her claim, Jackson observes that 'France [has] amend[ed] its constitution to permit judicial reviews of laws after they are enacted, moving away from

¹⁴¹ Cf Blanchot, M (1955) *L'Espace littéraire* Gallimard at 263: 'What threatens reading the most: the reality of the reader, his personality, his immodesty, [his] pertinacity in wanting to remain himself in the face of what he is reading'.

¹⁴² Watson, A *Legal Transplants* supra note 122 at 96 note 3 and 20, respectively.

¹⁴³ Schlesinger, RB 'Introduction' supra note 125 at 9. In the first edition of his casebook, Schlesinger formulated his unabashedly practical orientation in very clear terms. For him, the main point of comparative legal studies is to allow one to write 'an understandable letter asking for [the] opinion [of local counsel]' and 'make it possible for [one] "really to grasp [...]" that opinion: Schlesinger, RB (1950) *Comparative Law* Foundation Press at x-xi.

¹⁴⁴ See Zimmermann, R and Whittaker, S (eds) (2000) *Good Faith in European Contract Law* Cambridge University Press. The startling omission is Teubner, G (1998) 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (61) *Modern Law Review* 11.

¹⁴⁵ Hesselink, MW (2011) 'The Concept of Good Faith' in Hartkamp, A et al (eds) *Towards a European Civil Code* (4th ed) Wolters Kluwer at 620 and 648, respectively. The English case is *Walford v Miles* [1992] 2 AC 128 (HL) at 138 (Lord Ackner).

¹⁴⁶ Strangely, the author does not refer to a single English case throughout his text and confines his repertoire of authorities bearing on English law to one regulation, one law-review article, and six textbooks. But this exceedingly slim line of (Netherlandocentric?) references does not prevent the pronouncement that the English reticence vis-à-vis good faith is 'unjustified': Hesselink, MW 'The Concept of Good Faith' supra note 145 at 648.

¹⁴⁷ Jackson, VC *Constitutional Engagement in a Transnational Era* supra note 114 at 178 [emphasis original].

its longstanding constitutional opposition to judges having such power', a development that she holds as revealing 'some degree of transnational convergence towards judicial enforcement of constitutions'.¹⁴⁸ As I interpret this passage, Jackson's chief objective is to demonstrate to her US readership that after its 2008 institutional reform France is (at last?) operating like the US regarding constitutional review. Pursuant to this Americanocentric perspective, French law is not to be apprehended as a source of disturbance or anxiety by US constitutionalists. French law not being as 'other' as might have been feared, US lawyers ought not to be as disconcerted by it as they might have expected. In effect, French constitutional law is (now) so 'un-other' as to warrant active consideration by US constitutionalists. Arguably, French law shares such commonalities with US law that it could, in fact, even be envisaged as having something helpful to tell US constitutional lawyers.

But in order for this ready connection between French and US law to be propounded in a way that appears creditable, much must remain unsaid. Indeed, as Jackson produces her reassuring *re-presentation* of foreign law, she excludes a substantial amount of information both at this early juncture and everywhere else in her book. Specifically, she omits to discuss how, even after the 2008 reform, the French model continues to differ in most significant respects from its US counterpart.

Some of the obvious specificities characterizing post-reform French constitutional law, which all remain under erasure in Jackson's monograph, include the fact that in France only the *Conseil constitutionnel* is entitled to address the matter of the constitutional conformity of legislative texts to the 'rights and freedoms' (*droits et libertés*) guaranteed by the Constitution.¹⁴⁹ This restriction means that constitutional review is the prerogative of a body (which, strictly speaking, is not a court) effectively consisting of former politicians and other *notables* appointed pursuant to a partisan political process. Meanwhile, career judges sitting in ordinary courts, whether in the private-law or administrative-law sphere, enjoy no right to pronounce on the constitutional issue. Yet, although the request for an examination of the constitutionality of a given legislative text, known as the 'priority constitutional question' (*question prioritaire de constitutionnalité* or 'QPC'), falls within the exclusive jurisdiction of the *Conseil constitutionnel*, it cannot be argued immediately before it. Rather, the constitutional objection must first be made by an individual before an 'ordinary court', either on the 'private-law' or 'administrative-law' side, in the course of proceedings to which he is a party. Importantly, the litigant has to show that the contested legislative text is relevant to the resolution of the litigation at hand.¹⁵⁰ Once these basic requirements are satisfied, the constitutional challenge has to undergo two filtering processes by French judges.

A first appreciation of the character of the constitutional objection is made by the lower court to whom the matter is initially submitted. For the argument to be entertained at this level, it requires 'not to be devoid of a serious character' (*ne pas être dépourvu de*

¹⁴⁸ *Id* at 1.

¹⁴⁹ French Constitution, article 61-1 as added by 'Constitutional Statute No 2008-724 Dated 23 July 2008 on the Modernization of the Institutions of the Vth Republic' [*Loi constitutionnelle no 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République*] article 29 *Journal officiel* 24 July 2008 at 11890.

¹⁵⁰ 'Organic Statute No 2009-1523 Dated 10 December 2009 Relating to the Application of Article 61-1 of the Constitution' [*Loi organique no 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution*] article 23-2 *Journal officiel* 11 December 2009 at 21379.

caractère sérieux').¹⁵¹ Again, observe that the lower court is not entitled to pronounce on the constitutional merits of the claim and that its role is strictly confined to an assessment of the importance of the grievance. If the lower court confirms the significance of the issue being raised, it interrupts the proceedings and refers the constitutional issue 'without delay' (*'sans délai'*) to the highest court, that is, either to the *Cour de cassation* (on the 'private-law' side) or the *Conseil d'Etat* (in 'administrative-law' matters).¹⁵² Either one of these top-tier 'courts' (strictly speaking, the *Conseil d'Etat* is not a 'court') then has three months to decide in its turn if it wishes to send the case for constitutional resolution to the *Conseil constitutionnel*, the relevant criterion for referral being slightly more restrictive than the one applied by lower-court judges since the *Cour de cassation* or *Conseil d'Etat* have to be persuaded that the constitutional argument is 'serious' (*'sérieux'*).¹⁵³ This screening process is anything but cosmetic. Thus, during the four months following the coming into force of the reform on 1 March 2010, the *Cour de cassation* referred only 99 out of 256 claims (or 39% of the total number of submissions) and the *Conseil d'Etat* 26 out of 75 (or a little over 33% of the files).¹⁵⁴ If the constitutional objection is transferred to the *Conseil constitutionnel*, the *Conseil* has three months to reach its decision. Should the *Conseil* hold that the impugned legislative text indeed fails to conform to the guarantees concerning 'rights and freedoms' inscribed in the Constitution, this text finds itself abrogated as of the publication of the *Conseil's* decision. However, the *Conseil constitutionnel* can defer the application of its finding until a later date, which it is itself able to set.¹⁵⁵ Though the continued presence on the statute book of a legislative text having been declared unconstitutional is obviously most problematic, the aim of this postponement is to allow the government enough time to prepare alternative legislation so as to avoid a legal vacuum.

Beyond these technicalities, what fails to be indicated in Jackson's book is that the French reform addresses ascertainably local concerns traceable to the political unrest that plagued France in the late 1940s, on the one hand, and the ever-stronger impact on France of European Union law and the European Convention on Human Rights, on the other. For instance, leading French politicians, making specific reference to European institutions, have been arguing since at least 1990 that if a French legislative text is legally problematic, it should be for the French themselves to address the matter locally rather than be scolded on the international stage by a supranational entity like the European Court of Human Rights.¹⁵⁶ Once the decision had been made to reform the French Constitution, however, a

¹⁵¹ 'Organic Statute No 2009-1523 Dated 10 December 2009 Relating to the Application of Article 61-1 of the Constitution' [*Loi organique no 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution*] article 23-2 *Journal officiel* 11 December 2009 at 21379.

¹⁵² 'Organic Statute No 2009-1523 Dated 10 December 2009 Relating to the Application of Article 61-1 of the Constitution' [*Loi organique no 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution*] article 23-2 *Journal officiel* 11 December 2009 at 21379.

¹⁵³ 'Organic Statute No 2009-1523 Dated 10 December 2009 Relating to the Application of Article 61-1 of the Constitution' [*Loi organique no 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution*] article 23-4 *Journal officiel* 11 December 2009 at 21379.

¹⁵⁴ Brameret, S 'La motivation des décisions d'irrecevabilité des questions prioritaires de constitutionnalité par le Conseil d'Etat' *Petites Affiches* 5 May 2011 at 18 note 3.

¹⁵⁵ French Constitution, article 62 as amended by 'Constitutional Statute No 2008-724 Dated 23 July 2008 on the Modernization of the Institutions of the Vth Republic' [*Loi constitutionnelle no 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République*] article 30 *Journal officiel* 24 July 2008 at 11890.

¹⁵⁶ On 24 April 1990, Prime Minister Michel Rocard stated as follows: 'If there are, in our law, disputable provisions, I prefer, for myself, and by far, that they be declared such by French judges rather than have inflicted upon us the humiliation of being punished [...] in a supranational body in Strasbourg. [...] The only

historical distrust of the judicial branch made it impossible for judges to exercise definitive constitutional control. The pulverization of adjudicative authority through a somewhat intricate system of referrals and filters — not to mention the containment of the newly-established constitutional assessment to circumstances delineated by statute and the solicitude allowed to be shown to the state in the case of abrogation — also attests to the continued prevalence of a legicentric legal culture whereby a legislative text is regarded, in time-honoured Rousseauian terms, as the expression of the general will and therefore worthy of profound reverence.

In sum, the 2008 amendments to the French Constitution disclose no preoccupation with anything other than a local agenda. Most reasonably, then, a commentator writes that '[f]or better or for worse, the reform does not erase French exceptionalism or "anomalies"' and adds that '[t]he reform in fact follows neither [the US or the German] models of *ex post* constitutional review'.¹⁵⁷ One can easily further emphasize the singularity of the French model by adding that the kind of constitutional examination made possible by the 2008 revision supplements the *a priori* constitutional determination that has been in place since 1974 whereby 60 members of either the lower or upper house of Parliament ('*Assemblée nationale*' or '*Sénat*') can ask the *Conseil constitutionnel* to assess the constitutionality of a statute after it has been adopted but before it has been promulgated into law. Accordingly, French law now features two forms of constitutional evaluation, one *a priori* (reserved, as a typical expression of French republicanism, to the political élite) and the other *a posteriori* (disclosing a limited measure of decentralization), one evidencing a hierarchical attitude and the other a more democratic ethos.

Once more, the persuasiveness of the correlation being drawn between French and US law by Jackson very much depends on her election to silence French singularity in as much as it does not fit the transnational vision she is defending. Here, as elsewhere, it appears that 'the comparati[st] presumes similarities between different jurisdictions in the very act of searching for them',¹⁵⁸ while in effect one would want a comparatist-at-law to behave in precisely the opposite way. For example, rather than attempt to fit the square peg of similarity into the round hole of singularity, Jackson could have drawn on her expert knowledge of foreign law and, against the background of her *re-presentation* of French law, *which will never be too localized*, told US lawyers that to the extent that they expect foreign law to be like 'their' law or assume laws around the world to operate as a declension of 'their' law, their views on similarity and convergence across laws are at once ethnocentric and simplistic.

To understand why Jackson advocates US law as a language of general significance into which one is invited to translate French constitutional law (that is, again not insignificantly, '*droit constitutionnel*') and deemed able to do so without more ado, one has to appreciate, as I have indicated, that her book ultimately wishes to foster a domestic discourse targeting

fact that matters is [...] that the decision be taken by French authorities'. The reference is to the European Court of Human Rights. For Rocard's speech, see Carcassonne, G and Duhamel, O (2011) *QPC: la question prioritaire de constitutionnalité* Dalloz at 19. The official version is at *Journal officiel* [Débats parlementaires/Assemblée nationale] 25 April 1990 at 591.

¹⁵⁷ Hunter-Hénin, M (2011) 'Constitutional Developments and Human Rights in France: One Step Forward, Two Steps Back' (60) *International and Comparative Law Quarterly* 167 at 172 [emphasis original].

¹⁵⁸ Vining, J (1986) *The Authoritative and the Authoritarian* University of Chicago Press at 65. Cf Spivak, GC (2009) 'Rethinking Comparativism' (40) *New Literary History* 609 at 611 who chastises the 'discover[y] of varieties of sameness' as too 'easy'.

domestic circumstances (in this case, the US dispute about the legality and legitimacy of the US Supreme Court making reference to foreign law in constitutional adjudication). My critique is not that the US Supreme Court cannot profitably refer to foreign law; in fact, foreign references are citations that a comparatist cannot not want in a judicial decision. But the comparative motion requires to show how a law existing as encultured law (indeed, *inevitably* existing as encultured law) *elsewhere* can carry normative relevance *here*. And this demonstration seems to call for much greater sophistication than is allowed by pieties to the effect that 'cultural, political, social, as well as legal phenomena contribute to the spread of common problems and development of common ideas of how to handle them'¹⁵⁹ — or, for that matter, that '[w]e share traditions, problems, and challenges with many other nations with similar cultures'.¹⁶⁰

The (non-'hyperparticula[r]') fact is that the problem addressed by France on the occasion of its 2008 constitutional reform is not common to the difficulty faced by US courts in (and since) the 1803 landmark Supreme Court decision in *Marbury v Madison*. And the further (non-'hyperparticula[r]') fact is that the French 'idea' mobilized to respond to what is perceived to be the matter at hand in France is not common to the US 'idea' either. To suggest, to quote Jackson's key sentence again, that the French development may reveal 'some degree of transnational convergence towards judicial enforcement of constitutions' brings to mind Laurence Tribe's critique of the US Supreme Court's decision in *Lawrence v Texas*,¹⁶¹ in which the majority opinion claimed to derive some normative purchase from a sprinkle of the most cursory references to foreign law. In a comment, Tribe regrets the Court's 'crude' comparison.¹⁶² But for Jackson, 'the brief comparative reference to Europe [in *Lawrence v Texas*] seems sensible on the basis of *shared* commitments to political and civil rights, democracy, and the rule of law'.¹⁶³ If a healthy dose of (non-'hyperparticula[r]') scepticism vis-à-vis referential assumptions be allowed, one is prompted to reply: how 'shared' is 'shared'? In other words (literally!), how does one say 'civil rights' in French or 'rule of law' in German?

It remains that the desire to convince a local readership that it should engage with foreign law cannot justify a dramatic re-configuration of, say, French law, purporting to excise its salient characteristics. Only so much instrumentalization of the other's law with a view to fostering the self's goals can be defended. Perhaps this statement should, in fact, be reformulated thus: one always instrumentalizes the other in the pursuit of one's own ambitions but, on account of the recognition owed to the other and because of the

¹⁵⁹ Jackson, VC *Constitutional Engagement in a Transnational Era* supra note 114 at 279.

¹⁶⁰ Dworkin, R 'Justice Sotomayor: The Unjust Hearings' *The New York Review of Books* 24 September 2009 at 40. While it is being rehearsed as doctrinally chic in certain elite cosmopolitan circles, one must insist that such discourse proves seriously misleading if only on account of its triviality. For a longer litany, see Slaughter, A-M (2004) *A New World Order* Princeton University Press at 65-103.

¹⁶¹ (2003) 539 US 558.

¹⁶² Tribe, LH (2004) 'Lawrence v Texas: The "Fundamental Right" That Dare Not Speak Its Name' (117) *Harvard Law Review* 1894 at 1931. Another pertinent critique of such 'comparison lite' is in Ramsey, MD (2004) 'International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence*' (98) *American Journal of International Law* 69 at 82 where the author warns that the 'integrity' of comparative research is at stake. In the US, an innumerable quantity of pixels have been devoted to the question of judicial references to foreign law in recent years. For a particularly insightful analysis situating the matter by comparison to the place of international law in adjudication, see Knop, K (2011) 'State Law Without Its State' in Sarat, A, Douglas, L, and Umphrey, MM (eds) *Law Without Nations* Stanford University Press at 66-100.

¹⁶³ Jackson, VC *Constitutional Engagement in a Transnational Era* supra note 114 at 394 [emphasis added].

respect due to the other as *alter ego*, given this *debt*, any instrumentalization must aim to be the *lesser* instrumentalization. For Jackson, the worthier comparative argument — an infinitely more complex and challenging claim — would have been ‘to make [French law] “unfamiliar,” to make [French] forms difficult, to increase the difficulty and length of perception [for her US readership],¹⁶⁴ that is, to *interrupt* US expectations and demonstrate that US constitutional law has much to learn from French constitutional law *because French law is so irreducibly different from it or so irreconcilably singular vis-à-vis it*. That I should favour the problematization of the differend illustrates how optimistic I am as regards ‘the possibilities of learning’ vaunted by Jackson; indeed, I hold that one learns from difference rather than sameness (if A behaves in the same way as B, what is there for B to *learn* from A?).¹⁶⁵

According to the leading treatise in the field of comparative legal studies, the comparatist-at-law ought somehow to be conducting his similarization enterprise in ‘pure and disinterested’ fashion.¹⁶⁶ In his text, Kötz expressly advocates scientific reductionism across laws, a kind of mathematical response to the question raised by the situatedness of the interpretive endeavour involved in any comparison. For instance, he argues in favour of comparison-at-law as an ‘international legal science’ or a ‘universal legal science’.¹⁶⁷ He also claims that comparatists must aspire to ‘scientific exactitude and objectivity’.¹⁶⁸ Indeed, comparative legal studies requires to operate like ‘physics’, ‘microbiology’, or ‘geology’.¹⁶⁹ Unsurprisingly, perhaps, through the expression of this predilection for law-as-science — this science envy — and on account of an attendant injunction to the effect that comparatists have to focus exclusively on some areas deemed (by Kötz himself) to be ‘relatively “unpolitical”’ (these would include, to confine oneself to common-law parlance, contract, tort, and restitution law),¹⁷⁰ the author is replicating the epistemological schemata of appreciation and action characteristic of his native Germany and of the German legal culture that interpellated him and into which he was socialized (some of these frameworks being traceable over the very long term, for instance to Roman times).¹⁷¹

¹⁶⁴ Shklovsky, V ‘Art As Technique’ supra note 10 at 12.

¹⁶⁵ I want to add that for Jackson to confront ‘[the] undertone [...] that the [US], as a powerful and leading nation, has little to learn from others’ (Jackson, VC *Constitutional Engagement in a Transnational Era* supra note 114 at 391) is a courageous intellectual undertaking suggestive of the best comparatist militancy. On these terms, I applaud her admirable effort to heighten the relevance of foreign law in US constitutionalism. As I emphasize Jackson’s seriousness of purpose, I cannot but recall a French law professor who, having applied for a teaching position at the *Institut d’études politiques de Paris* (familiarily known as ‘*Sciences Po*’) was invited to make a recruitment presentation in May 2010, which I attended as a member of the public (I confess that my interest lay in the other finalist’s lecture). Upon being asked by the hiring committee why he was interested in comparative constitutional law, the French professor answered, ‘for fun’ (*pour le plaisir*). As I understood the *sotto voce* negotiations taking place at that crucial juncture in the recruitment process, the message being sent by the candidate was that he remained ‘hiring material’ for a French law school though he disclosed an outlandish, if increasingly fashionable, interest in foreign law (in law *out of the land*...). In other terms, the institution had no reason to be alarmed (what would there be to fear from a *comparaison de délasserment*?) and the majesty of French law was safe. By observing that he practiced foreign law strictly as a hobby, the way other law professors indulge tango or calligraphy, the applicant was ultimately signalling the innocuous character of his pursuit and thereby maintaining discursive decorum. In sharp contrast, Jackson, thankfully, is not writing ‘for fun’.

¹⁶⁶ Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 116 at 34.

¹⁶⁷ Id at 45 and 46, respectively.

¹⁶⁸ Id at 45.

¹⁶⁹ Id at 15.

¹⁷⁰ Id at 40.

¹⁷¹ For Heidegger, one ‘always exists factually’. One is not, then, ‘a free-floating self-projection’. Rather, one is

It is those models that Kötz has been made to incarnate through an array of institutional mechanisms that imposed themselves on him (like lectures, seminars, compulsory readings, and examinations) and that he has effectively incorporated into his individual personal and intellectual history, his cognitive temperament and taste, and his political agenda. Consequently, he now embodies one of the institution's forms of existence. In the process, he offers a fine example of the constitution of the individual mind and of the social colonization of the individual who, through the internalization of institutional power, is enlisted in a belief system and precipitated out of law school not only as a controlled person, but as a changed one — and this, even as he takes himself to have successfully disowned parochial ways and replaced them with a defiant cosmopolitanism.¹⁷² (In this regard, Kötz's epistemology has a lot in common with Descartes's essentialism. Indeed, Descartes 'did not notice either [...] how much of what he took to be the spontaneous reflection of his own mind was in fact a repetition of sentences and phrases from his school textbooks. Even the *Cogito* is to be found in Saint Augustine'.¹⁷³ In other words, Descartes also misrecognized himself as an unalienated individual, as someone who had escaped the structural impact of the institutional construction of the self.)

Crucially, the consensus around the similarization project is so pervasive within the field of comparative legal studies that this intellectual endeavour has remained largely immune from critique, discrepant evidence or awkward issues being readily ignored by those who have an interest in maintaining the prevailing 'atmospherics'.¹⁷⁴ Yet, Kötz's appreciation is abjured by the inescapable fact that any feature of legal ordering — even the law of contractual relationships, civil liability, or unjust enrichment! — has distributive implications and is therefore political.¹⁷⁵ Moreover, Kötz is assuming an obsolete view

'determined by thrownness as a Fact of the entity which it is; and, as so determined, it has in each case already been delivered over to existence, and it constantly so remains': Heidegger, *M Being and Time* supra note 6 at 321.

¹⁷² Typically in evidence in Schlesinger, as I mentioned (supra note 123), the predilection for law-as-mathematics boasts an ancient pedigree, especially in countries substantially indebted to Roman law such as Germany and France. For instance, see Le Douaren, F [Duarenus] (1765) [1561] *In primam partem Pandectarum, sive Digestorum, methodica enarratio in Opera omnia* vol I [Lucca ed] at 3: '[T]he elements of the law, the foundations of its maxims and of its fundamental problems are like the points, the lines, and the surfaces in geometry'. Famously, Domat also thought that law ought to model itself on geometry. For him, 'this mode of reasoning is more simple, more natural and easier than that of logic': Domat, J (1989) [1697] *Les Quatre livres du droit public* Université de Caen bk I title XVII at 307. Perhaps the widespread influence of the scientific model can also be shown by the fact that the two protagonists in the early-19th-century debate concerning the codification of German civil law, although bitterly opposed as regards this fundamental question, were in agreement with respect to another, which they clearly approached as being even more primordial, that is, they were both defending the relevance of the mathematical paradigm to law. For example, see Thibaut, AFJ *Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* supra note 8 at 43; Von Savigny, FC (1840) *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (3rd ed) JCB Mohr at 22. Thibaut, favouring the making of a code, specifically advocated 'pure legal mathematics'. Meanwhile, his opponent argued that the congruence between law and geometry, which unquestioningly had to obtain, was particularly obvious in Roman law.

¹⁷³ MacIntyre, A (1977) 'Epistemological Crises, Dramatic Narrative and the Philosophy of Science' (60) *The Monist* 453 at 458 [emphasis original].

¹⁷⁴ Thus, Richard Hyland specifically observes how '[i]t is odd that it took so long for anyone to object to the functionalist vision': Hyland, R *Gifts* supra note 131 at 68. A prominent exception is Frankenberg, G (1985) 'Critical Comparisons: Re-thinking Comparative Law' (26) *Harvard International Law Journal* 411. See also Hill, J (1989) 'Comparative Law, Law Reform and Legal Theory' (9) *Oxford Journal of Legal Studies* 101. Since Kötz has never conducted anything along the lines of an *Auseinandersetzung*, his reaction to these critiques remains unknown.

¹⁷⁵ See Kennedy, Duncan (2002) 'The Political Stakes in "Merely Technical" Issues of Contract Law' (10) *European Review of Private Law* 7.

of science, scientific inquiry having now been convincingly situated in terms of the historical, political, social, and philosophical conditions within which it manifests itself. Indeed, since the 1980s, the field of science studies — either in its ‘Science, Technology, and Society (STS)’ or ‘Sociology of Scientific Knowledge (SSK)’ guise — has featured a growing number of sophisticated interdisciplinary accounts challenging the traditional understandings of scientific practice and construction of scientific knowledge, all of them defending the view that no persuasive argument purporting to explain why some scientific claims triumph over others can draw either on objective evidence or on the truth of the victorious statement.¹⁷⁶ For example, it is observed that even the claimed objectivity of the biologist is informed by a determined interest. Or it is noted that the instruments used for describing the world are at once historically determined and qualified (and that if I want to assess those instruments, I require other instruments that are equally determined and qualified...).

In sum, one can assert that Kötz’s purported de-politicization is best regarded as the configuration of a specific brand of (conservative?) politics pretending to have neutralized the political through the re-presentation of the ‘legal’ in the form of the merely technical. Kötz’s positivism, then, cannot escape the all-enveloping theoretical membrane. It is not ‘point-of-viewless’. In effect, it is anything but theoretically anodyne. Indeed, through his affirmation of the positivist hegemon, on account of his ‘privileging of tidiness above other possible commitments’,¹⁷⁷ because, to quote a provincial disciple, he ‘ha[s] given much weight to some more “formal” aims, such as rationality, legal certainty, predictability, and efficiency’,¹⁷⁸ given that his intellectual endeavour promotes ‘objective evidence, terminological clarity, logical consistency, systematic coherence, and ahistorical orientation’,¹⁷⁹ since his partial and contestable stand as regards the focus of comparative legal research forecloses the realization of other possibilities that would fail the test of positivist surety and its clear semiotic boundaries, Kötz produces ‘exactly the kind of politicized theory that [he] claims to reject and from which [he] strives to distinguish [him]self’ (something that he fails to appreciate because he is unwilling to probe his convictions).¹⁸⁰

Remarkably, even as he is casting comparison-at-law as a de-worlded ‘*science pure*’ consisting of “neutral” concepts’,¹⁸¹ Kötz is mired in a fundamental contradiction. While

¹⁷⁶ For a selection of pioneering texts whose titles and sub-titles offer revealing insights into the intellectual approaches governing current work in science studies, see Barnes, B, Bloor, D, and Henry, J (1996) *Scientific Knowledge: A Sociological Analysis* University of Chicago Press; Knorr-Cetina, K (1981) *The Manufacture of Knowledge: An Essay on the Constructivist and Contextual Nature of Science* Pergamon Press; Latour, B and Woolgar, S (1986) *Laboratory Life: The Construction of Scientific Facts* (2nd ed) Princeton University Press; Pickering, A (1984) *Constructing Quarks: A Sociological History of Particle Physics* University of Chicago Press; Shapin, S and Schaffer, S (1985) *Leviathan and the Air-Pump: Hobbes, Boyle, and the Experimental Life* Princeton University Press; Biagioli, M (1993) *Galileo, Courtier: The Practice of Science in the Culture of Absolutism* University of Chicago Press; Licoppe, C (1996) *La Formation de la pratique scientifique* La Découverte; Shapin, S (1995) *A Social History of Truth: Civility and Science in Seventeenth-Century England* University of Chicago Press; Longino, HE (1990) *Science As Social Knowledge* Princeton University Press. For an influential overview of philosophy of science not written from a science-studies standpoint but nonetheless repeatedly casting doubt on the pertinence of ‘truth’ in science, see generally Godfrey-Smith, P (2003) *Theory and Reality* University of Chicago Press.

¹⁷⁷ Hutchinson, AC *The Province of Jurisprudence Democratized* supra note 12 at 100.

¹⁷⁸ Von Bar, C (2008) ‘The Launch of the Draft Common Frame of Reference’ (14) *Juridica International* 4 at 9.

¹⁷⁹ Hutchinson, AC *The Province of Jurisprudence Democratized* supra note 12 at 41.

¹⁸⁰ Id at 40. In this regard, Kötz’s unpreparedness to engage with his critics deserves to be noted once more.

¹⁸¹ Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 116 at 6 and 10, respectively. The first

promoting the abstract German model for all — a striking instance of how, whether consciously or not,¹⁸² he cannot avoid the over-learned and over-valued acceptances of his own legal culture, of how '[t]he strength and the efficacy of the system [...] transform transgressions into "false exits"',¹⁸³ of how 'the [German] scene [...] nonetheless remains active, stirring, inscribed in white ink, a design invisible and concealed in the palimpsest'¹⁸⁴ — he is also supporting the return to 'the era of natural law' (the word 'return' appears especially apt as Kötz, it seems, would take us back to the days of Grotius or Suárez nearly 500 years ago).¹⁸⁵ To be sure, it is hard, even on a charitable reading, to reconcile the case for distended *Dogmatisierung* with that for transcendentalism — unless, perhaps, one takes the view à la Paul Dirac that abstract mathematics are to reveal the laws of nature. Be that as it may, both of Kötz's strategies appear strongly suggestive of one form or other of deceptive genericism. Even in a more sophisticated version than Kötz's, the prescriptive claim in favour of a generic understanding of law continues to rest on the unacceptably facile assumptions that problems across laws are the same, that the methods used to address them are the same, and that the solutions formulated to resolve them are the same.¹⁸⁶ But the fact is that, far from being the species of a genus (no such generality exists), the different laws are concrete and irreducible in their localism.

A panorama of the *doxa's* unexamined positivism also reveals Gordley exclaiming, in resoundingly Platonizing terms, 'I am concerned with what the law [i]s', and holding that an interdisciplinary comparison 'should not be confused with a description of [...] the law'.¹⁸⁷ Other comparatists propound a like-minded view and maintain that 'law is only that which is binding'.¹⁸⁸ In the process, they similarly refuse to accept that law is ever-changing, as befits that which depends on interpretation, and that no account can overcome the gap between *signum* and *res*, such that any description is inscription (no comparatist is *scriptor absconditus*). In fact, for Gordley to be preoccupied with 'law-as-it-is', to aim to reach the 'is-ness' of the law, is not unlike seeking to access futyirep votkgemirrec silpdxqa. And it is positivism also that prompts Kötz to urge comparative legal studies to 'leave aside the topics which are heavily impressed by moral views or values'.¹⁸⁹

formulation appears in French in both the English and German editions.

¹⁸² Cf Gadamer, H-G (1994) [1975] *Heidegger's Ways* Stanley, JW (trans) SUNY Press at 58: 'The experience of history, which we ourselves have, is also covered only to a small degree by that which we would name *historical consciousness*' [emphasis original].

¹⁸³ Derrida, J *Marges* supra note 21 at 162.

¹⁸⁴ Id at 254.

¹⁸⁵ Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 116 at 45.

¹⁸⁶ For instance, see Law, DS (2005) 'Generic Constitutional Law' (89) *Minnesota Law Review* 652. I discern a tension between this author's transcendental aspiration with respect to constitutionalism and his more general commitment to empirical studies.

¹⁸⁷ 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 and 1077, respectively. See also Markesinis, B (1990) 'Comparative Law: A Subject in Search of an Audience' (53) *Modern Law Review* 1 at 13 who writes that '[c]ase law can reveal what the law really is'.

¹⁸⁸ 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 232.

¹⁸⁹ Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 116 at 40. Beckett's objection to Vico 'hoisting the real unjustifiably clear of its dimensional limits' seems apposite: Beckett, S (1984) [1929] 'Dante... Bruno. Vico.. Joyce' in *The Grove Centenary Edition* Auster, P (ed) vol IV Grove Press at 495.

Ultimately, though, the orthodoxy's efforts to discipline comparison-at-law, to regulate and control comparative research, to instill *good comparative manners* to the effect that bland is right, fail to overcome the epistemological impecuniosity of the '*praesumptio similitudinis*', the theoretical deficiency of 'functionalism', and the scholarly bankruptcy of 'manipulation'. In sum, the *doxa*'s attempts cannot obviate the intellectual vacuity of the 'pure comparison of laws'.¹⁹⁰ Only something like forcible interpretive closure allows the comparatist to assert that laws-in-co-presence can exist as a non-conflictual and harmonious ensemble — an illustration of how, even as it claims to be solidly grounded in the analytical and empirical, positivism retains an irenic utopian quality deriving in turn from an untroubled craving for uncontrolled, endemonistic access to foreign law. Specifically, the identification of 'sameness' across laws — that is, the similarization enterprise — can *only* be achieved if the historical, political, social, philosophical, linguistic, economic, and other *constitutive* discourses to which law-texts can be traced are dogmatically/artificially excluded from the interpretive framework. The frenetic search for commonalities-that-clearly-must-be-there-since-we-want-them-there is *necessarily* based on the repression of the singularity located in the matrix within which any manifestation of posited law is *inevitably* ensconced. Law is grounded: it simply does not exist *in der Luft*.

The argument for homogeneity across a range of posited laws — the neo-colonial imposition of a monoculture (or of one's monoculture) of legal knowledge — must therefore be regarded as a demonstrably coercive enterprise: heterogeneous singularities or differences are made to resemble each other (indeed, it is 'only differences [that are made to] resemble each other').¹⁹¹ A striking example of these oppressive tactics is on offer in the Unidroit *Principles of International Commercial Contracts* that expressly seek 'to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied'.¹⁹² This statement shows that any claimed commonality across laws-in-co-presence is strictly mental and only arises in a utilitarian guise, that is, by reference to a given intellectual strategy and its limits as deliberately set. Indeed, 'similarity [...] is incoherent if it is taken to be similarity independent of our theories and interests'.¹⁹³ In effect, '[o]ne believes or wants the text to mean what one wants or believes' — an observation that leads its author, a distinguished French philologist, to remark that '[t]his search for non-difference is the strongest censorship'.¹⁹⁴

Apprehensions of laws-in-co-presence that do so much violence to what there is, that actively seek to suppress other knowledges, for instance by purporting to show them to be like everyone else's (and, in particular, like 'our own'), cannot carry any tenable appeal for comparatists-at-law. Leibniz's insight holds, which, to repeat, teaches that in the co-presence of more than one law difference is necessarily there, that it is ineliminably present, no matter how much any comparatist-at-law may wish to disregard it. Rather

¹⁹⁰ Id at 47.

¹⁹¹ Deleuze, G (1969) *Logique du sens* Editions de Minuit at 302.

¹⁹² Governing Council of Unidroit (2004) 'Introduction' in *Unidroit Principles of International Commercial Contracts* (2nd ed) International Institute for the Unification of Private Law at xv; repr. in id (2010) [3rd ed] at xxiii. One is reminded of Beckett's castigation of 'the go-getters, the gerimandlers', those who go about with 'solution clapped on problem like a snuffer on a candle': Beckett, S (1984) [1938] 'Intercessions by Denis Devlin' in *Disjecta* Cohn, R (ed) Grove Press at 92.

¹⁹³ Boersema, D (2009) *Pragmatism and Reference* MIT Press at 180.

¹⁹⁴ Bollack, J (2000) *Sens contre sens* La Passe du Vent at 179-80.

than disempowering foreign knowledge, a form of epistemological injustice or indeed 'epistemicide',¹⁹⁵ the comparatist's task must therefore be, as he finds himself enmeshed in an experience of irreducibly complex, singular, forms of life-in-the-law, responsively and responsibly to characterize, articulate, and justify — to *redeem* — foreign law through a resolute focus on *foreign* knowledge, best described in terms of its local history, its local politics, its local socialness, its local episteme, and so forth.¹⁹⁶

What is required from comparative legal studies in an age of globalization — in the face of bewildering transformations in economic organization, social regulation, political governance, and legal regimes — is a profound understanding of how foreign legal 'communities', as they address either local issues or transnational patterns in their various local guises, think about the law, why they think about the law as they do, why they would find it challenging to think about the law in any other way than they do, and *how their thought differs vis-à-vis other configurations of the 'legal'*.¹⁹⁷ Note that to let the other speak is anything but a passive gesture. It is an activity: it is to *make* the other speak. In sum, instead of falling for ready positivism, comparatists-at-law need to engage in the construction of exceedingly complex narratives while abiding by Montesquieu's counsel: '[N]ot to consider as similar those instances that are really different and not to overlook

¹⁹⁵ See de Sousa Santos, B, Nunes, JA, and Meneses, MP (2007) 'Opening Up the Canon of Knowledge and Recognition of Difference' in de Sousa Santos, B (ed) *Another Knowledge Is Possible* Verso at xix.

¹⁹⁶ I accept that there is nothing that obviously exists as 'local' — or does not — and that the notion of the 'local' demands to be problematized, if only to avoid the traps of romanticization or over-exoticization. Thus, Whitehead refers to 'the fallacy of simple location': Whitehead, *Process and Reality* supra note note 79 at 137. For a thoughtful reflection on point, see Latour, B *Reassembling the Social* supra note 97 passim.

¹⁹⁷ The notion of 'community' requires in-depth theoretical investigation (bearing in mind at the outset that 'community' is expressed by many as a constraint from which they want to be emancipated). No discussion of 'community', however, can convincingly be dissociated from a profoundly autobiographical input. For instance, the fact of my francophony cannot but bear on my (sceptical) view of 'community'. After all, I am, by birth, a Quebec francophone, a *Québécois* who is also a colonized francophone, someone who speaks the language of the first acknowledged colonizers of Quebec, of those masters and schoolmasters, of those other francophones. In this regard, I relate to Derrida's experience of being exiled in language as he says, 'I have one language only, it is not mine': Derrida, J (1996) *Le Monolinguisme de l'autre* Galilée at 13. But I am also a francophone who teaches at the Sorbonne, arguably the most 'central' academic institution within the francophone world. And the *Québécois* that I continue to be does not speak French in the way his Parisian colleagues speak French. For a Quebec francophone in Paris, to speak the French that one speaks is once more, although differently from before, to speak in a foreign language, in the language of the other — which entails that one relinquishes 'Parisian recognition', 'forever desired and desirable', a forfeiture that also has to do, of course, with the familiar French diffidence towards foreignness and the no less habitual condescension vis-à-vis cultural colonies: Gauvin, L (2010) 'Traversal of Languages' in McDonald, C and Suleiman, SR (eds) *French Global* Columbia University Press at 420. I could continue. Having been made a *Québécois* by birth, I am also a Canadian but not a Canadian in the way my Toronto-born colleagues can be Canadian. While to be Canadian is to be peripheral, to be *Québécois* is to be peripheral within the periphery. And there is more. As a Canadian, I am also a little American although I am not American in the way in which anglophone Canadians can be American. In the shadow of Heidegger's consideration of 'Mitsein' (a philosopheme translatable literally as 'being-with') as it relates to 'Dasein' (being), three texts in particular call for close reading: Blanchot, M (1984) *La Communauté inavouable* Editions de Minuit; Nancy, J-L (1986) *La Communauté désœuvrée* C. Bourgois; Agamben, G (1993) [1990] *The Coming Community* Hardt, M (trans) University of Minnesota Press. See also Lingis, A (1994) *The Community of Those Who Have Nothing in Common* Indiana University Press; Corlett, W (1989) *Community Without Unity* Duke University Press. See generally Herbrechter, S and Higgins, M (eds) (2006) *Returning (to) Communities* Rodopi; Esposito, R (2010) [1998] *Communitas* Campbell, T (trans) Stanford University Press. Famously, Benedict Anderson argues that (national) communities are imagined: Anderson, B (2006) *Imagined Communities* (2nd ed) Verso. Even if Ludwig Wittgenstein fails to summon me in the way Derrida does, I have benefitted from reading a learned investigation of the way in which the motif of 'exile' has coloured the Austrian philosopher's work: Klage, JC (2011) *Wittgenstein in Exile* MIT Press.

the differences in those that appear similar'.¹⁹⁸ The goal, then, must be to mobilize the differend as an alternative form of order or articulation of foreign law. Only against the background of differential comparison's edifying insights, and certainly not through the production of fallacious assimilates, can it become possible for comparatists to assess how, through their thought and action, on account of their writing, they can begin to do justice to the other-in-the-law in a way that reveals a creditable degree of consonance with the otherness-in-the-law that manifests itself across the differend. And, for this to happen, the comparatist-at-law must, resolutely, *trace*.

Rejecting the idea that law would be free from the constraints of place and time as unconvincing — holding that it is, in fact, hard to think of anything more susceptible to place and time than law — I find it convenient to use the word 'culture' to capture in synthetic fashion the traces constitutively informing the law and to which a responsible differential comparison must respond.¹⁹⁹ Concretely speaking, I deem it useful to be able to say that law exists as culture, that law is haunted by culture, in order to convey in shorthand form the dynamics between law and world — what positivists are prone to regard as 'the infective detritus of the world'²⁰⁰ — through the mediation of the trace. In other words, *law exists as culture, which exists as trace, which exists as law* (for those who like acronyms with their dinner, LCTL could offer a pithy rendition of this sequence). In this regard, then, I take the view that culture is not primarily an object to be addressed by a specialist discipline such as 'cultural studies' or anthropology, but the constructed idiom in terms of which the problematization of law must materialize. Accordingly, it is not that I am fetching the cultural from some realm outside the law and bringing it into law, but that I defend the claim that culture is not separable from law, that it constitutes an irreducible aspect of law. Again, I propose that law exists *as* culture. As I formulate this claim, I remain aware how strongly positivists defend the view that one ought to approach law as only that which is (legally) binding — a tautological understanding of the 'legal' that, despite its political forcefulness, remains but an interpretation and, as such, cannot foreclose others.

While definitions of culture, though abundant, tend to prove unsatisfactory and prompt often fruitless cavils, I have come to value Giorgio Agamben's characterization: 'Every culture is essentially a process of transmission and of *Nachleben*'.²⁰¹ In the published English translation of Agamben's essay, the word 'afterlife' is suggested parenthetically next to '*Nachleben*', which, in the Italian text, Agamben insists on keeping in the German

¹⁹⁸ Montesquieu (1951) [1748] *De l'esprit des lois* in *Oeuvres complètes* Caillois, R (ed) vol II Gallimard at 229.

¹⁹⁹ Fine illustrations of research on law-as-culture include Kahn, PW (1999) *The Cultural Study of Law* University of Chicago Press; Chase, OG (2005) *Law, Culture, and Ritual* New York University Press; Rosen, L (2008) *Law As Culture* Princeton University Press. Predictably, positivism has been activating its immune defenses and targeting them squarely at culture, difference, and the trace — challenging ideas all, which the *doxa* is determined to keep at a safe distance. For an example of the cursory expulsion of the law's spectrality (as if one could simply wave one's wand...), see Milhaupt, CJ and Pistor, K (2008) *Law and Capitalism* University of Chicago Press at 208 who dismiss 'culture' on the ground that it is '[an] open-ended concept' and that its use would 'ope[n] a Pandora's box of interpretive nightmares'. For another positivist, an account 'must remain within the law without taking recourse to general societal culture, because culture and its relation to the legal rules and institutions are *unclear*': Michaels, R 'Two Paradigms of Jurisdiction' *supra* note 48 at 1017 [emphasis added].

²⁰⁰ Mitchell, AJ *Heidegger Among the Sculptors* *supra* note 23 at 55-56. If they wanted to borrow from Beckett, positivists could also denigrate '[a]ll these demented particulars': Beckett, S (2006) [1957] *Murphy* in *The Grove Centenary Edition* Auster, P (ed) vol I Grove Press at 11. Even more dramatically, they could excoriate 'the offal of experience': Beckett, S *Proust*, *supra* note 112 at 546.

²⁰¹ Agamben, G (1992) [1977] *Stanzas* Martinez, RL (trans) University of Minnesota Press at 112.

original without offering any complementary insight. 'Nachleben' indeed harbours a posthumous dimension, such that it allows for 'a derivation of ought from was'.²⁰² More precisely, it connotes the combined ideas of 'survival' and 'influence' in a manner that perspicuously evokes law-as-culture and culture-as-trace (and trace-as-law).

As I attempt some delineation — and, in fact, a measure of concretization — of the notion of 'legal culture', I want to emphasize that the comparatist-at-law's primordial task remains to ascribe meaning to other laws, which are inherently hypercultural, and to the other-in-the-law, who is intrinsically hypercultural. Now, I argue that *a comparatist reading foreign law culturally cannot not affirm otherness, while a comparatist reading foreign law positivistically cannot not deny it.*

AN EXCURSUS ON CULTURE

Any understanding of 'culture' is itself cultural, in the sense at least that it varies according to place and time. And any appreciation of 'culture' is inevitably approached from a cultural standpoint in the sense at least that whoever comes to it is himself situated in place and time.²⁰³ In short, culture purports to capture a phenomenon of aggregation that is stabilized by imitation and standardized through reproduction over time (culture is less about recency than tradition). And then, there is law-as-culture, or legal culture, which is 'best illustrated by reference to legal language, legal reasoning, legal argument and legal justification' — all signs of human action through which culture manifests itself, having to do with a culture's 'ostensivity'.²⁰⁴ More complicatedly, legal culture also includes protean perceptions, inchoate awareness, and unconscious assumptions. In brief, a view of law-as-culture gestures towards the idea that whatever law there is, it is in important respects constructed, on the one hand, and that any fashioning of the 'legal' is in significant ways local, on the other. Note without further ado that, counter-intuitively perhaps, the 'sum' — legal culture — is to be approached as being smaller than the 'parts' — any given legal agent — because even as the notion of 'legal culture' can be taken to embrace all that pertains to the 'legal' within any individual, it never refers to more than a very small dimension of an individual's identitarian fabric (that is impossible to connect to stable boundaries and distinctions in any event): any individual is much more than his legal identity.²⁰⁵

It is obvious that legal culture, as a form of governance, is not to be reduced to a static, linear, totalizing, permanent, and idealized configuration. Speaking of 'legal culture' certainly does not automatically privilege coherence, imply reification, entail essentialism,

²⁰² Hardin, R (2011) *How Do You Know?* Princeton University Press at 171 [emphasis original].

²⁰³ Cf Wagner, R (1981) *The Invention of Culture* University of Chicago Press at 35: 'We study culture through culture'. For an excellent argument situating the emergence of a modernist sense of 'culture' in 1922 with specific reference to three paradigm-shifting texts in literature and anthropology — TS Eliot's *The Waste Land*, James Joyce's *Ulysses*, and Bronislaw Malinowski's *Argonauts of the Western Pacific* — see Manganaro, M (2002) *Culture*, 1922 Princeton University Press. Interestingly, the paramountcy of 'culture' in Eliot's and Joyce's texts is discerned although the word is not mentioned in the former and appears six times only in the latter. See also North, M (1999) *Reading 1922* Oxford University Press. See generally Williams, R (1983) *Culture and Society: 1780-1850* (2nd ed) Columbia University Press. The notion's Eurocentric history lies at the core of a well-known challenge to 'culture' in Dominguez, VR (1994) 'Invoking Culture: The Messy Side of "Cultural Politics"' in Torgovnick, M (ed) *Eloquent Obsessions* Duke University Press at 237-59.

²⁰⁴ Wilson, G (1987) 'English Legal Scholarship' (50) *Modern Law Review* 818 at 845. The notion of 'ostensivity' is in Inglis, F (2004) *Culture Polity* at 29.

²⁰⁵ This point is a leitmotiv in Latour, B *Reassembling the Social* supra note 97 passim.

exaggerate distinctness, preclude temporal change, efface individual variations or contestations that can take the form of participation or non-participation in a range of sub-cultures, fetishize identity so that it would lay beyond critique, trivialize agency or individual reasoning, and cast its advocates as blinkered conservatives.²⁰⁶ In sum, to argue the case for culture is not to fathom some tyrannical force 'ossifying' a 'community' along stereotypical lines and disabling any individual from harbouring idiosyncratic behaviour vis-à-vis the group. In effect, only culture's detractors ascribe such simplistic implications to culture — the extent of their attempt to disqualify the notion through caricature possibly being a measure of the significance of the threat that 'culture' is seen to pose on the road to the 'universalism' to which such critics remain largely committed. While on the subject of culture's depreciators, I find it important to add that even though the notion of 'culture' can be exploited by those who wish to deploy it in an anti-cosmopolitan sense so as to inflate the patterning and uniformity of human action, such strategy cannot offer a reason to jettison culture. After all, the fact that an idea can be used to foster a reactionary political project as well as a progressive one is hardly a difficulty specific to culture. Who would consider no longer resorting to the word 'democracy' because the Soviet regime abused it for much of the 20th century?

Importantly, therefore, resort to legal culture does not imply acquiescence to oppressive or repressive demands for conformity and certainly does not require anyone to 'accept' fundamentalist Islamic regimes — or rain dances, for that matter. Moreover, *a legal culture is not monolithic*. Individuals do not act within precisely the same cognitive framework in response to typical objects and events (nor, incidentally, are individual world-views internally consistent). Moreover, legal culture need not be subordinated to the idea of 'nativism'. A legal culture is not a windowless monad allowing neither for cross-cultural interaction nor for cultural overlap. It is permeable and, instead of firm edges or limits, it features an 'endless multiplication of folds, unfoldings, foldouts, foldures, folders, and manifolds': *the framework is not framed*.²⁰⁷ Accordingly, legal culture cannot be understood as assuming a number of discrete heritages organically tied to specific homelands and considered best kept separate (like the laboratory specimens in petri dishes that one also calls 'cultures') — what James Tully stigmatizes as the 'billiard-ball' conception of 'culture'.²⁰⁸ In other words, legal culture is not to be reduced to isolationism. Indeed, a legal culture exists *characteristically in relation* to other legal cultures: it is multilayered and polyvocal, decentered and fractured, pervious and fluid — or *liquid*, to write like Zygmunt

²⁰⁶ I reserve the case of 'strategic essentialism', an idea that can aptly be marshalled in situations featuring unacceptable symbolic violence. For example, if, as comparatist-at-law, I want to argue the epistemological legitimacy of idiographic reasoning within the European Union in the face of an ideological assault launched by continental lawyers who, on account of their own cultural conditioning, happen to find themselves more comfortable with a nomothetic model, there are strategic reasons — not least from a didactic standpoint — why it seems apposite to highlight 'the' common-law approach to legal thought even as I am aware of the existence of two or three Oxford or London lawyers who would welcome codification. My claim is that it is sometimes advantageous for the comparatist temporarily to 'essentialize' a cultural unit — whether it be 'the' common law or 'French' law or 'Swedish commercial lawyers' — in order to bring forward a simplified group identity with a view to achieving certain goals. I have in mind, if you will, the delineation of a temporary solidarity for the purpose of social action whereby the inherent heterogeneity of a group is made subservient to a strategic aim. Of course, the decision by the comparatist-at-law to deploy strategic essentialism must be made... strategically. I am grateful to Professor Karen Knop for inviting me to refine this argument.

²⁰⁷ Derrida, J (1972) *La Dissémination* Le Seuil at 301.

²⁰⁸ Tully, J (1995) *Strange Multiplicity* Cambridge University Press at 10.

Bauman. Thus, Derrida does well to remind us that 'what is peculiar to a culture is not to be identical to itself'.²⁰⁹ Culture is ever-becoming — and the comparatist-at-law's representations of it, though always already situated, are ever-mobile.

Yet, a legal culture's porosity is restricted, which means that it is only 'finitely elastic'.²¹⁰ Because culture functions as an ongoing integrative process, what one encounters by way of alternative experience is intelligibilized against the background of existing patterns within which it is ultimately incorporated even at the cost of a measure of dissonance reduction (if psychoanalysis is to be credited with any insights, a key advance is surely that one's psychological state, one's past experience, and one's memories curtail one's field of action, such that one enjoys but interstitial freedom to think away from oneself). If you will, the matter involves the contrivance of epistemological safeguards whereby external perturbations are coded as information in the culture's pre-defined terms so that change tends to be marginal and incremental. Like other organisms, a legal culture strives to maintain a homeostatic equilibrium in relation to its environment and to perpetuate itself through duplication: it aims to overcome transgressions. It is 'backed by a body of knowledge that, in a sense, has a boundary around it, a boundary that is more or less secure against the easy entry of contrary new knowledge'.²¹¹ As has been observed, 'legal cultures, like languages, can absorb huge amounts of foreign material while preserving a distinctive structure and flavor'.²¹²

Characteristically, legal culture refers to features that are not universal but reach beyond the individual. (This observation is emphatically not to suggest that I am harnessing legal culture in defence of anything along the lines of Westphalian nationalism, a model that comparative legal studies purports to overcome in any event through its processes of deterritorialization.) To account for the idea of predilections and practices being 'culturally' regulated and maintained, it is important to grasp culture as effect instead of cause. Rather than manifest itself as a hidden controlling ruler that would justify one in saying 'culture made me do it', culture exists as a *result* of there being a range of cognitive and affective dispositions within the individual, which are iterated across a number of individuals engaging in sustained social interaction with one another. Indeed, it is because of actions being replicated by individuals that a culture holds together. Having said this, and still as regards the arcane topic of causal attribution, the argument can be propounded that culture plays a causal role not in the sense that it has causal efficacy in itself qua supra-individual, supra-organic, or supra-physical invisible force, but in as much as its influence on human behaviour is relayed by physical entities such as dopamine-sensitive neurons in the brain's frontal lobe. It is indeed through the brain that culture is effectuated via the actions of organic individuals. *In this sense*, these actions can intelligibly be said to be causally related to culture.²¹³

²⁰⁹ Derrida, J (1991) *L'Autre cap* Editions de Minuit at 16 [emphasis omitted].

²¹⁰ Bohannan, P (1995) *How Culture Works* Free Press at 167.

²¹¹ Hardin, R (2011) *How Do You Know?* supra note 202 at 166.

²¹² Galanter, M (1994) 'Predators and Parasites: Lawyer-Bashing and Civil Justice' (28) *Georgia Law Review* 633 at 680.

²¹³ For instance, see Lakoff, G and Johnson, M (1999) *Philosophy in the Flesh* Basic Books at 555 where the authors argue that '[o]ur conceptual system is grounded in, neurally makes use of, and is crucially shaped by our perceptual and motor system'. See also Searle, JR (1995) *The Construction of Social Reality* Free Press at 228: '[T]here is a continuum from the chemistry of neurotransmitters such as serotonin and norepinephrine to the content of such mental states as believing that Proust is a better novelist than Balzac'. (My reference to John

A notion, not a thing, legal culture is a tool to assist description, not an object that is being described. (The perspective lines on a canvas are there to help the painter as she purports to give an impression of depth. But they are not the object that is being painted.²¹⁴) There is, then, the work of those who make culture work rather than the work of culture. In this regard, it must be said that no statement about law-as-culture-as-trace-as-law can be 'theory-independent',²¹⁵ that there is no account of the 'cultural' that does not comport an inherent performative dimension, that is not invented (in the etymological sense in which I have used the word above). Of course, there is simply no possibility for any enunciation to 'match [...] what is "really there"' (whatever *that* is), any such idea of replication being 'illusory in principle'.²¹⁶ And this observation applies to as basic a comparative intervention as the interpretation of a foreign statute. Here also, the 'really there' (whatever *that* is) is beyond a 'reconstruct[ion]' that would not feature any input from the comparatist-at-law himself.²¹⁷ (Note how I am not suggesting that 'reality' is but a projection of thought or that it has a strictly mental instead of material basis. My claim is epistemological rather than ontological. In brief, my argument is not that there is no mind-independent 'reality', but that a mind-independent 'reality' is *inconceivable*, which means, literally, that it cannot be conceived. If you will, it is not that there is no 'in-itself' and that there is only 'for-us', but that any 'in-itself' is inconceivable *as such* because only 'through-us' is any conceivability conceivable. I return to this matter at some length below.)

Since it can never be totally articulated on the ground of indubitable evidence, legal culture is emphatically not able to generate Gibraltar-firm scientific findings. But the indeterminacy of legal culture, say, the impossibility of distinguishing between culture and non-culture in empirically verifiable ways, ought to be a handicap only for the positivist seeking the kind of clear and determinate guidance usually associated with computer programmes. The malleability surrounding the notion of 'culture' does not prevent the articulation of various characteristics concerning the foreign laws being made into focuses of research and the ascription to them of the brand of determinative efficacy that makes such features of direct relevance as regards the pursuit of comparative legal studies. Ultimately, like philosophy, 'culture' allows us 'to understand how things in the broadest possible sense of the term hang together in the broadest possible sense of the term'.²¹⁸ The fact is that everywhere one finds sets of learned elements that are shared more extensively by people who interact with one another — and who have been interacting with one another over the very long term — and that differ from other sets of learned elements to be found in other people with whom there has not been such a significant level of interaction. Again, I have in mind patterns and regularities (not unalloyed homogeneity) emerging on account of predilections and predispositions (not unmitigated determinism).

For example, my French law students organize their essays into two parts and four sub-parts. In this respect, they have been taught to imitate their teachers in the same way

Searle is confined to this specific point and does not embrace his wider theory of meaning.) For arguments to the effect that culture and biology are inextricably intertwined, see Wexler, BE (2006) *Brain and Culture* MIT Press; Richerson, PJ and Boyd, R (2005) *Not by Genes Alone* University of Chicago Press.

²¹⁴ I draw on Latour, B *Reassembling the Social* supra note 97 at 131.

²¹⁵ Kuhn, TS (1996) *The Structure of Scientific Revolutions* (3rd ed) University of Chicago Press at 206.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ Sellars, W (1963) *Science, Perception and Reality* Routledge & Kegan Paul at 1.

as these teachers had themselves been instructed to copy what their own teachers were doing. This practice could presumably be traced to epistemological influences having made themselves felt over the very long term, which, although they would in all likelihood include Ramism (a 16th-century school of thought requiring to be interpreted in its turn), would have to be specific enough to account for the fact that this particular outline, or *plan*, does not obtain in French departments of literature or political science.²¹⁹ In any event, enough of my French law students feel that they have to abide by the specific bipartite outline, and enough of them actually follow this model (every student's commitment being reinforced on account of the commitment expressed by other students), while enough English, US, or German law students do not conform to this arrangement, for me to be able to say, legitimately, that 'French law students' divide their essays into two parts and four sub-parts and that this practice is an attribute of what can helpfully be called 'French legal culture' (as distinguished, say, from French law in the positivist sense of the term). To be sure, I occasionally see a third part or six sub-sections (not five, though!). And I suspect that there is the odd 2L at the University of San Diego who occasionally opts for bipartite divisions. But this fact is unusual enough, and noticeable enough when it manifests itself, for the general statement to hold in a way that allows it to resist any accusation that it would consist of a hegemonic formulation devoid of heuristic value. Though my French students may well have ceased thinking of the bipartite outline in cultural terms to approach it rather as what is right (for them? for law students all over the world?) — the exact point at which factual knowledge would have veered into moral knowledge being, of course, debatable — it remains that to reject the notion of 'legal culture' would be to accept that identifiable ways of feeling, thinking, and acting as regards law, or specific patterns of production or usage of legal knowledge, are randomly distributed across individuals or strictly determined by biological heredity — both hypotheses having been repeatedly disproved by anthropological research. To those who do not like the notion of 'legal culture' and would leave unnamed and untheorised the scheme of legal-identity formation that a practice such as the bipartite structuring of legal knowledge instantiates, I ask: What is your competing model of epistemological cohesion in law? Or do you not like the idea of 'epistemological cohesion' either?

The contention that the French outline used in law schools pertains to French legal culture (and that it could be traced to Ramism — not to mention Descartes's authoritative predilection for method) can readily be extended to more technical provisions of the law. Consider article 1184 (3) of the French civil code and its injunction to the effect that 'termination', or '*résolution*', of contract must be requested in a court of law. Positivists would reflexively confine their examination of this article to its exegetical features and try to ascertain how the courts (and, possibly, the leading writers of textbooks or law-review articles) have interpreted the relevant key-words. In the process, this interpretive exercise would find itself trapped within a circular and superficial understanding of the provision's significance. In effect, it would embrace the view that the law (the civil code) means this or

²¹⁹ For an account of the work of Ramus (Pierre de la Ramée, 1515-1572) and his influential epistemological claims for clarity, measure, and order; the enunciation of plain and concise axioms; the prevalence of definitions and conceptual assemblages marking the eviction of empiricism and induction; the elaboration of rigorously deductive thought; the formulation of dichotomous schemes proceeding through a division into parts according to degrees of descending generality; and the exposition of the homogeneity and reciprocity of the relevant elements of knowledge, see Bruyère, N (1984) *Méthode et dialectique dans l'oeuvre de La Ramée* Vrin.

that because the law (the judge) says that it means this or that. For a culturalist, however, the law-text proves traceable, much more rewardingly, to constitutive ideas — all of them manifestations of French culture and, in particular, of French legal culture — such as a strongly assertive state, a well-honed social demand for state interventionism, the deep distrust into which the individual is readily held, a time-honoured aversion for the unfettered play of the market, and the related assumption that only the state can bring to bear the appropriate dose of *solidarité* that must feature within a French contractual relationship.²²⁰ A view of law-as-culture indicates these various aspects of the law-text as being key features of the civil-code provision compelling the need for judicial authorization before a contract can be ‘terminated’ rather than allowing a party unilaterally to declare the contract at an end subject to the payment of damages in case of subsequent retaliatory litigation — which is, in a nutshell, the position obtaining in the common-law tradition.²²¹ But in order to generate the sort of interpretive ‘yield’ that, alone, can permit a deep or thick understanding of the law-text,²²² a comparatist must be prepared to approach law *as culture* (that is, to treat law as law-as-culture) and trace the law-text to its constitutive features on the understanding that the traces deemed relevant are an integral part of the text, that these traces survive *as* the text (one is back to Agamben’s idea of ‘*Nachleben*’), that they exist *as* the text that therefore exists *as* culture. In other terms, the comparatist-at-law writing on article 1184 (3) of the French civil code must be disposed to be *writing culture*.

For positivists, the ideas of state activism, suspicion of the individual, market-aversion, *solidarité*, and so forth ought perhaps to concern political theorists or sociologists or economists but certainly not lawyers — a conservative, disciplinary, reaction that I have addressed above through reference to its denial of ‘spectrality’. I claim that from the perspective of the interpreter of a legal culture, such as a comparatist-at-law, there can be nothing that is quintessentially ‘legal’ or automatically outside the ‘legal’. Because there

²²⁰ The prominence of ‘*solidarité*’ in French thought can readily be traced to Durkheim and through him to Rousseau who, in his 1762 *Du contrat social*, famously paired the contractual and social themes: Rousseau, J-J (1762) [1964] *Du contrat social in Oeuvres complètes* Gagnebin, B and Raymond, M (eds) vol III Gallimard at 347-470. For a discussion of ‘*solidarité contractuelle*’, see Durkheim, E (1930) [2007] *De la division du travail social* Presses Universitaires de France at 177-209. Unsurprisingly, Durkheim devoted a course of lectures to Rousseau’s *Du contrat social*, which was first published in 1918 shortly after his death: Durkheim, E (c1900) [2008] *Le Contrat social de Rousseau* Hayat, P (ed) Kimé. For a detailed examination of ‘*solidarité*’ in French political philosophy, see Spitz, J-F (2005) *Le Moment républicain en France* Gallimard. For his part, René Demogue is widely acknowledged to be an early defender of the idea of ‘*solidarité*’ in the law of contractual obligations: Demogue, R (1931) *Traité des obligations en général* vol VI Rousseau at 9. But, in his doctoral dissertation, Emmanuel Gounot, later a law professor in Lyon, had argued 20 years earlier that a contract epitomized ‘a principle of union and *solidarité*’: Gounot, E (1912) *Le Principe de l’autonomie de la volonté en droit privé* [:] *contribution à l’étude critique de l’individualisme juridique* Rousseau at 376. For a powerful illustration of the contemporary reach of the idea of ‘*solidarité*’, see ‘Statute No 96-588 Dated 1 July 1996 on Loyalty and Parity Within Commercial Relationships’ [‘*Loi no 96-588 du 1er juillet 1996 sur la loyauté et l’équilibre des relations commerciales*’] *Journal officiel* 3 July 1996 at 9983. See generally Grynbaum, L and Nicod, M (eds) (2004) *Le Solidarisme contractuel* Economica; Cedras, J (2004) ‘Liberté — Egalité — Contrat: le solidarisme contractuel en doctrine et devant la Cour de cassation’ in *Rapport de la Cour de cassation 2003* La Documentation française at 215-33; Mazeaud, D (2006) ‘La politique contractuelle de la Cour de cassation’ in *Libres propos sur les sources du droit: mélanges en l’honneur de Philippe Jestaz* Dalloz at 371-96.

²²¹ At times, French courts appear willing to ignore the civil code’s demand for a judicial pronouncement and show themselves prepared to validate a unilateral ‘termination’ of contract. Eg: Civ 1st 9 July 2002 Bull I no 187 at 145; Civ 1st 28 October 2003 Bull I no 211 at 166. The presence of dissenters, a feature of every legal culture, can help, as is the case here, to confirm the strength of the governing pattern.

²²² This helpful word is in Ewald, W (1995) ‘Comparative Jurisprudence (I): What Was It Like to Try a Rat?’ (143) *University of Pennsylvania Law Review* 1889 at 1944.

is no algorithm to determine the vectors of cultural extension, the following observation remains apposite: 'It would be unwise [...] to regard anything in Japanese society as *prima facie* irrelevant to the understanding of Japanese law on first setting out to get to grips with it. The links between law and language, law and the political or social and economic order, law and the history and traditions of the country, its codes of morality, its senses of justice and the relationship between the legal profession and other professions and between legal scholarship and other forms of scholarship, the relative standing of different actors in and around the legal system, all have their impact on law and its administration and the definition of law and legal scholarship'.²²³ In more succinct language, the Austrian writer Thomas Bernhard exclaims how, potentially, '[t]he world is utterly, thoroughly legal'.²²⁴ The quality of 'legality' (if this be the apt word) is thus conferred to the *interpretandum* on the basis of the heterogeneous elements that the comparatist-at-law connects or assembles, that he understands as pertaining to the 'legal', and that he names 'the French law of "termination" of contract' (I leave to one side the fact that the French themselves would refer to '*résolution*').²²⁵

Note that, as is the case with any research endeavour, while the making of knowledge will owe much to the dependence of the knowledge-production exercise upon the comparatist's situatedness and the insights that his circumstances will allow him to contribute to the interpretive task, it will also, pragmatically speaking, have something to do with temporally emergent contingency (I have in mind, for example, the serendipity of the comparatist-at-law's readings — a book may be missing in the library at the time of his research visit — and the existential randomness dictating his encounters with local lawyers). From a culturalist standpoint, the fact remains that the process of ascription of meaning through tracing is incompatible with the idea of the 'legal' being structurally closed: one never reaches the stages at which law can convincingly be said precisely to 'begin' or 'end'.

The notion of 'legal culture' contests deeply-ingrained lawyerly ways in another important respect also. Traditionally, '[t]he grand ideals of justice, of impartiality and fairness, have seemed to remove law from the ordinary, disordered paths of life'.²²⁶ If you will, justice, on account of what has been apprehended as its necessary transcendental, has been deemed not be reconcilable with any given singular configuration of the 'legal', whether elsewhere or here, and lawyers interested in achieving justice have accordingly found themselves disregarding or discrediting law's specific occurrences. John Rawls's thoroughly abstract *A Theory of Justice* is an influential application of such postulates.²²⁷ For its part, comparative legal studies invites lawyers to revisit the assumption that justice — or at least something like justice — must be completely detached from localism. Indeed, it is reductionist to denigrate local knowledge as being inherently prejudiced — in the derogatory rather than the etymological sense of the term — because of its situatedness.

²²³ Wilson, G 'English Legal Scholarship' supra note 204 at 831.

²²⁴ Bernhard, T (2001) [1967] 'Ist es eine Komödie? Ist es eine Tragödie?' in *Erzählungen* Suhrkamp at 74.

²²⁵ To my knowledge, the most rewarding treatment of the wide range of theoretical issues arising as regards the translatability of law is in Glanert, S (2011) *De la traductibilité du droit* Dalloz.

²²⁶ Post, R (1991) 'The Relatively Autonomous Discourse of Law' in Post, R (ed) *Law and the Order of Culture* University of California Press at vii.

²²⁷ Rawls, J (1971) *A Theory of Justice* Harvard University Press. Gayatri Spivak refers to Rawls's 'interminable suppositions': Spivak GC (2008) *Other Asias* Blackwell at 29.

Why should local knowledge be deemed structurally feckless or biased and stigmatized as a source of embarrassment, as something that one needs to overcome? In effect, '[t]o say that the law is cultural does not by itself dismantle the force of the idea of justice', quite to the contrary.²²⁸ Pace Rawls, it is arguable that a compelling argument about justice indeed requires not a process of abstraction, but of concretization.²²⁹

Thus, while affirmative-action programmes for African-American university students may be approached as defensible in the US, they would not be regarded as making sense in neighbouring Canada where universities have however accorded preferential treatment to Aboriginals. This difference is easily explained and can arguably be shown to be 'just' as long as one accepts that 'justice' pertains to local circumstances — and, of course, to local encumbrances — much more significantly than it does to the realm of ideas. What comparative legal studies permits one to appreciate is precisely that justice, if dissociated from local ways, can rapidly become shallow and unconvincing. (Needless to add, I accept that local knowledge, including a local conception of 'justice', can prove oppressive to a 'community' or certain individuals. And I do not want to claim that whatever is understood as local justice is intrinsically good and must always trump other values (in other words, the comparatist-at-law's affirmation of local knowledge must remain impervious to easy equations). What I maintain, though, is that localism cannot be disqualified out of hand as when Jürgen Habermas writes (somewhat portentously) that '[t]he law of a concrete legal community must, if it is to be legitimate, at least be compatible with moral standards that claim universal validity beyond the legal community'.²³⁰ (I return to universalism below.)

For comparative legal studies to valorize law-as-culture therefore attests to a commitment to a unit of analysis that no longer regards the technical aspects of the posited law as a controlling centre of the interpretive action and that includes law-in-situation.²³¹

²²⁸ Greenhouse, CJ (1989) 'Just in Time: Temporality and the Cultural Legitimation of Law' (98) *Yale Law Journal* 1650 at 1650.

²²⁹ Admittedly, going beyond the two abstract principles of justice that he developed in Rawls, *J A Theory of Justice* supra note 227, Rawls suggested eight principles for application to the international arena in Rawls, J (1999) *The Law of Peoples* Harvard University Press. But even this normative account of global justice, though it can be said to be taking cultural pluralism seriously, remains mired in abstract transcendentalism. For example, Rawls endorses 'universal rights' and refers to the law of peoples as '[u]niversal in [r]each': id at 80 and 85, respectively [emphasis omitted]. He adds that 'universal peace among nations is possible': id at 103. Interestingly, even after *The Law of Peoples*, as committed a universalist as Amartya Sen takes strong exception to Rawls's transcendentalism: Sen, A (2009) *The Idea of Justice* Harvard University Press. For a thoughtful assessment of Sen's challenge, see Schmidtz, D (2011) 'Nonideal Theory: What It Is and What It Needs to Be' (121) *Ethics* 772. I thank Professor Larry Alexander for bringing this review to my attention.

²³⁰ Habermas, J (1996) [1992] *Between Facts and Norms* Rehg, W (trans) MIT Press at 282.

²³¹ The contours of the 'unit' will vary according to the comparative intervention. In other terms, the location of culture will depend on the specific question that the comparatist-at-law is addressing. For example, the legal culture at issue might be that of Corsica, commercial courts in France, or labour lawyers in Poitiers. In each case, the scales of the comparison will influence what will count as data or hold as interpretive material. The 'unit' could also be — and indeed will often be — coterminous with French lawyers as a whole, that is, with the group of legal agents who, let us say, have in common French citizenship or the practice of law in France (that is, to write rapidly, who are 'French') — although even notions like 'citizenship' or 'practice' can hardly claim impermeable intellectual borders and are not to be envisaged as totalizing structural formations. There is more, for facts are vertiginous. As I have indicated, the 'legal' is not the only feature of an individual's identity. In effect, any individual partakes in a seemingly infinite array of ascertainable cultural formations. One can be a labour lawyer in Poitiers while being a feminist, a Belgian expatriate, a European, a militant of Amnesty International, a breeder of siamese cats regularly entering international competitions, and a long-standing member of the *Parti socialiste*. Now, the decision by a comparatist-at-law to address one specific manifestation of culture only cannot be taken as denying the legitimacy of cultural analysis. In practice, any research endeavour

In no way, however, must a differential analysis of juriscultures dispense with the usual legal artefacts like statutes and judicial decisions. Indeed, my contention is precisely that cultures are to be found at work, so to speak, *as* statutes and judicial decisions, which must therefore remain one of the principal focuses of research for comparative legal studies. But the posited law cannot be where comparison stops. Rather, it must be something whence comparison begins its *presencing*; it must act as the comparison's starting-point (I say 'starting-point' in order to write economically: as any tracing will reveal, the statute or judicial decision is a construction that necessarily comes after something, that is inherently *belated*). For the comparatist-at-law, then, the aim is to refuse to take statutes or judicial decisions as so many givens and, through an unceasing movement of oscillation towards and away from the posited, something like a Heideggerian *Verwindung*,²³² to try to see how these law-texts are conditioned and shaped by contingent epistemological patterns directed to values — and also how the posited in action sustains and amplifies these values in its own guise.

To return to the French civil code on 'termination' of contract, a comparatist-at-law favouring a culturalist approach to foreign law in pursuit of deep or thick understanding could therefore be expected to maintain that state activism or distrust of the individual prove to be more significant dimensions of the law-text — deserving to be traced at length — than whatever the courts may have been saying about the meaning of 'termination', these judicial pronouncements therefore losing the interpretive centrality they have traditionally been holding for positivists. Incidentally, I argue that there is nothing in the tracing of the civil-code provision to the social demand for a strong state or discomfort in the face of an unregulated market to suggest anything like a reification or totalization or stereotypification of knowledge. While the comparatist's tracing remains the best answer he can offer in order to make sense of the local and singular law, any tracing is provisional. Indeed, as I have indicated above, not only are traces constitutive of the law-text, but their coming forth cannot be extraneous to the comparatist-at-law's intervention. Increased knowledge of French history or French society or French law could lead the comparatist, in due course, to revisit his tracing or indeed to invent new traces with a view to enhancing understanding of the French law of 'termination' of contract further still.

Again, it is not a matter of jettisoning posited law, but of coming to it *obliquely*. The fact is that no formulation of the posited law can safely escape a cultural interpretation and that all formulations of the posited law can therefore beneficially be envisaged as cultural expressions. In the words of Lawrence Rosen, 'to consider law, one cannot fail to see it as part of culture'.²³³ I insist that, as I make these various claims, I am not arguing that law exists only as culture or can be reduced exclusively to culture. What I do contend, however, is that such legal artefacts as statutes or judicial decisions exist *as* incorporative cultural forms no matter what else they also exist as simultaneously. Thus, statutes and judicial decisions exist as the articulators or vectors of a cultural sensibility that is actually inscribed in the textual fragments themselves and can be traced to arrays of historical,

must ultimately contend with the matter of boundedness. Nor can the determination to map one particular feature of the discursive sprawl that is culture be taken to suggest a lack of awareness of the composite character of cultural identity.

²³² For a thoughtful appreciation of Heidegger's emancipatory idea, see Küchler, T (1994) *Postmodern Gaming* P Lang at 1-18 and passim.

²³³ Rosen, L *Law As Culture* supra note 199 at 5.

political, economic, social, philosophical, ideological, linguistic, and other formations. To argue that law exists as culture suggests that a salient feature of legal discourse lies precisely in its *embeddedness*. Indeed, even leaving to one side the matter of time (stabilized knowledge is vulnerable to later destabilization), I contend that legal discourse can never fully transcend facticity. Whether as regards place or accent (but the extension of the *genius loci* is infinite), situatedness is always already a structural element of law (which means that law cannot even be imagined as otherwise than situated). Law, then, enjoys no standpoint-independent status. It is inherently law-*in-situation* — the preposition ‘in’ aiming to capture the kind of all-encompassing involvement that a sentence like ‘Imogene is *in* love’ might suggest. Crucially, to see law as law-*in-situation* allows one to appreciate that no law is ever absolutely right or wrong, but that law is right or wrong for a ‘community’.

Law remains law-*in-situation* even when it purports to have been de-situationalized whether through an international convention or any other allegedly globalizing process. The fact is that these panopticons retain a local or perhaps a ‘glocal’ dimension that cannot efface spatial disjuncture. The diversity of what there is, of more than one law — the differend — is irreducible. Its purported gathering into a form that would be ‘the one’ changes nothing to the situation. Not even the positing of formal unity can avoid the persistent manifestation of the manifold. Through uniform law, for example, the many laws, although now increased by one (say, the international convention), do not become one. Such connective synthesis is not in itself enough to define the actual becoming of law-worlds. Inscribed within the site of the international text, there will take place a disjunctive synthesis of routes and permutations (note, once more, that disjunctive multiplicity is not to be understood as implying the existence of monadic entities, but rather as allowing for a complex web of sophisticated intersections). In Gunther Teubner’s words, there is ‘the fragmentation of global law’ harking back to ‘contradictions between society-wide institutionalized rationalities, which [uniform] law cannot solve’.²³⁴

Indeed, whatever persuasive or binding character a decision of the WTO Appellate Panel may feature, it holds as it is implemented in *this* way by *this* country as regards *this* trade dispute. And whatever persuasive or binding character a clause of the International Federation of Consulting Engineers Model Contract may display, it deploys as it is implemented in *this* way by *this* building contractor as regards *this* construction site. And any international convention is ultimately interpreted locally by these lawyers, these judges... (And any purportedly global initiative undertaken to address climate change can only assert itself locally also.) In other terms, between any purportedly non-local law and its instantiation, there is inevitably a hiatus.²³⁵ It is in this *entre-deux*, through this process of perhaps ever-so-fleeting but ever-so-primordial re-territorialization, that the localism and singularity of law forcefully and unavoidably come forth — which it remains comparative legal studies’s abiding task to unfold. Even in the face of transnational administration and investment, there remains an irreducible element of autochthony constraining the epistemological receptivity to globalization, which means that local difference persists. (Indeed, at times, one has the distinct feeling that local difference finds itself exacerbated

²³⁴ Fischer-Lescano, A and Teubner, G (2004) ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (25) *Michigan Journal of International Law* 999 at 1004.

²³⁵ Cf Ricoeur, P (1950) *Philosophie de la volonté* vol I Aubier at 165 who observes that even ‘between the least contradicted rule and its application, there always remains a hiatus’.

on account of globalization as when culture is apprehended as a valuable resource to be used for various contestatory socio-economic and political ends.) 'The point is that people in each place make their own uses even of the most global commodities', such that 'homogeneity [...] is still the local kind'.²³⁶ If you will, 'culture [...] dissolve[s] globalization [...] into a wide variety of different mutations, as each manifestation of multinational economics reaches into and is absorbed by the customs, cognitions, committees, and significances which together make up the locations of culture'.²³⁷ In short, '[w]hatever globalization may turn out to be [...], it is refracted, rebuffed, repelled and reconstituted by cultures'.²³⁸ Because, when all is said and done, culture remains the optimal index of the local that comparatists-at-law have at their disposition, a comparison hearkening to law-as-culture can helpfully disclose how local knowledge *sites* so-called 'global' law.

Not even transcultural legal phenomena, therefore, are culture-less, if only because they arise from a cultural diversity that precedes them; they are the *outcome* of cultural flow. Any alleged *consensus gentium* — say, the distinctive cluster of meanings, symbols, and practices associated with the *lex mercatoria* or international arbitration — thus finds its anchorage in the variations in meaning-systems that different individuals gather to assemble, so that the finished product continues to reveal a dependence upon a certain kind of learning, a pattern that inevitably sets limits to cultural variability. Yes. I argue that even the legal globalizers are, to an extent at least, constructed out of their own legal culture's materials of meaning and expression and, to that extent at least, remain possessed by their legal culture.²³⁹ Ultimately, '[t]here exists no place that can be said to be "non-local"'.²⁴⁰

'OBJECTIVITY' AND 'TRUTH'

The argument that I defend for the recognition and respect of differential co-presence within comparative legal studies must now address at greater length the view that dissensus across laws is to be overcome by the identification of truth — in other words, by extolling one view (or law) as being 'true' while demoting other views (or laws) that would then be decried as 'false'. Consider Kötz's writings with specific reference to his practice of truth-ascription. For him, the comparatist-at-law has 'to discover which solution of a problem is the best',²⁴¹ '[to] indicate which is the best solution here and now',²⁴² 'to decide which of the possible solutions is most suitable and just'.²⁴³ In other words, the comparatist-at-law's 'ultimate goal is [to] discove[r] the truth'.²⁴⁴ And Kötz's language is about solutions being "'better'", "'worse'", 'equally valid', 'clearly superior', and 'superior to all others'.²⁴⁵

²³⁶ Appiah, KA (2006) *Cosmopolitanism* Norton at 113 and 102, respectively.

²³⁷ Inglis, F *Culture* supra note 204 at 144.

²³⁸ Id at 74.

²³⁹ For studies insisting on the centrality of culture to globalization and showing how cultural agency is negotiated within globalized contexts, see, eg, Ong, A and Collier, SJ (eds) (2005) *Global Assemblages* Blackwell; Kraidy, M (2005) *Hybridity, or the Cultural Logic of Globalization* Temple University Press.

²⁴⁰ Latour, B *Reassembling the Social* supra note 97 at 179.

²⁴¹ Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 116 at 8.

²⁴² Id at 23. Although this passage does not feature in the German text, it can legitimately be ascribed to Kötz to the extent that he was closely involved in the preparation of the English version of his book.

²⁴³ Id at 47.

²⁴⁴ Id at 3.

²⁴⁵ Id at 46-47. For example, see also Bogdan, M (2004) 'On the Value and Method of Rule-Comparison in Comparative Law' in Mansel, H-P et al (eds) *Festschrift für Erik Jayme Sellier* at 1240: 'After having compared

According to him, the comparatist's engagement with other laws must act as 'an "école de vérité"' — a French expression that can confidently be rendered as 'school of truth'.²⁴⁶

Kötz's activation of truth appears clearly from a passage in his treatise where he informs us that 'the [English, French, and German] systems attach different legal consequences to the issuance of an offer' (presumably by way of exception to his stated '*praesumptio similitudinis*') and that '[t]he critic is forced to conclude that on this point the German system is best'.²⁴⁷ Apparently building on a view of commensuration across laws as unproblematic and seemingly discarding the assumption that 'civil institutions are only "better" and "best" relatively to the people for whom they exist',²⁴⁸ Kötz's argument is that the truth as regards 'the issuance of an offer' is German law, which becomes the unique referent to which all other forms find themselves subordinated. Here, to cast the matter in the Cartesian terms that resonate with Kötz's *Weltanschauung*, one has an assertion being made by a 'subject' (Kötz) as regards an 'object' ('the [German] syste[m]'). Kötz affirms a feature of the 'object' (its 'bestness' or 'correctness' or 'truthfulness'), that is, what would be an independently determinate property of the 'object', a fixed attribute, an inherent quality, and purports to do so in a manner that is adequate to the 'object' itself, that accounts for it exactly so that it can (and, indeed, must) be said to be 'true'. Ultimately, then, German law is 'true' and what Kötz says when he tells us that German law is 'true' is itself 'true'. In this regard, Kötz-as-verist effectuates the task that he ascribes to comparative legal studies: to ascertain truth-in-the-law.

In identifying its 'bestness' or 'correctness' or 'truthfulness', Kötz, inscribing himself squarely within a time-honoured mindset featuring a subject/object dynamics, is 'giving' us — or, at least, is claiming to give us — the German system 'just as' it is, that is, *an sich*. There is, then, a transcendental dimension to Kötz's approach. For him, 'bestness' of law arises without any extensive reference requiring to be made to local knowledge; it is a hallmark that 'we can carry from nation to nation, counting upon uniform action and results everywhere, as we do, for instance, with a steam engine or a telescope'.²⁴⁹ 'German law' is best irrespective of any political, economic, or historical configuration whence it emerges, with which it is connected, and to which it relates — or, to quote from Unidroit once more, 'irrespective of the legal traditions and the economic and political conditions of the countries in which [it is] to be applied'.²⁵⁰ 'German law' is best beyond any 'Germanity', and this is why it can be expected to work in France, England, and elsewhere. The 'German law' that Kötz has in view is disembodied, ethereal German law. There is a sense in which it is almost a misnomer to refer to it as 'German' law. It is simply a form of law that happens to prevail in Germany at this historical juncture (this argument being precisely Gordley's claim regarding, say, German judicial decisions not having anything 'German'

how two (or more) legal systems deal with the same problem, it is natural to ask which of the two (or more) legal solutions is better or the best one'.

²⁴⁶ Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 116 at 15. The formulation appears in (un-italicized) French in both the English and German editions.

²⁴⁷ Id at 362.

²⁴⁸ Sumner, WG (1914) [1877] 'Democracy and Responsible Government' in *The Challenge of Facts and Other Essays* Keller, AG (ed) Yale University Press at 244. William Sumner was an influential 19th-century US anthropologist.

²⁴⁹ Id at 245.

²⁵⁰ Supra note 192.

about them).²⁵¹ Kötz's 'bestness' thus purports to eschew any local connection. It situates itself in a sphere that is located beyond any local law. But there is more.

Not only does Kötz aim to place the comparative project in a beyond-any-law (for him, solutions are to be 'cut loose from their conceptual context and stripped of their national doctrinal overtones'),²⁵² but he also wants to situate it in a beyond-any-comparatist — which is another feature of his transcendentalization enterprise. Thus: '[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'.²⁵³ Given that 'the comparatist must eradicate the preconceptions of his native legal system',²⁵⁴ and because the 'good' comparatist can be trusted to proceed in this fashion, it becomes possible for Kötz to write that, as regards a given matter, '[t]he critic is forced to conclude' in a particular manner,²⁵⁵ meaning that any detached critic, any disengaged comparatist, is bound to reach one conclusion only, which is to say that that conclusion no longer depends on the comparatist, that truth-in-the-law exists irrespective of the comparatist, of what any comparatist may think or say. (How strongly this sententious sentence bespeaks the *doxa*'s epistemological overbearance — or is it audacity?) According to Kötz, the true law is *there*, and the comparatist can come to it as long as he does what he must do in order to reach it. And he will succeed provided that he delocalizes himself — '[o]ne must never allow one's vision to be clouded by the concepts of one's own national system'²⁵⁶ — and uses the proper method, that is, as long as his comparative analysis is cast in 'purely functional terms'.²⁵⁷

For Kötz, fully satisfied that an effective methodological investigation will lead the comparatist-at-law to truth, that is, beholden to what Bernard Williams calls a 'truth-acquiring' type of inquiry,²⁵⁸ truth manifests itself as the outcome of a coalescence of three processes of objectivation. In particular, Kötz insists on the fact that the comparatist must self-objectify, on the additional fact that the legal solutions found in foreign laws must themselves be objectified, and on the further fact that the comparatist's reports on other laws must be made objective.²⁵⁹ Truth will then affirm itself to the comparatist-at-law in a way that he will be 'forced' to accept, independently of his own circumstances.²⁶⁰ Here, as elsewhere (for example, when he indulges a subject/object dichotomy), Kötz reminds one of Descartes who held that 'our mind is of such a nature that it cannot help assenting to what it clearly conceives'.²⁶¹ Kötz, then, is a truth-seeker and truth-asserter — not, of course, in the sense that he would be seeking or asserting an originary or essential truth in the strictly philosophical understanding of the term, but as he purports to identify and

²⁵¹ Supra note 120.

²⁵² Supra note 133.

²⁵³ Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 116 at 10.

²⁵⁴ *Ibid.*

²⁵⁵ Supra note 247.

²⁵⁶ Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 116 at 35.

²⁵⁷ Supra note 130.

²⁵⁸ Williams, B (2002) *Truth and Truthfulness* Princeton University Press at 127 [emphasis omitted].

²⁵⁹ See Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 116 at 10, 44, and 43, respectively.

²⁶⁰ *Id.* at 362. This formulation does not feature in the German text. For the reason that I have already indicated at supra note 242, it can nonetheless fairly be attributed to Kötz.

²⁶¹ Descartes (1988) [1640] [Letter to 'Regius'] in *Oeuvres de Descartes* (2nd ed) Adam, C and Tannery, P (eds) vol III Vrin at 64.

claim something like truth-in-the-law, that is, truth as it becomes phenomenally explicit as legal knowledge. (Although I do not want to digress, it bears mentioning that Kötz's statements regarding similarities across laws and his concomitant views to the effect that the comparatist-at-law must ascertain the 'true' law reveal a fundamental tension in his thought. To put the matter bluntly, if all laws are similar 'even as to detail',²⁶² how can one law be the true one? It seems that comparatists-at-law are faced with the simultaneous affirmation of two incompatible doctrines.)

Kötz's references to the idea of 'objectivity' assume a monolithic and immutable concept. In effect, objectivity is neither. For one thing, at least three discrete meanings of the term can be identified — which Kötz somewhat revealingly collapses. When Kötz insists on the comparatist's objectivity, he has in mind 'aperspectival objectivity'. This brand of 'objectivity' seeks to exclude 'perception, which can fool us; the body, which has its frailties; society, which has its pressures and special interests; memories, which can fade; mental images, which can differ from person to person; and imagination'.²⁶³ In sum, the goal is the elimination of idiosyncrasies, whether attributable to an individual to the exception of anyone else or ascribable to an individual on account of the fact that he is culturally situated. Ideally, for Kötz, one would behold a 'view from nowhere'.²⁶⁴ However, when Kötz focuses on the objectivity of the laws being examined or the reports being written about these laws, he is addressing 'mechanical objectivity', another form of objectivity that can be said, succinctly, to oppose the idea of 'interpretation' and aim to guarantee the reliability of findings through the development of procedures avoiding the trap of personalization. And as Kötz discusses the truth of one law 'in the sense of compelling assent from all rational minds, be they lodged in human, Martian, or angelic bodies',²⁶⁵ he is gesturing towards something like 'ontological objectivity', yet another form of objectivity.²⁶⁶ Not only, then, does objectivity feature a complex semantic extension, which Kötz does not communicate to his readers, but it also enjoys an ancestry that is intimately connected with the development of moral philosophy, on the one hand, and scientific practices and ambitions, on the other. Therefore, objectivity is anything but the unproblematic and unproblematized 'trans-historical given' that Kötz would have his readership assume.²⁶⁷ Indeed, the situatedness of objectivity appears clearly from even a brief examination of 'aperspectival objectivity', the first of the three kinds of objectivity that I have mentioned.²⁶⁸

'Aperspectival objectivity', then, is neither intrinsically timeless nor inherently veracious. The idea's early manifestations can, in fact, be traced to the late 18th century. Its conceptual home was then moral philosophy. Thus, David Hume, discussing the critic's task, enjoined him to 'preserve his mind free from all *prejudice*, and allow nothing to enter into his consideration, but the very object which is submitted to his examination'. The aim for the critic must be, 'considering [him]self as a man in general, [to] forget, if possible, [his] individual being and [his] peculiar circumstances'. Otherwise, he 'evidently departs

²⁶² Supra note 116.

²⁶³ Lakoff, G (1987) *Women, Fire, and Dangerous Things* University of Chicago Press at 183.

²⁶⁴ Nagel, T (1989) *The View from Nowhere* Oxford University Press 1989.

²⁶⁵ Daston, L (1992) 'Objectivity and the Escape from Perspective' (22) *Social Studies of Science* 597 at 598.

²⁶⁶ For the three senses of 'objectivity' that I use here, see *id passim*.

²⁶⁷ *Id* at 598.

²⁶⁸ In what follows, I rely heavily on *id*.

from the true standard; and of consequence loses all credit and authority'.²⁶⁹ A few years earlier, in his first book, Adam Smith had similarly devalued perspectival apprehension. According to Smith, it was not sufficient for an individual to bring to bear all points of view pertaining to a situation since distortions could only be avoided by adopting the perspective of someone who was completely removed from the circumstances and could therefore fully rise above them: 'We must view [these opposite interests], neither from our own place nor yet from [that of another with whom we have no particular connexion], neither with our own eyes nor yet with his, but from the place and with the eyes of a third person, who has no particular connexion with either, and who judges with impartiality between us'.²⁷⁰

If anything, in proceeding to move from empathic prowess to idealized detachment, Smith had raised the objectivity threshold higher than Hume, the latter having confined his exhortation to the need for an individual to surmount his own circumstances. Importantly, in his *Critique of Pure Reason*, Kant, as he addressed the overcoming of the idiosyncrasy of one's judgment, would soon add the idea of 'communication' to the moral understanding of objectivity. Kant evidently did not hold that the communicability of a belief (*Fürwahrhalten*) was, in and of itself, sufficient to make it into a fully-fledged objective statement, but he took the view that the 'touchstone' of belief was 'the possibility of communicating [it]'.²⁷¹ As he contended that 'communicability is made possible both by the shared rationality of minds [...] and the shared object to which the idea refers', Kant was effectively valorizing the public character of knowledge.²⁷² And it is very much around the particular notions of 'communication' and 'public knowledge' that the sciences, responding to a set of specific organizational demands, began in earnest to articulate their own understanding of 'objectivity' in the mid-19th century.

While collaborative science had manifested itself in the 17th century and although science had become ascertainably cosmopolitan by the 18th century, it is only in the course of the 19th century that a worldwide scientific community emerged, whether as regards medicine or astronomy, drawing in earnest on improved transportation and communication systems. Because of these technological developments, '[a]rticles circulated across oceans and continents, measurements were exchanged, observations tallied, instruments calibrated, units and categories standardized'.²⁷³ For instance, 'international commissions met and wrangled over the standards and definitions that would make the result of, say, statistical or electrical research comparable'.²⁷⁴ On account of these important changes aimed at the transnational coordination of science, communicability became a significant value.

In order to be communicable, however, knowledge had to be formatted in such a way that it could be disseminated easily. And, of course, for that diffusion to happen, the knowledge in question had to be released into the public sphere. Now, the enhancement

²⁶⁹ Hume, D (2006) [+1777] *Essays: Moral, Political, and Literary* in *David Hume: Moral Philosophy* Sayre-McCord, G (ed) Hackett at 353-54 [emphasis original].

²⁷⁰ Smith, A (1976) [1759] *The Theory of Moral Sentiments* Raphael, DD and Macfie, AL (eds) Oxford University Press at 135. See generally Raphael, DD (2009) *The Impartial Spectator: Adam Smith's Moral Philosophy* Oxford University Press.

²⁷¹ Kant, I (1996) [1781] *Critique of Pure Reason* Pluhar, WS (trans) Hackett A821/B849 at 748.

²⁷² Daston, L 'Objectivity and the Escape from Perspective' supra note 265 at 606.

²⁷³ Id at 608.

²⁷⁴ Id at 608-09.

of a brand of scientific knowledge that would be at once nomadic and overt required mechanical formulations such as quantitative statements. If only because writers and readers within the sciences could be placed at considerable distance from one another, the aim was to avoid personalized judgments and favour the idea of 'interchangeable and therefore featureless observer[s] — unmarked by nationality, by sensory dullness or acuity, by training or tradition; by quirky apparatus, by colourful writing style, or by any other idiosyncrasy that might interfere with the communication [...] of results'.²⁷⁵ As de-individualization, self-effacement, and impartiality found themselves being energetically fostered, objectivity came to be apprehended as an abiding goal. But it is key to appreciate that, although traces of the earlier moral philosophy could still be discerned within the new scientific economy, objectivity was now valued on account of the public circulation of data that it made possible with a view to the fashioning of a certain type of scientific community. Indeed, Theodore Porter shows that certain forms of quantification like mathematization came to be associated with objectivity *not on account of the fact that they were thought to mirror 'reality' more accurately*, but because they were perceived to be serving the needs of communicability more optimally.²⁷⁶

As I address the orthodoxy operating within comparative legal studies, what is crucial for present purposes, and what therefore justifies my excursus into the modern makings of objectivity, is that objectivity is neither an idea that was forever there nor a notion that has ever existed transcendentally — contrary to what Kötz's text would have us readily believe. Far from being anything natural, for instance, objectivity developed in the sciences at an identifiable moment in time and in order to address a specific problem. Therefore, it is an idea that was *achieved* on account of 'an intense social discipline', a configuration that not only involved standardizing data, but also 'agreeing, tacitly, to limit attention to what could be brought under good experimental control'.²⁷⁷ Indeed, it should not be overlooked that the move towards objectivity 'often [resulted in] a loss of valuable information that had previously been an integral part of the observation report [...] but information too particular to person and place'.²⁷⁸ In sum, objectivity is seen to express values contingently related to place and time. In other words, it is revealed to be *cultural*.

As comparatists-at-law well know, objectivity is not the only idea that Kötz presses into service as if it were the kind of 'given' that must self-evidently impose itself unto any serious study of foreign law unfolding anywhere in the world — though all the while, upon critical examination, remaining identifiably aleatory and unsurpassably factual. I have in mind Kötz's repeated references to 'truth'. But, just like objectivity, truth calls for de-absolutization, re-deployment outside the dogmatic circle, and location in place and time. As this motion evinces the elementary confusion between the empirical and the transcendental wrought by Kötz, it undermines the patency with which this author unwarrantably invests the notion of 'truth'.

In the sense in which it refers to transmission of knowledge through assertion in a manner purporting to make information strictly correlative with what there is, truth can

²⁷⁵ Id at 609.

²⁷⁶ See Porter, TM (1995) *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* Princeton University Press at 85-86.

²⁷⁷ Porter, TM (1992) 'Quantification and the Accounting Ideal in Science' (22) *Social Studies of Science* 633 at 646.

²⁷⁸ Daston, L 'Objectivity and the Escape from Perspective' supra note 265 at 612.

fairly be approached as a cultural artefact. An early and influential conception of 'truth' is thus credited to Plato (c428-c348 BCE) and Aristotle (384-322 BCE). In the Greece of the 5th and 4th centuries BCE, public debates would be organized so as to coincide with festive occasions. Such events were taken seriously and the creditability of the debaters was at stake. It is said that even their livelihoods could be at risk. Some debaters, by then having gotten to be collectively known as the 'Sophists', specialized in this exercise. Most famously, they included Protagoras (c490-c420 BCE) and Gorgias (c485-c380 BCE). In those days, winning the argument basically meant pointing to a contradiction in an opponent's speech or developing a discourse so coherent that one's opponent simply had to adhere to it. On account of their expertise, the Sophists were particularly adept at implementing either strategy. Indeed, they claimed that they could carry an argument on the basis of one discourse while also being able to win exactly the opposite contention on account of a different speech. Plato and, later, Aristotle sought to limit the influence of such tactics. These philosophers (a term that, like the word 'Sophist', came into use in the course of the 4th century BC) moved the criterion of discursive validity from the absence of self-contradiction — a yardstick internal or immanent to speech — to an external or transcendental benchmark whereby a discourse would be said to be true only if it conformed to that which it was purporting to warrant. Pursuant to this scheme, absence of self-contradiction, while a necessary condition for the establishment of truth, was no longer sufficient. The elaboration of this alternative model appears to offer the earliest known manifestation of the notion of '*adaequatio rei et intellectus*'. As it entails reference being made to outside authorities qua assessors of the accordance of a statement with its object, it hints at the idea of 'objectivity'. Making allowance for the fact that one cannot reconfigure exactly the locus that truth occupied in Greek philosophical thought 2500 years ago, it remains that the idea is traceable to a specific historical setting and calls to be analyzed as a situated intellectual and cultural practice.²⁷⁹

While allowing me to deflate exaggerated claims concerning its obviousness, my assertion regarding the contingency of truth is not meant, in the context of this specific argument at least, to disqualify the notion from any and all usages. Indeed, I am willing to accept that truth can prove serviceable in a range of urbane and reasonable circumstances: '— I hear that Casimir is currently studying in Madrid. — Yes, it's true'; '— If I remember correctly, the cupcakery opens at 9h30. — Yes, it's true'; '— Washington is colder than San Diego at this time of year. — Yes, it's true'.²⁸⁰ All the same, in each illustration the answer could be simply 'Yes' and arguably prove as effective.²⁸¹ In any event, such statements are hardly contentious in the sense that they are not politically controversial and do not

²⁷⁹ See Jorion, P (2009) *Comment la vérité et la réalité furent inventées* Gallimard at 111-18. See also Kojève, A (1968) *Essai d'une histoire raisonnée de la philosophie païenne* vol I Gallimard at 247. On verbal jousting in Greek antiquity, see, eg, Lloyd, GER (1990) *Demystifying Mentalities* Cambridge University Press at 36. For observations on the history of the words 'Sophist' and 'philosopher', see Nightingale, AW (2004) *Spectacles of Truth in Classical Greek Philosophy* Cambridge University Press at 30.

²⁸⁰ Incidentally, the matter of the physical world is not for this Article since 'physical nature does not organize itself culturally': Harding, S (1992) 'After the Neutrality Ideal: Sciences, Politics, and "Strong Objectivity"' (59) *Social Research* 574 at 574-75. On truth and the physical world, see, eg, Burge, T (2010) *Origins of Objectivity* Oxford University Press.

²⁸¹ Cf Quine, WVO (1960) *Word and Object* MIT Press at 24: 'To say that the statement "Brutus killed Caesar" is true, or that "The atomic weight of sodium is 23" is true, is in effect simply to say that Brutus killed Caesar, or that the atomic weight of sodium is 23'.

address the kind of convictions that give shape or depth to personhood. I am concerned with an altogether different problematique, which involves more than one law in co-presence and, therefore, 'seriously conflicting truth claims joined with seriously disparate grounds of epistemic authority and seriously divergent prior beliefs, general assumptions and relevant aims and interests'.²⁸² In this regard, and by way of counterpoint to the practice prevailing within orthodox comparative legal studies, I want to dispute, for instance, the pertinence of truth as a way to ascribe relative standing to different law-worlds. In the context of comparison-at-law, and with specific reference to the appreciation of various laws vis-à-vis one another, I apprehend an appeal to the idea of 'truth' as unsustainable, if only because of the suspicious metaphysical connotation that such a reference carries. The fact of the matter is that there is no epistemological strategy that can make truth assertible, that can bring truth (even assuming its existence) within the compass of the comparatist-at-law's knowledge, that can confer upon it anything other than the comparatist's warrant. Accordingly, I claim that statements having law as their focus of study do not admit of the characterization 'true'; they are not a truth-apt discourse. For me, '[t]he first step toward a new [comparative] legal stud[ies] is the bracketing of any truth claims for or about law'.²⁸³

Consider Kötz on the law of offer. When this author, through the idea of comparison as 'école de vérité',²⁸⁴ suggests that the German law on offer is the 'true' one, he cannot be asserting a necessary relation between his sentence and 'German law' as if the latter belonged to an extra-linguistic 'reality' to which he would be coming qua impassible describer able to account for it *as such*. Whatever affirmation Kötz is propounding retains an ineliminable bond to his own experience of the law and the world. (Observe that when I refer to Kötz's 'own' experience, the 'ownness' I have in mind exceeds Kötz's consciousness and indeed his capacity for consciousness, which suggests that the matter of 'experience' is more complex, from the very point of enunciation of the term, than is assumed.) Kötz's assertion, therefore, is insurpassably bounded. The very fact that Kötz and his disciples imply otherwise illustrates once more the remarkable range of techniques through which the orthodoxy seeks its self-immurement. As Kötz proclaims the truth of the law — and as Kötz's reader is being 'forced to conclude' oh-so-docilely that the truth, seemingly free from corrigibility, is what Kötz says it is²⁸⁵ — there takes place the imposition of an intellectual regimen of closure of the mind strikingly adverse to scholarly inquiry.²⁸⁶ In effect, what more is there to say once there is the truth? What would be the point for comparatists to continue a reasoned conversation about foreign law after Reason? The negotiation between enunciation and counter-enunciation is over. No one requires to revisit one's position. Of course, the situation would differ if Kötz explained why the German law of offer is his *preferred* law, if he indicated what there is about the German law of offer and what there is about himself, about his personal knowledge of various laws of offer, about his experience-based belief as to which of the laws under scrutiny would more optimally effectuate the goals that he deems worthy of being pursued by a law of offer, such that

²⁸² Smith, BH (2005) *Scandalous Knowledge* Duke University Press at 47.

²⁸³ Kahn, PW *The Cultural Study of Law* supra note 199 at 34.

²⁸⁴ Supra note 246.

²⁸⁵ Supra note 247.

²⁸⁶ Stengers, I 'Comparison As a Matter of Concern' supra note 74 at 57-58: '[T]he general idea of objectivity [...] can never be dissociated from an overpowering determination to silence or eradicate [...] inadequately credentialed claimants to knowledge'.

that law is entitled to be selected as being better than all others by *him* (as I write these words, I remain aware that there is nothing like sheer subjectivity at work). But then Kötzt's claim, because it would effectively be tantamount to presenting to his readership '[the] causes of the acquisition of [his] beliefs [...] and [the] reasons for the retention or change of [his] beliefs',²⁸⁷ would reveal itself to be defeasible. Deprived of any grounding in truth, the plausibility of Kötzt's conclusion would depend on how persuasive his readership is willing to find his argument. It would be shown to be precarious.

No matter how challenging the epistemological situation for the comparatist-at-law, I argue that the finitude of the comparative dynamics permits no breakthrough to 'objectivity' or 'truth' that would allow for an understanding of foreign law that would be immune to the sensible intuitions by which individuals endowed with cognitive capability can get to apprehend the law-world. Anything like transcendental cognition remains out of the reach of the comparatist's discourse. It cannot take place (literally, it cannot occupy a place, it cannot place itself). At best, 'a statement is true [...] for a world it fits'.²⁸⁸ This is not to say that all statements about a given law-text are equally valid or invalid. Indeed, it is easy to see that some enunciations will generate, say, in the eyes of an interested readership faced with competing arguments, an interpretive 'yield' that will surpass others.²⁸⁹ It is rather to argue that no meaning can be secured through the vocabulary of 'objectivity' or 'truth'. While '[i]t is inconceivable that France would follow Ptolemy and Italy would adopt Copernicus', George Fletcher reminds us that 'law is culture-specific'.²⁹⁰ And the epistemological implication is that '[a] cultural inquiry into law's rule cannot make any claims to an unconditioned truth, either empirical or normative'.²⁹¹

With respect to the impossibility for the discourse on foreign law to generate a transcendental contention, I discern two principal restrictions that I propose to investigate at greater length. While they intersect (as my argument will show), one mostly involves the law, the other mainly the comparatist. Together, they constrain the comparative motion twice, that is, they act as a double bind. I hasten to add that there is no reason for the comparatist-at-law to experience these limitations calamitously. They are neither an occasion for melancholy nor for pessimism. Through the agency that they compel, these epistemological strictures in fact provide the comparatist with a signal opportunity to 'strive for the standpoint of someone committed to the moral relevance of contingent particulars',²⁹² to embrace interpretation as emphasis on heterogeneity, mobilization of difference, activation of the singular, and, to put the matter more philosophically, as a reading that strives to emancipate itself from the metaphysics of essence and its expression through unsupportable ideas like 'objectivity' and 'truth'.²⁹³

²⁸⁷ Rorty, R (1991) *Objectivity, Relativism, and Truth* Cambridge University Press at 121.

²⁸⁸ Goodman, N (1978) *Ways of Worldmaking* Hackett at 132. Cf Vattimo, G *A Farewell to Truth* supra note 24 at 136 who refers to truth as 'that which works for us' [emphasis original].

²⁸⁹ Supra note 222.

²⁹⁰ Fletcher, GP (1997) 'What Law Is Like' (50) *Southern Methodist University Law Review* 1599 at 1610.

²⁹¹ Kahn, PW *The Cultural Study of Law* supra note 199 at 39.

²⁹² Minow, M (1990) *Making All the Difference* Cornell University Press at 381.

²⁹³ Cf Bass, A (2006) *Interpretation and Difference* Stanford University Press at xi: 'Nonmetaphysical interpretation is actively differentiating'.

THE DOUBLE BIND (I)

As concerns foreign law — *any* foreign law — the primordial aporia precluding any idealization of it, for example through its designation as 'true', is that it necessarily exists as cultural construct, that it is inevitably embedded in facticity, that it is situated in place and time. This claim refers to two sets of empirically verifiable circumstances at least. First, law is fabricated by women and men who are themselves situated in culture, who occupy a culture (indeed, who have been *thrown* into a culture), and who, as located individuals, have internalized normative structures of attitude and reference through a process of socialization into a given (if open-textured) 'community' and into a given (if open-textured) legal 'community'. Secondly, foreign law — *any* foreign law — is constituted out of traces that, whether they be the remaining of a historical configuration, a political rationality, a social logic, an epistemological assumption, or any other instantiation of culture, reveal the embeddedness of the 'legal' within a sprawling local semantic economy, even as the conceptual closure underlying the positivist idea of 'law' wishes to dissimulate that excess.

For foreign law, then, there is no such place as 'no-place' — no matter how effortlessly the *doxa* within comparative legal studies seems to be gliding over the issue in its attempt to dislocate the inevitably-located law and see to it that 'a complex, unique, specific, varied, multiple, and original expression is replaced by a simple, banal, homogeneous, multipurpose term under the pretext that the latter may explain the former'.²⁹⁴ In effect, a comparatist-at-law ought to be trudging painfully slowly as he engages in costly exercises in translation pursuant to which, on account of the inherently situated character of law, the tiniest connection across laws is only possible against the background of the constant delineation of a seemingly infinite network of traces haunting each text and inscribing each text as local. In the words of Bruno Latour, 'a good account [i]s one that *traces a network*', one key question being 'how much energy, movement, and specificity our [...] reports are able to capture' as they enunciate, in performative manner rather than by means of direct indication, what a law exists as.²⁹⁵ In this regard, Derrida does very well to remind us that 'the thought of the trace [...] cannot not take flair into account'.²⁹⁶

Perhaps I can be allowed to illustrate my argument by mentioning once more the law-texts regarding 'religious attire at school' that I have been featuring. In order to emphasize how the comparatist's interpretive motion takes place with a view to elucidating the legal/cultural singularity inhering to any foreign law, I want to consider these texts by using the notion of 'empowerment' as connector. As I proceed, I am unable to surmount completely the artificiality of the comparative enterprise since there is nothing like 'empowerment' *as such*. All I can offer is a 'thirthing' of knowledge, that is, I can frame a notion that I call 'empowerment'. Now, I do not borrow this idea from either of the laws under scrutiny. Accordingly, the notion of 'empowerment' I am introducing differentiates itself from each of these laws. Yet, I argue that through empowerment I can emphasize certain characteristics that, on the basis of my familiarity with what I am prepared to name 'French culture' (I claim that it remains legitimate to talk of *a* French perspective although French voices are multiple and disparate), I feel able to associate with France. Simultaneously,

²⁹⁴ Latour, B *Reassembling the Social* supra note 97 at 100.

²⁹⁵ Id at 128 and 131, respectively [emphasis original].

²⁹⁶ Derrida, J *De la grammatologie* supra note 36 at 233.

the idea of 'empowerment' makes it possible for me to display various specificities that, on account of my experience with what I am willing to style 'Canadian culture', I feel in a position to link with Canada. The fact that I, qua comparatist, intervene as a Canadian having lived in France for fifteen years or so both helps and hinders this 'trialectical' process that, inevitably, even as it purports to convey information about laws, effectuates a transformation of them and, just as inescapably, perpetrates a deformation also. In this sense at least, as Mallarmé had occasion to observe, 'any comparison is defective at the outset'.²⁹⁷

As it silently suggests that the 'empowerment' of the individual emerges from his subjection to the state, the French statute implements an idea that, in France, is closely associated with the political philosophy of Rousseau whose key contention in this regard is that the state is created in order to preserve freedom and that it is in one's interest to submit to the state so that one can be favoured with freedom (something that despotism would deny one). Accordingly, the citizen enjoys freedom as defined by the state, which means that ultimately freedom is achieved *through* the state.²⁹⁸ In the words of Lucien Jaume, a leading French political scientist who refers to the 'precariousness of individual right',²⁹⁹ in France 'the recognition of an individual right [...] cannot come first; it is obtained by subtraction from the prerogatives of the public authority or through an autolimitation of its prerogatives by the public authority'.³⁰⁰ The state is conceptualized as 'the body defining, controlling, and implementing the general interest', such that private interests can only enjoy derivative legitimacy.³⁰¹ In sum, 'centralization and the omnipresence of the state are thought to be indispensable for individual freedom'.³⁰² Indeed, if there exists one individual right, it is '*to be well governed*'.³⁰³ Pursuant to this conception of 'empowerment', it is arguable that after the coming into force of the statute on 'religious attire at school', a French citizen enjoys more freedom than was previously the case. Specifically, this citizen is now endowed with a supplementary layer of freedom from disturbance, that is, from having to confront awkward manifestations of religious allegiance at school. (Anecdotally, I may add that a number of French colleagues have indicated to me in private conversation how they would find the wearing of religious dress at school by the few a shocking and unacceptable imposition on the many.)

At the same time, the Canadian judicial decision is regarded by Canadians as 'empowering' given how it confirms one's entitlement freely to express religious allegiance at school. Here, being configured within a different, non-Rousseauian, 'rights-against-the-state' model, 'empowerment' is premised on the fact that if 'the diverse cultural ways of the citizens are excluded or assimilated, [the constitutional order] is, to that extent, unjust'.³⁰⁴ This postulate finds its expression in the recognition by the state of identity groups that deploy comprehensive and ascertainable world-views informed, amongst other constitutive features, by religious convictions and in the willingness of the state to

²⁹⁷ Mallarmé, [S] (2003) [1892] 'Quelques médaillons et portraits en pied' in *Oeuvres complètes* Marchal, B (ed) vol II Gallimard at 138. This text was published upon Tennyson's death.

²⁹⁸ Eg: Troper, M (2000) 'French Secularism, or *laïcité*' (21) *Cardozo Law Review* 1267 at 1268.

²⁹⁹ Jaume, L (1997) *L'Individu effacé* Fayard at 372.

³⁰⁰ Id at 371.

³⁰¹ Id at 18-19 [emphasis omitted].

³⁰² Spitz, J-F (2005) *Le Moment républicain en France* Gallimard at 447.

³⁰³ Jaume, L *L'Individu effacé* supra note 299 at 539 [emphasis original].

³⁰⁴ Tully, J *Strange Multiplicity* supra note 208 at 6.

grant these groups some legal autonomy or form of self-government within the public sphere. Through the judicial decision of the Supreme Court of Canada, state law thus reveals a normative commitment to cultural accommodation that makes it possible for an individual to be governed, as a matter of Canadian law, by the institutions and traditions of the religious group to which the person professes allegiance. As it fosters respect for pluralism, this approach to legal/cultural governance implements an institutional design featuring a specific distribution of rights and authority between the state and the group allowing for what have been called 'group-differentiated rights'.³⁰⁵ It also promotes a conception of the polity incorporating the view that legal/cultural narratives must be seen to be inextricably intertwined even at the price of some social fissiparity.³⁰⁶ The demand for public recognition of one's particular views is, of course, precisely what Rousseau abhorred. Charles Taylor thus points to a key passage in the *Discours sur l'inégalité* where Rousseau castigates the moment when individuals begin to solicit 'preferential esteem' within a society.³⁰⁷ For Rousseau, this is 'the first step towards inequality and towards vice at the same time'.³⁰⁸ 'By contrast', in Taylor's words, 'in republican society, where all can share equally in the light of public attention, [Rousseau] sees the source of health'.³⁰⁹

In the end, then, in both jurisdictions it will be thought that the law has intervened to 'empower' citizens. Yet, French citizens can be expected to take the view that by allowing express manifestations of religious allegiance at school, the Canadian court is 'forcing' religion unto all students in the classroom and thus confining many students' freedom in a way that 'disempowers' them while Canadians may readily interpret the French statute as an affront to individual freedom and, as such, as a prime illustration of 'disempowerment' of the individual by the state. As I mentioned above, it must be clear, though, that the French and Canadians are using different conceptions of 'empowerment' — or rather of what I, qua comparatist, style as 'empowerment' for, as I have observed, it is the case that I am *inventing* the (unobjectivizable and untruthable) idea of 'empowerment' through a 'thirthing' of knowledge on account of which I then intervene in my capacity as situated comparatist-at-law. If you will, the notion of 'empowerment' embodies or enacts a decision on my part. Again, this observation is not to suggest that my understanding of local manifestations of 'empowerment' can be reduced to a figment of my imagination. Rather, it means that, in interpretive response to the information garnered in the course of my comparative investigation, I frame 'empowerment' according to my ingenuity — or my 'flair'³¹⁰ — and in the knowledge that my constructions are defeasible at least to the extent that a more convincing argument can be found to carry over mine. Since no account of foreign law is wholly free of narrativity, it follows that every report on foreign law is in part autobiographical, the expression of a partial and engineered point of view that, like each comparatist, I call 'mine' (and that finds itself competing with other partial and engineered observations by other comparatists). Note that no amount of logic, precision,

³⁰⁵ Kymlicka, W (1995) *Multicultural Citizenship* Oxford University Press at 6.

³⁰⁶ Throughout this paragraph, I track Shachar, A (2001) *Multicultural Jurisdictions* Cambridge University Press at 1-2.

³⁰⁷ Taylor, C (1994) 'The Politics of Recognition' in Gutmann, A (ed) *Multiculturalism* Princeton University Press at 35.

³⁰⁸ Rousseau, J-J (1964) [1754] *Discours sur l'origine et les fondemens de l'inégalité parmi les hommes* in *Oeuvres complètes* Gagnebin, B and Raymond, M (eds) vol III Gallimard at 169-70.

³⁰⁹ Taylor, C 'The Politics of Recognition' supra note 307 at 35.

³¹⁰ Supra note 296.

or clarity in the comparatist's account of foreign law can eliminate narrativity from his report. Arguably, in fact, the more logical, precise, or clear the comparatist's writing — the more he 'keeps wanting to add just one more word, in the futile hope of making it all clear'³¹¹ — the more narrativity it will feature since his rendition of foreign law will then be more *storied*.

I find it important to insist on the fact that even though foreign law cannot be uncovered except through the comparatist's interpretation, it must not 'collapse' into mere interpretation. In other words, my claim that, in terms of what is accessible, there is no foreign law that is not always already located in a language and therefore in an interpretation, need not entail that foreign law cannot exist without being thought or is nothing apart from the comparatist-at-law's reading. To say that the comparatist invents foreign law is not to militate for the abrogation of referentiality (indeed, if asked to express the most cursory view on reference, I would, along with Willard Quine, plead 'inscrutability' or 'indeterminacy', that is, opacity, an argument to which I return below).³¹² Rather, I contend — I am almost minded to write that I *simply* contend — that it is not possible for a comparatist-at-law to *conceive* of something existing independently of his thinking of it, a view already well expressed in Berkeley who called the contrary proposition 'a manifest repugnancy'.³¹³ Framed differently still, my claim is that even assuming a given world, this given world is inevitably given to *the comparatist-at-law*. Incidentally, no measure of 'givenness' being conceded to foreign law should lead one to the view that the comparatist's contribution is superfluous on the ground, say, that foreign law exists irrespective of him, that there is a foreign law-text in meaningful existence somewhere outside any reading process. Crucially, without the comparatist's realization foreign law could not mean anything: it could not *signify*.

As I re-present each law-text on 'religious attire at school' qua singular statement whose truth-claim, if one wants to persist in using such language (for now!), offers but a variation on the theme of local knowledge, I renounce any identification of either law-text as truth in the received sense of the word, that is, as truth carrying a transcendental import. Between the French and Canadian models, there is the rational presentation of a 'truth-claim' by one society to another, which, sincerely and legitimately, will reject it on the basis of its 'truth'. Percipiently and perspicuously, Beckett captured the enigmaticity of this exemplary situation as he referred to 'the simple and necessary and yet so unattainable proposition that their way of being we, [is] not our way and that our way of being they, [is] not their way'.³¹⁴ In other words, when the French state is being a state dealing with religious attire at school, like Canada, the French state's way of being *that* (that is, a state dealing with religious attire at school) or the French state's way of being a state that, like Canada, is dealing with religious attire at school or, in short, the French state's way of being Canada as regards religious attire at school, is not Canada's way. The same can be said in

³¹¹ Miller, JH (2003) 'Zero' in *Glossalalia* Wolfreys, J (ed) Routledge at 388.

³¹² See Quine, WVO *Word and Object* supra note 281 at 26-79. Thirty years later, Quine was taking the view that the expression "'indeterminacy of reference'" would have been better': Quine, WV (1992) *Pursuit of Truth* (2nd ed) Harvard University Press at 50.

³¹³ Berkeley, G (1996) [1710] *Principles of Human Knowledge* in *Principles of Human Knowledge and Three Dialogues* Robinson, H (ed) Oxford University Press §23 at 33.

³¹⁴ Beckett, S (1990) [1946] 'The Capital of the Ruins' in *As the Story Was Told: Uncollected and Late Prose* J Calder at 25.

reverse as regards Canada vis-à-vis France. And I am able to endorse Beckett's insight to the effect that every paradigm is assessed — indeed, can *only* be assessed — on the basis of another paradigm even as I allow for the (evident) fact that there are people in France who are drawn to multiculturalism and that an argument for laicity could win some support in Canada — although one would expect the proposition to have to be adjusted, or localized, so that it could resonate beyond the legal culture of whose practice it is the theory.

What must remain chimerical, however, is the formulation of a contention vindicating one of the different claims in a way that would prove acceptable *both* to the French and Canadians or seem persuasive within *both* prevailing paradigms. Specifically, one cannot reasonably imagine a situation where the French would understand the Canadian position on its own terms and according to its own justifications; then proceed to identify inadequacies in the Canadian view that the Canadians themselves would accept; and finally explain how, by resorting to the French model, these difficulties could be avoided in a manner that the Canadians would countenance. And even if one claim were to be ascertained as more 'adhesion-worthy' than the other from practically every perspective and for practically everyone, these facts would still not make it transcendently 'true'. Rather, the argument, though popular at a specific point in time and in a particular place, would remain fallible and contestable.

In line with this claim, because each law has its regime of 'truth' (to continue with such language... for now!), I maintain that the notion of 'universal law' is a contradiction in terms. (There are other difficulties arising from universalism, not least the fact that '[t]he difference of cultures cannot be something that can be accommodated within a universalist framework'.³¹⁵ Moreover, the use of 'universalism' as a symbolic stratagem hides one of the most invidious forms of essentialism, which is the compression of the intractable difference characterizing humankind to a narrow set of features said to pertain to all human beings at some fundamental level. Here, 'common humanity is a trap since it defines divergence as secondary'.³¹⁶) No doubt controversially, I therefore take the view that there is no 'universal human-rights law', another overreaching and overburdened idea (not unlike 'global human rights' or, for that matter, 'global justice'), except, as Quine would have put it, qua assignment of reference to words by their speaker.³¹⁷ Far from being a disinterested claim, universalism is always someone's 'universalism'.³¹⁸ Indeed, '[t]he question about the universality of human rights is a Western cultural question'.³¹⁹

To be more precise, this matter concerns 'the historical continuum of the European colonial project in which whites pose as the saviors of a benighted and savage non-European world', '[t]he white human rights zealot join[ing] the unbroken chain that

³¹⁵ Bhabha, H 'The Third Space' supra note 106 at 209.

³¹⁶ Stengers, I 'Comparison As a Matter of Concern' supra note 74 at 62-63.

³¹⁷ See generally Quine, WVO *Word and Object* supra note 281 at 26-79. Is it necessary to add that to be against the way in which human rights are understood and re-presented in terms universal, transcendental, or eternal is *not* to be against human rights? The point is not, then, that human-rights work should not continue, but that it should be pursued in the name of a presently-located and presently-ascertainable ideology asserting itself through an inscription in power.

³¹⁸ Cf Spivak, GC *Other Asias* supra note 227 at 312 note 62: 'It is folly to think that an unmarked universalism can be produced in politics or philosophy'.

³¹⁹ De Sousa Santos, B (2007) 'Human Rights As an Emancipatory Script? Cultural and Political Conditions' in de Sousa Santos, B (ed) *Another Knowledge Is Possible* Verso at 12. For converging critiques, see, eg, Woodiwiss, A (2002) 'Human Rights and the Challenge of Cosmopolitanism' (19) *Theory, Culture & Society* 139; Otto, D (1997) 'Rethinking the "Universality" of Human Rights Law' (29) *Columbia Human Rights Law Review* 1.

connects him to the colonial administrator, the Bible-wielding missionary, and the merchant of free enterprise'.³²⁰ Indeed, '[f]rom the beginning human rights are something Euro-Americans take to others'.³²¹ For example, the practices that are used as yardstick by human-rights movements in Sudan or Indonesia are effectively those of the US or France, which are somehow cast as 'other than' structures of domination, deemed to be disseminable, and claimed to be worthy of export with a view to correcting or replacing local ways.³²² As a result, curiously (!), the prevailing 'universal' human-rights discourse is speech in which 'one readily perceives [...] the face of bourgeois liberal feminism, American constitutionalism as interpreted by [the US] Supreme Court, or middle-class Judeo-Christian family life in North America or Western Europe today'.³²³ In effect, the alleged universalism being defended is but a particularism whose specificity consists in important ways in defining/downgrading its rival knowledges as particularistic — which suggests that such appeal to universal values is tarnished with the idea of totalization or even totalitarianism.³²⁴ In this regard, it seems fair to say that 'the rhetoric we Westerners use in trying to get everyone to be more like us would be improved if we were more frankly ethnocentric, and less professedly universalist' — which is not at all the same as asserting that all rights claims are indistinguishably weak.³²⁵ It remains that the differend is what there is; in other words, there is more than one human-rights law-as-culture, each instance being singular and none being in a position to assert an objective entitlement to being the true one.³²⁶ The Venn diagram of universal human rights is an empty set.

Because I am discussing human rights, I find it especially important to remark that acceptance of contingency need not lead to quietism. 'What we do around here' cannot be immune from critique on account of the fact that, well, it is 'what we do around here'. Strong advocacy, indeed explicit partisanship, necessarily to be informed by one's history and the circumstances at hand, is admissible and can indeed prove desirable. In this regard, there is no reason why a cultivated consciousness of one's contingency should

³²⁰ Mutua, M (2002) *Human Rights: A Political and Cultural Critique* University of Pennsylvania Press at 155. See also Chakrabarty, D *Provincializing Europe* supra note 73 at 5 who notes how 'European imperialism [...] reduced th[e] [Enlightenment] idea [of the human] to the figure of the settler-colonial white man'.

³²¹ Nader, L 'Human Rights and Moral Imperialism' *Anthropology News* September 2006 at 6.

³²² For an excellent demonstration on point, see Goodale, M (2009) *Surrendering to Utopia: An Anthropology of Human Rights* Stanford University Press.

³²³ Shweder, RA (2008) '[Comment]' (49) *Current Anthropology* 377 at 377.

³²⁴ See de Sousa Santos, B, Nunes, JA, and Meneses, MP 'Opening Up the Canon of Knowledge and Recognition of Difference' supra note 195 at xl-xli. Although only tangentially related to the human-rights agenda, the 'rule of law', a conservative 'law-and-order' discourse closely connected to the state and envisaged as a 'technical, legal, and apolitical' template, has been subjected to an analogous process of diffusion while also having to acculturate itself locally: Rajagopal, B (2008) 'Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination' (49) *William and Mary Law Review* 1347 at 1349.

³²⁵ Rorty, R (2007) [1997] *Philosophy As Cultural Politics* Cambridge University Press at 55.

³²⁶ If law is intrinsically singular, and if it can meaningfully be recognized as singular without losing its singularity in the process, is it not the case that law therefore features a characteristic that can be said to be shared by all laws and that, accordingly, could legitimately be called 'universal'? This argument would require the singularity that is a feature of every law to be common to every other law. However, by definition so to speak, singularity excludes commonality. In other words, singularity is intrinsically un-universalizable (irrespective of the extent of accumulating singularities) or, if you will, the only 'universal' property that one can associate with singularity is its non-universalizability. In sum, all that can be said to be 'universal' about law's singularity is that... it cannot be universal. Now, only someone who is desperately keen to retain the idea of 'universality' would argue that the non-universalizability that is characteristic of law's singularity meaningfully partakes in the universal. Cf Derrida, J and Ferraris, M A *Taste for the Secret* supra note 112 at 58 where Derrida refers to 'the sharing of what is not shared' and adds that 'there is a consensus on *nothing*' [emphasis original].

disqualify or cramp the comparatist-at-law's agency. Arguably, showing awareness of the situatedness of one's views and revealing oneself to be sensitive to the existence of other situated alternatives will, in fact, make agency more responsible and plausibly more effective locally than an uncompromisingly objectivist or universalist conviction.³²⁷ Again, it is key to observe that the idea is not at all to hold that every foreign law is as good as every other, an argument that would imply 'an omniscient epistemological vantage from which (and of course in relation to which) all difference is simultaneously available to a detached, surveying gaze' — a kind of Archimedean standpoint that simply cannot be sustained.³²⁸ Rather, I contend that any study of a foreign law requires the comparatist, through a process of tracing, to appreciate it qua law-as-culture and accept that its situatedness deprives it of any claim to objectivity or truth.

THE DOUBLE BIND (II)

I mentioned that the other matter concerning the ideas of 'objectivity' and 'truth' as they manifest themselves within orthodox comparative legal studies concerns the comparatist. There are two basic claims that I want to advance in this regard.

My first argument is to the effect that there is simply no self — specifically, no comparatist-at-law — whose understanding can be unencumbered by any constitutive cultural inheritance. Prior to the formulation of explicit epistemological relations to the world, the comparatist-at-law always already has an involvement with the world that makes it possible for him to ascribe meaning to the entities he encounters. If you will, there is an asymmetrical dependence of knowledge-acquisition upon pre-understanding, such that any appreciation of what is constituted — the world — turns on an always already constituted understanding of it. In other words, the interpreter's habitus, to an important extent, 'closes' the situation epistemologically speaking. I readily concede that such an assertion has become trite in many fields of learning. Whether in anthropology, sociology, or comparative literature, to name but three disciplines, it is accepted that language acts not as mere intermediary (leaving what it transports intact), but as mediator (transforming what it carries).³²⁹ And, to indicate but one more illustration, it is equally understood that there is no possibility of knowing the world extra-experientially. But these insights fail to be appreciated in comparative legal studies where, in its quest for the depletion of the rich semantic contents of the 'legal' in favour of the levelling of meaning, the *doxa*, very much informed by the compulsive analyticity, preemptory conceptualization, and obsessive systematization favoured by German lawyers and their disciples, in Germany and elsewhere, continues to elide the constructive role of language and experience. For example, it persists in proclaiming that an account seeking to formulate the 'better' law can be 'impartial',³³⁰ 'dispassionate',³³¹ and 'neutral'.³³²

³²⁷ I draw closely on Smith, BH 'The Chimera of Relativism' supra note 26 at 24-25.

³²⁸ Scott, D 'Culture in Political Theory' supra note 19 at 104-05.

³²⁹ Latour reminds us of the significance of the distinction between these two terms: Latour, B *Reassembling the Social* supra note 97 at 37-42. For a general discussion (not necessarily framed according to Latour's differentiation), see Simpson, D (2002) *Situatedness* Duke University Press.

³³⁰ Von Bar, C and Lando, O 'Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code' supra note 188 at 222.

³³¹ *Ibid*

³³² *Id* at 228.

Comparatists-at-law defending these views fail to realize — or are willing to ignore — that such bankrupt bromides, as they reveal at best slipshod introspection, reveal them in a particularly poor epistemological light. How, for example, can one even begin to diagnose what one regards as local deformations of the 'better' law without presuming some contentful notion of 'good' law that would motivate one's analysis, thus disclosed to be inherently *interested*? It is as if there was no appreciation by the *doxa* of the fact that only within the pregiven sign-system within which one has been enculturated can one experience and understand. It is as if there was no realization that '[o]ur equipment for cognition and action is soaked in particularity'.³³³ As Heidegger observed, '[i]n every case [...] the interpretation [...] is grounded in *something we grasp in advance* — in a *fore-conception*'.³³⁴ Indeed, understanding does not emerge despite cultural embeddedness, but is rendered feasible because of it. Such is, if you will, the principal achievement of enculturation: *it makes understanding possible*. How could any understanding happen without anticipation of meaning? And how could there be anticipation of meaning without enculturation? Meanwhile, Kötz holds that 'the comparatist must eradicate the preconceptions of his native legal system'.³³⁵ He would untie comparatists-at-law from themselves and have them neutralize their own existential horizon, their own worldhood. He would leave them epistemologically bereft. But how can he not appreciate that '[t]o try to escape from one's own concepts in interpretation is not only impossible but manifestly absurd'?³³⁶ How can he not accept that '[t]o interpret means precisely to bring one's own preconceptions into play so that the text's meaning can really be made to speak for us'?³³⁷ (Within comparative legal studies, the neglect of theory stands neglected. Above, I asked whether one should frame the *doxa*'s assumptions in terms of naïveté or disingenuousness, of overbearance or audacity, of failure of realization or willingness to ignore. The most charitable interpretation would be that the *doxa* is neither dishonest nor incompetent, indeed that it features 'intelligent, sometimes ethically motivated, often exceptionally well-trained people',³³⁸ who have however been instructed into a very specific idiom according to a very particular grammar and syntax — an education that, from a legal/cultural standpoint, is profoundly embedded locally and therefore irrevocably contingent. *Quaere*: is this interpretation *too* charitable?)

To return to the matter of pre-intervening understanding, facilitation is limitation and enablement is disablement. Thus, what can at the very least be called 'cultural suggestibility' confines appreciation within a particular horizon (recall that 'horizon' derives from a Greek word connoting the ideas of 'limit' or 'boundary'). Accordingly, a Parisian can never understand the Canadian legal experience *like a Montrealer* because 'at most [he is] always just "there alongside"'.³³⁹ It is not that a Parisian can never understand the Canadian legal experience. Understanding there can be but, the self not being the

³³³ Unger, RM (2007) *The Self Awakened* Harvard University Press at 55.

³³⁴ Heidegger, M *Being and Time* supra note 6 at 191 [emphasis original]. Karl Marx's blazing version of this assertion states that '[t]he tradition of all the dead generations weighs like a nightmare on the brain of the living': Marx, K (2000) [1852] *The Eighteenth Brumaire of Louis Bonaparte* in *Karl Marx: Selected Writings* (2nd ed) McLellan, D (ed) Oxford University Press at 329.

³³⁵ Supra note 254.

³³⁶ Gadamer, H-G *Truth and Method* supra note 25 at 398.

³³⁷ Ibid.

³³⁸ Smith, BH 'The Chimera of Relativism' supra note 26 at 16.

³³⁹ The word is Heidegger's: Heidegger, M *Being and Time* supra note 6 at 282.

other, a *different* understanding it will *have to* be since a Parisian cannot *inhabit* Canadian legal culture. Canadian law, for example, is that which a Parisian observes while it is that which a Montrealer lives through.³⁴⁰ I am reminded of Tony Weir's quip: 'Collaboration between jurists of different nations has its problems; two of them are that neither questions nor answers are understood'.³⁴¹ This erudite comparatist-at-law was then emphasizing, not least on the basis of his own extensive foreign experience, that the abyss across cultures — or across laws-as-cultures — cannot be bridged.³⁴² 'It is enough to say that we understand in a *different* way, *if we understand at all*'.³⁴³ Should the message ever overcome the unpredictable vagaries of errancy and get transmitted, it will have transformed itself along the way. Having ascertained, therefore, that there can be no dialogue — that interdiction is interdicted — and that only *negotiation* is possible (which, as inevitably as crucially, features a relation of power),³⁴⁴ Derrida, wishing to upset the totalizing impulse underlying the idea of 'community' and wanting to talk instead about a 'gathering-together of singularities',³⁴⁵ appositely draws a crucial conclusion: 'Between my world, [...] what I call "my world", [...] between 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 desire for world or the lack of world, the [human] being in lack of world, will try to pose, to impose, to propose, to stabilize. There is no world, there are only islands'.³⁴⁶

As I read him, Derrida's contention is that a French lawyer, for example, can never see English law as featuring the presence of no-code instead of an absence of code. Rather than communication, there is distantiation — not the alienating type, but a productive kind allowing the comparison to occur in the time in which the comparatist acts and in the third space in which he dwells not as interpretive accord or harmony, which would spell totalization, but as that which is *out of joint*. The thinness of the contrary position is

³⁴⁰ What is 'a Parisian'? Who is 'a Montrealer'? Although the contrast that I am drawing here does not appear to me to call for such specification, I accept that there are contexts in which a term like 'Montrealer' would require problematization in order to show that a 'Montrealer' can be, for instance, an 'east-end francophone' or a 'west-end anglophone'. And there are other situations where it would be necessary to illustrate that a 'west-end anglophone' can be an 'anglophone *de souche*', as the local saying goes (at least amongst francophones), or a 'second-generation immigrant'. And there are no doubt contexts where the notion of 'second-generation immigrant' would have to allow for a distinction between Asian and Eastern European immigration. Along the way, as the dedicatee of this Article helpfully observes, one must not lose sight of the fact that Jerusalem makes Montreal look homogeneous.

³⁴¹ Weir, JA (1969) [Book Review] (27) *Cambridge Law Journal* 122 at 123.

³⁴² Poets like Rainer Maria Rilke and Paul Celan have been blunter. Cf Rilke, RM (1950) [1902] in *Rilke Briefe* Rilke-Archiv in Weimar (ed) vol I Insel at 41: 'And there stand those stupid languages, helpless as two bridges that go over the same river side by side but are separated from each other by an abyss. It is a mere bagatelle, an accident, and yet it separates...'. In this letter written from Paris, Rilke was commenting on the impossibility of communicating with Rodin on the occasion of his visit to him. The word 'abyss' ('*Abgrund*') also appears in Celan's correspondence with specific reference to the separation between languages: Lyon, JK *Paul Celan and Martin Heidegger* [1960] supra note 92 at 37.

³⁴³ Gadamer, H-G *Truth and Method* supra note 25 at 296 [emphasis original].

³⁴⁴ See Derrida, J and Labarrière, P-J (1986) *Altérités* Osiris at 83. The relevant passage is Derrida's.

³⁴⁵ Derrida, J (1993) *Sauf le nom* Galilée at 38.

³⁴⁶ Derrida, J (2010) [2002] *La Bête et le souverain* Lisse, M, Mallet M-L, and Michaud, G (eds) vol II Galilée at 31. Having addressed '*the incommunicability as such between beings*', Pierre Klossowski enters one crucial reservation as he observes that 'there is only one authentic [...] communication', that is, '*the exchange of bodies through the secret language of corporeal signs*': Klossowski, P (1997) [1970] *La Monnaie vivante* Rivages at 61 [emphasis original].

expressed by an analytical philosopher who does not deem it apposite to formulate even a perfunctory repudiation of the view he opposes: 'I neither have argued nor will argue that our culture has the intellectual resources which make it possible, with good will and sympathetic imagination, to understand alien cultures. I take it for granted that this is so'.³⁴⁷ Such a vacuous statement seems on par with assumptions to the effect that many individuals cross daunting cultural barriers on a daily basis or that texts can mean the same thing in different languages.

I maintain that errancy is not simply an accident that somehow befalls purposive communication. Rather, I defend the view that there is simply no possibility for a comparatist-at-law to reach a point where to stand and behold, let us say, the French and Canadian law-texts on 'religious attire at school'. Indeed, there is no stable distinction or separation between the comparatist's mind and the compared texts. It is not, of course, that a mind is the same thing as a text. But it is impossible to identify a definite moment at which the mind would stop acting productively in its enmeshment with the text and begin to behave strictly receptively vis-à-vis the text that it would view as 'object'. To return to my reference to 'empowerment', there is no access to an objective conception — or to a meta-conception — of 'empowerment' that would allow a hypothetically detached comparatist-at-law, someone having somehow extirpated himself from all culture, to gauge from such a distance as to prevent any interpretive involvement whatsoever how the French and Canadian conceptions of 'empowerment' rank on a hypothetical 'empowerment' scale. Far from being a 'common' denominator, as a superficial apprehension of the matter might suggest, 'empowerment' qua 'thirthing' of knowledge is *not-common* since it is emerging as a manifestation of the comparatist-at-law's situated appreciation of the laws being compared. In the absence of 'some co-understanding beforehand',³⁴⁸ the idea of 'commonality' across laws had already been interrupted. Now, the delineation of the third space creates further differentiations as the notion of 'empowerment' developed by the comparatist-at-law is seen to differ from its particularization in this French way or that Canadian manner.

On account of its situatedness, then, the French statute resists objectivation as wrong, incorrect, or worse than the Canadian judicial decision, which similarly avoids objectivation as right, correct, or better than the French statute. And, in the absence of access to an objective standpoint, a comparatist-at-law cannot claim that the French statute embodies the true standard of empowerment to be set for Sikh boys in Canadian public schools or that the Canadian judicial decision incorporates the true standard of empowerment to be

³⁴⁷ Raz, J (2009) *Between Authority and Interpretation* Oxford University Press at 46. Jürgen Habermas's discourse ethics, which, on the basis of the principle of universalizability that he himself enunciates, assumes the possibility of a decentering of the self, unconstrained and undistorted communication, co-operative search for truth, and consensus, fares only marginally better. The difficulties regarding what is effectively Habermas's reliance on a metaphysical stance in order to 'burs[t] every provinciality asunder' (Habermas, J (1987) [1985] *The Philosophical Discourse of Modernity* Lawrence, F (trans) MIT Press at 322) are nowhere more apparent than when, in his later writings, he purports to combine a situated reason with a transcendent one through the notion of '[t]ranscendence from [w]ithin': Habermas, J *Between Facts and Norms* supra note 230 at 17-27. To put the matter charitably, as he asserts the independence of reason from cultural conditions of intelligibility and possibility 'Habermas [...] does not have an ear for the plurality of voices in which reason can speak': Kompridis, N (2006) *Critique and Disclosure* MIT Press at 86. In effect, Habermas's neo-Kantianism basically dissolves the critical theory that one associates with the Frankfurt school, in particular with Max Horkheimer and Adorno, even as Habermas defends his intellectual filiation.

³⁴⁸ Heidegger, M *Being and Time* supra note 6 at 207.

set for Muslim girls in French public schools. What the comparatist can assert, of course, operating against the background of his specific point of departure,³⁴⁹ is that *according to him, as he approaches the matter*, the French statute or Canadian judicial decision ought to be adopted by both, or indeed by all, laws-as-cultures. Possibly, the comparatist-at-law can also get others to think like him. Perhaps he may even secure a large number of converts. But neither such predilections on his part nor the formulation of a consensus around him can allow for objectivity or assert access to truth. Note that at no point is the comparatist-at-law saying that the two laws are indifferently valuable. In this regard, Richard Rorty helpfully formulates the distinction between 'saying that every community is as good as every other and saying that we have to work out from the networks we are, from the communities with which we presently identify'.³⁵⁰

Yet, someone like Ronald Dworkin contends that 'there is objective truth to be had in the realms of ethics and morality',³⁵¹ that one must be prepared 'to claim absolute truth as the basis of a theory of human rights'.³⁵² In Dworkin's view, '[on]e ha[s] no option' and cannot afford to 'worry that it is both arrogant and impolitic' to argue the case for truth.³⁵³ For instance, according to Dworkin, 'a scholar who labors for years over a new reading of *Hamlet* cannot believe that his various interpretive conclusions are no more valid than the contradictory conclusions of other scholars [...]. [...] [I]f [interpreters] have come to think that one interpretation of something is best, they can also sensibly think that that interpretation meets the test of what defines success in the enterprise, even if they cannot articulate that test in much or any detail. So they can think there is objective truth in interpretation'.³⁵⁴ For my part, I cannot see how Dworkin's interpreter is legitimately — and creditably — able to move from 'sensibly think[ing] that [his] interpretation meets the test of what defines success in the enterprise' to 'think[ing] [that] there is objective truth in interpretation'.³⁵⁵ Now, consider a comparatist-at-law inscribing a foreign (human-rights) law. Assume further that this comparatist is acting seriously and wishes to be taken seriously. Of course, one can expect this comparatist to deem his interpretation of foreign (human-rights) law to offer a more compelling reading than, say, other extant interpretations to be found in various books or journals. But this sense of achievement does not mean, need not mean, and must not mean, that this comparatist-at-law should hold his interpretation (or a foreign human-rights law) to be 'true'. What this comparatist requires to believe, and what others need to believe about his work, is that his interpretation (or the foreign human-rights law at issue) carries a higher interpretive 'yield' than other

³⁴⁹ See Derrida, J *De la grammatologie* supra note 36 at 233: 'We must begin *somewhere where we are*', '[s]omewhere where we are: within a text already where we believe that we are' [emphasis original]. Contrariwise, positivism assumes that the influence of the interpreter must be minimized as much as possible and, ideally, that it must be effaced altogether. The French *Cour de cassation's* anonymous and (seemingly) rigorously syllogistic decisions offer an exacerbated illustration of the position whose background assumption is that a position can be held without any background assumption.

³⁵⁰ Rorty, R *Objectivity, Relativism, and Truth* supra note 287 at 202.

³⁵¹ Dworkin, R (2006) *Is Democracy Possible Here?* Princeton University Press at 46.

³⁵² Dworkin, R (2011) *Justice for Hedgehogs* Harvard University Press at 338-39.

³⁵³ Id at 339 and 338, respectively.

³⁵⁴ Id at 151 [emphasis original].

³⁵⁵ For an equally problematic, if more convoluted, assertion, see Dworkin, R (2006) *Justice in Robes* Harvard University Press at 14: 'A proposition of law is true [...] if it flows from principles of personal and political morality that provide the best interpretation of the other propositions of law generally treated as true in contemporary legal practice'.

interpretations (or other foreign human-rights laws).³⁵⁶ They do not need to think of it as 'true'. Indeed, 'truth' is superfluous as regards any expression of conviction in the supremacy of one interpretation over others. Moreover, it is misleading for while it evokes authority, it fails to account for the vulnerability that inherently befalls any interpretation.

My second contention, which I have already addressed but want to re-assert at this stage, is that the comparatist himself fabricates the foreign law that he makes into his 'object' of study (indeed, he also constructs his 'own' law, but this fact falls beyond the purview of this Article). A prevalent, though unexamined, epistemological assumption within mainstream comparative legal studies concerns the matter of referentiality. In particular, it is taken for granted that 'the English law of divorce' exists in 'reality' or as 'reality', not unlike the view being taken of this rock or that tree. Specifically, there would be 'the English law of divorce' existing independently of comparatists who come to 'it' in order to ascribe meaning to 'it' in a context where 'it' would be there, already perfectly determinate, awaiting understanding. There would be, if you will, English-law-in-itself, not unlike the Kantian *Ding an sich*. I suggest that this approach can most generously be regarded as indulging an unwarranted metaphysics of presence. In effect, as I indicated above, it is not so much that the 'in-itselfness' of the law does not exist (which would be an ontological claim of the type I do not want to make), but that the very idea of *that* is inaccessible to thought since one cannot have in mind something that would exist out of mind (which is the brand of epistemological statement I want to defend). Far from there being a discontinuity between the foreign law and the comparatist, between an 'object' and a 'subject', there exists an *interface*. In practice, no longer has the comparatist assembled his books that he proceeds to act as an earnest (and remorseless) producer of knowledge, even as he must accept a kind of silent and ineluctable submission or subscription, a being-made-hostage, to the foreign law-text (after all, he could hardly creditably say of the English statute on divorce that it concerns ratemaking in international air transport). In sum, the comparatist-at-law behaves in important ways as if he was constructing a fictional narrative.³⁵⁷

Imagine a comparatist in the Oxford library on a gloomy November afternoon as he undertakes to trace 'the English law of divorce'! Intervening on the available materials, that is, on the books that he happens upon and that happen upon him (which means that there is an opportunistic dimension to the acquisition of knowledge on 'the English law of divorce'), operating within the time at his disposal, which will allow for so much research only, he decides to use this textbook rather than that, to quote the passage at page 345 rather than simply refer to it in a note, to give pride of place to Smith's critique published in what he regards as a lesser-known journal or to ignore it on account of its idiosyncratic character, to accentuate this 2002 Court of Appeal decision rather than that 1998 judgment, to quote from Lord Jones's opinion rather than Lord Thomas's, and so on and so forth. Along the way, this comparatist readily depends on the views of individuals whom he is willing to regard as local experts — although it is not always clear how he judges a local author to be a reliable source of knowledge in an area in which he himself, being from France, often cannot act as an authoritative source of knowledge. It is rare indeed that

³⁵⁶ *Supra* note 222.

³⁵⁷ This point is excellently argued in Bercea, R (2009) 'Toute comparaison des droits est une fiction' in Legrand, P (ed) *Comparer les droits, résolution* Presses Universitaires de France at 41-68.

the comparatist will pursue the chain of authority very far. In his urge to use information rather than verify it, he will usually fail to seek a 'first knower', that is, he will *satisfice*. The fact that so much information is personally uninvestigated indeed compels one to ask whether one ought not to be talking about the comparatist holding a belief rather than knowledge. Be that as it may, it should be obvious that information about foreign law is acquired in an adventitious and messy agglomeration of ways. Beyond crafting his tracing, the comparatist polishes his writing by choosing this word rather than that, this formulation instead of that, and this argumentative sequence over that. In addition, he decides to italicize this passage, insert this sub-heading, and indent this quotation (but not that...).

Any close examination of the comparatist-at-law's research-*cum*-writing intervention on the foreign law-text reveals how it involves from beginning to end a strategy of fabrication of 'the English law of divorce', which is self-reflexive in key respects — the idea of 'self' being used expansively to embrace the discursive formation into which the comparatist has been institutionalized and whose lessons now condition his intellectual deportment as he purports to ascertain relevant sources of knowledge in order to construct a creditable account of 'the law'. Along the way, 'the English law of divorce' is revealed not to be available to the comparatist as a given only, but as the outcome of a complicated exercise in tracing and therefore in invention. Throughout, the comparatist is engaged in a re-presentation, which means that he is presenting anew — or re-presenting — what has already been presented once in the judicial decisions, textbooks, law reviews, and other texts he has considered. The singular meaning of foreign law on which the comparatist will eventually settle (not, then, 'the' meaning of foreign law) does not exist as such in the law-texts, but is generated through the specific interpretive strategy of invention he has elected to deploy. What is re-presented as 'the law' is, in effect, arising from an incessant movement of differencing. The law's 'identity' manifests itself out of the assemblage of the different texts being read and interpreted by the comparatist; it is the outcome of an exercise in knowledge production extending over a certain time and being pursued so as to include a process of open-ended tracing.

Discreetly perhaps, in silence even, no matter how seemingly self-effacing or external vis-à-vis the law-texts under scrutiny, *the comparatist makes the comparative event as he invents the foreign law*. Through a process of close reading, he is actively at work in terms of the very structuration of the foreign. Comparison-at-law is *ars inveniendi*. Quite apart from the fact that this epistemological situation negates the separation between 'subject' and 'object' (the comparatist cannot think of the text outside of his relationship to it), it is important to see that what meaning-making takes place is not free of (political) assumptions in as much as every single one of the comparatist-at-law's micro-decisions is explainable as choice — if as an institutionally conditioned one. More specifically, each micro-decision stands as the joint application, in varying parts, of a taught syntax of articulation of the law and a personal experience, which affect one another. (Importantly, there is nothing here to suggest that the comparatist can construct foreign law irrespective of the law-texts before him. Again, there is an element of recalcitrance to textuality, that is, there is the force of the text, its retortion: *there is what the English statute on divorce wants*.)

Ultimately, the comparatist wishes to discern the singularity of foreign law in order for it to make sense. So as to achieve his goal, he is forced to differentiate between this judicial decision and that, this opinion and that, this textbook and that, this passage and that. His approach shows, once more, how, every one of his readings being unprecedented and

unpredictable, the comparatist actively participates in the production of meaning-at-law. It also suggests that meaning is defeasible — for example, by other comparatists marshalling greater linguistic appreciation, enhanced substantive knowledge, and, generally speaking, a more informed view of the law being studied. Be that as it may, it should be clear that, despite the existence of a statute having demonstrably come into force on 1 July 1973 or a Court of Appeal decision having ascertainably been rendered on 21 November 1959, the conviction that through objectivity one can access something like the truth of foreign law, or foreign law *as it is*, cannot hold.

To formulate the argument that a comparatist, as he appreciates laws transnationally, cannot objectively affirm any law to be true, is not, in my view, to be making an extravagant allegation at all, although I accept that my contention runs askance the epistemological paradigm that obtains within the field of comparative legal studies. In significant ways, I defend something like 'inscrutability of reference', a celebrated claim by Quine to the effect that all that can exist, as I mentioned above, is *assignment of reference to a word by its speaker* (the point being, as far as comparatists-at-law are concerned, that anything that is said about foreign law is uttered *by a comparatist, indeed by this or that comparatist*).³⁵⁸ In particular, then, I disagree with the idea that a law existing in historically-emergent language can ever defensibly be termed — after having been apprehended by the comparatist in his 'own' historically-emergent language — objectively to be true as opposed to other laws, also existing in historically-emergent language, which could just as objectively be said by the comparatist to be false. I reject the contention that a comparatist, regardless of how sophisticated he may show himself to be, could ever be in a position to identify a law as being objectively true, right, correct, or 'better than', in contradistinction to other laws that he could just as objectively identify as being false, wrong, incorrect, or 'worse than'. I have no doubt, however, that a wise comparatist, having proceeded to invent the singularity of foreign law by way of a resolute tracing — a strategy of signifiatory differencing — can fashion a most convincing argument in favour of the desirability of one law over another given the particular values that he thinks ought to be promoted and in line with the specific circumstances having to be addressed. (Indeed, differential comparison not being meant as a quietist syntax that would attempt to preserve laws *as such*, a claim for one law rather than another strikes me, epistemologically speaking, as unproblematic.) But for that comparatist to say, as Kötz would have him do, that in conformity with comparison-at-law being an '*école de vérité*',³⁵⁹ he can affirm, for example, that the French law on the transmission of pre-contractual information from the seller to the buyer is 'better', as a matter of objectivity, than the English law on point or assert that the French law is objectively 'superior' to the English law or contend that it is the 'correct' law, the 'true' law, makes no sense to me. At any rate, it does not make any more sense than to talk of a loud blanket or of an angry cucumber.

To return to Quine, 'truth', as far as he is concerned, depends thoroughly on a language.³⁶⁰ It also turns on a theory of the world for 'we can never do better than occupy

³⁵⁸ Supra note 317.

³⁵⁹ Supra note 246.

³⁶⁰ See Quine, WV (1995) 'Reactions' in Leonardi, P and Santambrogio, M (eds) *On Quine* Cambridge University Press at 353: '[S]entences are tied to languages. A string of marks is true only as a sentence of some specific language L; true in L'.

the standpoint of some theory or other, the best we can muster at the time'.³⁶¹ Still according to Quine, 'there is no extra-theoretic truth, no higher truth than the truth we are claiming or aspiring to as we continue to tinker with our system of the world from within'.³⁶² Fletcher effectively applies this claim to comparative legal studies as he writes that '[t]ruth in law need not extend beyond a particular culture'.³⁶³ At this juncture, pursuing the matter along Quinian lines, one might want to take Pinter's insight one important step further. If, when it comes to laws in co-presence, one cannot traffic in 'the truth' because the only 'truth' that can be said to exist is language-related and theory-related also, if the synchronic claim must be that there are but truths or, to quote Michel Foucault, 'truth games',³⁶⁴ is it not the case that one might do very well to renounce the word 'truth' altogether if only to cancel the ideas of 'ubiquity' and 'permanence' — not to mention other 'truth-effects' like intangibility — that the word seemingly inevitably evokes?³⁶⁵ After all, is there not more than a disturbing touch of the oxymoronic in 'truths'?

CONSEQUENCES, CURSORILY

Foreign laws, then, are embedded and the comparatists who come to foreign laws to engage in ascription of meaning are embedded also. As I have mentioned, I am thinking of cultural conditioning rather than determinism, though German or French jurists, to mention but two familiar instances, illustrate how the formatting can go so very far. I am thus allowing for an ability to surpass tradition on the understanding that this achievement must depend on what tools tradition itself supplies since neither a statute nor a comparatist-at-law can shed cultural appurtenances the way one changes one's car or one's wardrobe. Be that as it may, this dual process of cultural encumbrance — this double bind — excludes anything like objectivity or truth from the comparative scenario.³⁶⁶

To be sure, the differend is anxiogenic. In the absence of the reassurance offered by shibboleths such as 'objectivity' and 'truth', a comparatist's interaction with foreign law can easily take the form of an apprehension. Consider Iris Murdoch's elderly gentleman, Uncle Theo, sitting with his twin niece and nephew while the children play on the seashore. The beach is a source of acute discomfort to Uncle Theo. While the predictable noise and exuberance bother him, what really makes Uncle Theo anguished is the multiplicity of things. As if twinness was not enough of an ontological disturbance, there are on the beach

³⁶¹ Quine, WVO *Word and Object* supra note 281 at 22.

³⁶² Quine, WV (1975) 'On Empirically Equivalent Systems of the World' (9) *Erkenntnis* 313 at 327. Unsurprisingly, a partisan of the right-answer thesis like Dworkin attacks Quine's views to the effect that there can only be different answers, though his conclusion that '[p]erhaps we are not often faced with equally good interpretations' appears unconvincing: Dworkin, R *Justice for Hedgehogs* supra note 352 at 149.

³⁶³ Fletcher, GP 'What Law Is Like' supra note 290 at 1610.

³⁶⁴ Foucault, M (1984) *Histoire de la sexualité* vol II Gallimard at 13.

³⁶⁵ For Rorty, indeed, 'truth is not the sort of thing one should expect to have a philosophically interesting theory about', such that 'there is no interesting work to be done in this area': Rorty, R (1982) *Consequences of Pragmatism* University of Minnesota Press at xiii-xiv.

³⁶⁶ At the end of a jurisprudential analysis devoted specifically to the pertinence of truth in law, Dennis Patterson underlines the futility of any statement to the effect that a proposition of law would be true. While not concerned with foreign law in particular, this author reaches the conclusion that 'a return to the local' is advisable. In his words, 'meaning arises from human practices and [...] no practice or discourse enjoys a privileged position vis-à-vis others': Patterson, D (1996) *Law and Truth* Oxford University Press at 181 and 182, respectively.

all those pebbles. Because each pebble is clamoring in its particularity, the plurality of them is threatening the intelligibility and manageability of the world. Uncle Theo is a man who can only negotiate the possibility of plurality if the many can be reduced to a few or, best of all, to one. While the twins display youthful delight in variety, Uncle Theo exhibits a plethoraphobic distaste for multiplicity and randomness. His preoccupation with perceptual and conceptual tidiness shows Uncle Theo as the primordial orthodox comparatist-at-law, that is, as someone who is dismayed and disturbed by difference.³⁶⁷

Given fear of otherness, concern over pluralism, worry regarding multiplicity — recall Foucault as he writes how ‘one experiences a singular repugnance to think in terms of difference, to describe discrepancies and dispersions’³⁶⁸ — what is one to do to take matters beyond comparative legal studies’s ensnarement in the transcendental net and emancipate the field from positivism’s hegemonal account, from its *doxa*’s unexamined epistemological commitments to objectivity and truth, from the view that comparative research would somehow exist to gratify the comparatist’s metaphysical urges?

At the very least, the answer supposes an anticipatory openness on the part of comparatists-at-law to how things might otherwise be. In adopting such a stance, however, one soon realizes that, if one wishes to renew comparative theory and practice, one has to think in contradiction to one’s time, being out of step with it, opposing it, acting in a way as its bad conscience. Indeed, one’s negativity has to go so far as to negate the *doxa*’s negation (that is, negate positivism’s negation of law-as-culture). Now, the fact is that the argument in favour of differential comparison has been made by a certain number of comparatists-at-law over the years. However, it is a rejoinder that has either been ignored or denigrated largely in the absence of any serious reading of what was being claimed or without any work on the merits of this alternative approach to the study of foreign law. The subversive idea (!) was, of course, to fashion a comparison-at-law that *becomes* otherness — this verb wanting to suggest at once the requirement for a new theorized practice to emerge and the further need for it to befit the differend.³⁶⁹ Crucially, this strategy demanded of comparatists-at-law that they go beyond the established dikes. It is now possible to see that ‘[w]hatever the (demonstrated) necessity of such an oversight, it will have shocked, one will not have ceased to want to contain it, to resist it, to reconstitute the old partitions, to accuse what could no longer be thought without confusion, to accuse difference as excessive *confusion!*’³⁷⁰

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The negotiation with other laws requires to configure itself as an intervention informed by the conviction that any meaningful comparison assumes encountering the other law in its traced singularity with a view to recognizing and respecting this otherness. Indeed, a creditable comparison-at-law has to situate itself in *response* to the other law, which means that it is destined to come after it or, if you will, that the other law is inevitably prior to it. It is this priority that the comparatist must acknowledge in the course of his research

³⁶⁷ Murdoch, I (2000) [1968] *The Nice and the Good* Vintage at 152-53. I paraphrase Spelman, EV (1988) *Inessential Woman* The Women’s Press at 1-2.

³⁶⁸ Foucault, M (1969) *L’Archéologie du savoir* Gallimard at 21.

³⁶⁹ I draw on Viveiros de Castro, E (2011) ‘Zeno and the Art of Anthropology’ Walford, A (trans) (17) *Common Knowledge* 128 at 145.

³⁷⁰ Derrida, J (2003) [1986] ‘Survivre’ in *Parages* (2nd ed) Galilée at 119. This text was originally published in English in 1979.

and writing as he accepts, with Derrida, that 'the law it is out of the question [he] should infringe [...] is to say "yes" to the work that comes before [him] and that will have been without [him], a work that was already affirmed and signed with the other's "yes", so that [his] own "yes" is a "yes" to the other's "yes", a sort of blessing and (ring of) alliance. Not infringing this law thus means doing everything not to betray it, not to betray either the law or the other'.³⁷¹ This instruction entails that 'in order for [his] countersignature, [...] subject to this law, to attest both to knowledge, the best and most competent knowledge possible, and to recognition, for it to be both knowing and recognizing [...] it must both respect the absolute, absolutely irreducible, untranslatable idiom of the other [...] and inscribe in [his] own "yes", at the moment [he] recognize[s] the other's singularity, the work of the other. In [his] "yes", in [his] own untranslatable, singular idiom, [he] must countersign the other's text without counterfeit'.³⁷² Importantly, Derrida concludes this exhortation thus: 'How can this be done? Well, I ask the question but I have no answers. Not only I have no answer, but I hold that there must not be an answer in the form of a general norm, a rule or a prior criterion. By definition, there can be no prior answer or method or technique. Each time it is necessary to invent the singular law of what remains and must remain a singular event, held in this aporia or *double bind*'.³⁷³

At the very least, as an ineliminable minimum, the yearning for the justice that is owed foreign law and its idiomaticity, the debt that must be acquitted on account of the foreign law-text's singularity, the recognition of the foreign law's refusal to conform to any law but to the law that it exists as, and the respect for the foreign law-text's irreducibility — all of which will require an attempt by the comparatist to overcome the foreign law-text's inherent resistance to interpretive authority, to full legibility — must involve the *tracing* of the foreign law to that which (silently) constitutes it with a view to showing how, in response to its haunting traces, the foreign law-text occurs at all (even as the comparatist remains aware that, despite his intervention, irrespective of how sophisticated his invention of foreign law and his language of explanation or justification, there is that about the foreign that will ultimately remain inaccessible, hidden, encrypted, secret).

For the comparatist-at-law, the pursuit of an ethics seeking to emphasize, like Benjamin's dramatist, 'the incommensurable and the singular',³⁷⁴ purporting to make the other othery in the way the artist attempts 'to make the stone *stony*',³⁷⁵ cannot happen through recourse to a method, which, by definition, implies a regular, systematic, given, path in approaching an object. In the fabrication of his response to the singularity of a foreign law-text, as a 'protestation of singularity',³⁷⁶ *the comparatist-at-law must reject method*. Again, the only approach to the event of the foreign law-text is one of nomadic errancy based on experience and experimentation (interestingly, the French language has only one word, '*expérience*', to embrace both terms). Observe that an 'experience' is anything but banal, as Heidegger reminds us: 'To undergo an experience with something, whether it be a thing, a human being, or a god, means that we let it befall us, strike us, come down on

³⁷¹ Derrida, J 'Countersignature' supra note 68 at 28-29.

³⁷² Id at 29 [emphasis original].

³⁷³ Id at 30 [emphasis original].

³⁷⁴ Benjamin, W *Understanding Brecht* supra note 63 at 8.

³⁷⁵ Shklovsky, V 'Art As Technique' supra note 10 at 12 [emphasis original].

³⁷⁶ Barthes, R (2002) [1980] *La Chambre claire* in *Oeuvres complètes* (2nd ed) Marty, E (ed) vol V Editions du Seuil at 795.

us, jostle us, and transform us'.³⁷⁷ To be sure, the comparatist's resistance to method 'does not exclude certain directions for use',³⁷⁸ what one can perhaps term 'protocols', ranging from the need to work with materials in the other's language to the imperative to ensure the currency of the information being deployed about the foreign law — again, as the expression of an ethics aiming not to circumscribe a foreign law-text within a familiar interpretive horizon, but to suspend a familiar interpretive horizon because of another law-text, to interrupt the (restricted) economy of the same. Singularity, it bears mentioning, is not to be understood as connoting some vaguely sensational textual strangeness. My claim is rather that the comparatist-at-law should reach a point where the law-text being interpreted is allowed to project itself in its singularity, such that it submits the act of interpretation to a kind of reversal whereby the comparatist is able to get near the text by withdrawing any pre-given method, that is, by allowing the text to appear within a third space that he, the comparatist, is deliberately trying to hold open for it.

Because the comparative motion implies granting foreign law, the other's law, the recognition and respect that are solicited, if tacitly,³⁷⁹ since it means giving the other-in-the-law a voice about her/his mapping of another law-world without reducing that law-world to the comparatist's (in other words, to what it is not and, often, has not wanted to be), comparison-at-law emphatically stands as a political gesture. In this regard, I argue that I need not defend the view that legal pluralism is inherently good. It is enough for me to say that the diverse forms of life-in-the-law remain the expression of the human capacity for choice and self-creation. As such, they embody a vital aspect of social existence, which helps to define selfhood and deserves to be appreciated by comparatists-at-law showing themselves singularly responsible in the face of the singularity of the other. Thus, the other's laws are entitled to the comparatist's charitable interpretation of them. They deserve to be credited with an initial measure of (situated) rational warrant, to be accepted as operating rationally albeit in conformity with a local rationality. They are owed their epistemological due. Admittedly, recognition and respect are infinitely harder to bestow on the Nazis, although one accepts that supremacist policies were justifiable to them, or Al-Quaeda militants, even as one is told that their actions are animated by a deeply-felt desire to turn themselves from what they regard as victims of history into actors of history.³⁸⁰ (But recognition and respect can arguably be owed only to those who are themselves prepared to extend recognition and respect in their turn, an issue injecting the complex idea of 'mutuality' into the matter of the extension of these interpretive tropes. Incidentally, this question can also be addressed from another angle in as much as difference ceases to be a value worth defending if it will be used as a stigma to discriminate against someone

³⁷⁷ Heidegger, M (1985) [1959] *Unterwegs zur Sprache* in *Gesamtausgabe* vol XII V Klostermann at 149. Cf Derrida, J *Papier machine* supra note 37 at 368 who equates experience with 'the trajectory, the way, the crossing'. For Derrida, this 'way' is to be distinguished from method's 'hodos': Jacques Derrida (2004) 'Et cetera... (and so on, und so weiter, and so forth, et ainsi de suite, und so überall, etc.)' in Jacques Derrida Mallet, M-L and Michaud, G (eds) *L'Herne* at 24. This text was originally published in English in 2000.

³⁷⁸ Derrida, J *La Dissémination* supra note 207 at 303.

³⁷⁹ However, one does not wish recognition to operate as a process of capture whereby one is made to 'fit' into pre-conceived cultural patterns and held to behave according to expectations in a way that may ultimately ensure one's continued exoticization and attendant marginalization. For a compelling study of the insidious character that recognition can assume, see Povinelli, EA (2002) *The Cunning of Recognition* Duke University Press.

³⁸⁰ For the case concerning Al-Quaeda, see Devji, F (2008) *The Terrorist in Search of Humanity* Columbia University Press.

and worsen the person's position.) Observe that recognition and respect suggest that the dynamics between self and other can overcome antagonism, that difference need not be understood as divisive.

None of these observations, then, is to claim that there is deadlock, that no judgment is possible or worthy. As I have indicated above, to appreciate other laws, to accept the differend across laws, and to recognize and respect the other's law, is not to condemn oneself to normative standstill. Nor does the acknowledgment that one's judgment is the expression of certain cultural commitments (not all of them voluntary) prevent one from expressing a preference or compel one to the view that all conceptions of law are equally good. (Who, in any event, believes all conceptions of law to be equally good? Who does not regard one's stance as carrying greater authority, at least in one's own eyes, than the views held by others?³⁸¹) To say that a comparatist does not have access to an objective or true metric by reference to which a conception of foreign law can be assessed is emphatically not to maintain that conceptions of foreign law cannot usefully be assessed by a comparatist. Non-metricity is not 'critique impossible', and one can surely attempt through negotiation to construct, say, another discourse's comparability with one's own (perhaps in the hope that, once one's standards of justification have managed to persuade, the other side will acknowledge error and transfer allegiance).³⁸² Clearly, for instance, the Canadian multiculturalist can form a view of the French statute and regard it as intolerant. And, just as evidently, the French republican can claim that the Canadian judicial decision panders to fundamentalist culturalism. In each case, however, this expression of preference, as it purports to solve a differend in the law-world, remains situated. It is not made objectively nor is it formulated by reference to truth. Again, there is 'no rigorous argument that is not obedience to our own convictions'.³⁸³

Where, indeed, would be the commonality between the French and Canadian measures regarding 'religious attire at school'? What would be the common measure — or the meta-measure — that would allow one to argue, say, that there is more of 'it' here ('empowerment', 'freedom', 'dignity') and less of 'it' there, such that here is 'better' than there, that here is indeed true? The answer is that '[w]e do not have units of measure, only multiplicities or variety of measurement'.³⁸⁴ The fact is that there is no way in which the issue can be resolved according to a meta-language agreed by both communities. Yet, the Canadian multiculturalist can seek to convince the French republican that French

³⁸¹ For a claim to this effect, see Rescher, N (1995) *Pluralism* Oxford University Press at 102. This remark alludes to relativism in its various guises about which more could be said — for example, on the subject of its demonization by those who wish to insulate their beliefs against the force of difference (I have in mind the famous slippery slope according to which anything goes and before you know it, they will be doing it in the streets). As Mark Goodale aptly writes, 'the very real dilemmas of relativism have been treated derisively, ignored, and otherwise assigned to the intellectual savage slot': Goodale, M *Surrendering to Utopia: An Anthropology of Human Rights* supra note 322 at 63. For an excellent discussion of relativism featuring a persuasive refutation of the usual canards, see Smith, BH *Contingencies of Value* (1988) Harvard University Press at 150-84.

³⁸² Elsewhere, I have argued for comparison as caress (a less invasive gesture than, say, penetration, and a less submissive attitude than, say, surrender). Now, there is nothing in the metaphor I advocate to defeat the possibility of critique. Even as I caress, I retain my critical faculty. I wish to thank Professor Ralf Michaels for addressing this question in conversation.

³⁸³ Rorty, R 'The Fate of Philosophy' *The New Republic* 18 October 1982 at 33. Cf Wittgenstein, L (1972) [c1950] *On Certainty* Anscombe, GEM and Von Wright, GH (eds) Paul, D and Anscombe, GEM (trans) Harper & Row at 16: 'I act with complete certainty. But this certainty is my own' [emphasis original].

³⁸⁴ Deleuze, G and Guattari, F (1980) *Mille plateaux* Editions de Minuit at 15.

republicanism is compatible with 'religious attire at school' and stands to benefit from allowing *hijabs* in high-school classrooms. And the French republican may attempt to persuade the Canadian multiculturalist that Canadian multiculturalism can accommodate the curtailment of identitarian claims and would gain from prohibiting *kirpans* at school. In each case, the strategy would consist in putting into defamiliarizing relief the other's self-understanding and practices through the generation of increased awareness of previously hidden postulates or unthematized articulations with a view to depriving available assumptions of their seemingly obvious support. But for the Canadian multiculturalist's argument to foster what could emerge as an alliance across legal/cultural boundaries, as '[the French] are responding to something that is not [them]',³⁸⁵ she/he will have to speak the language of French republicanism — which, of course, she/he will speak differently from a French republican. And for the French republican's claim to succeed in overcoming Canadian reticence, she/he will have to argue in the language of Canadian multiculturalism — which, inevitably, she/he will speak differently from a Canadian multiculturalist. The differend remains: the specific sense that can be ascribed to each law is singular and therefore different from that which can be attributed to the other law, which means that each law *exceeds* the other, that neither law can assimilate the other's meaning.

In the words of Alasdair MacIntyre, '[t]here is no standing ground, no place for enquiry, no way to engage in the practices of advancing, evaluating, accepting, and rejecting reasoned argument apart from that which is provided by some particular tradition or other'.³⁸⁶ As I have mentioned, and to put the point in slightly different wording, there is no way in which the matter of 'religious attire at school' can be addressed in language that members of the French and Canadian communities would all accept. Absent common premises, no side can prove anything to the other since the best one can do is to entreat the other in the other's language *in as much as this can be done*. And because law, like language, speaks monologically,³⁸⁷ this argument extends to New York-based or Strasbourg-based human-rights advocates who, having internalized the justice of US or French institutions, are fighting the practice of clitoridectomy in Ethiopia.³⁸⁸ The fact is that '[r]ight can only be grounded on national and local laws, and traditions and the declarations of human rights remain a "nonsense on stilts" unless translated into the culture and law of a particular society'.³⁸⁹

Unlike the quest for objectivity and truth, imaginary goals external to the research inquiry — which therefore reaches a terminating point once its aim has allegedly been attained —, the ethics of engagement that I defend is an 'infinite *striving*' in which the ambition is self-consciously internal to the investigation.³⁹⁰ While positivists take the two ends of the chain of knowledge, what they call 'subject' and 'object', as the entire chain, in fact the chain features a series of intervening steps, such as reading of the foreign law-text,

³⁸⁵ Taylor, C (1995) [1991] *Philosophical Arguments* Harvard University Press at 77.

³⁸⁶ MacIntyre, A (1988) *Whose Justice? Which Rationality?* Notre Dame University Press at 350.

³⁸⁷ Cf Heidegger, M *Unterwegs zur Sprache* supra note 377 at 264: '[L]anguage is monologue' [emphasis original].

³⁸⁸ For a thoughtful analysis of this issue, see Shweder, RA (2002) "'What About Female Genital Mutilation?" and Why Understanding Culture Matters in the First Place' in Shweder, RA, Minow, M, and Markus, HR (eds) *Engaging Cultural Differences* Sage at 216-51.

³⁸⁹ Douzinas, C (2000) *The End of Human Rights* Hart at 165. The allusion is, of course, to Bentham's familiar sarcasm.

³⁹⁰ Rorty, R (1979) *Philosophy and the Mirror of Nature* Princeton University Press at 377 [emphasis original].

interpretation, and writing by the comparatist, followed by reading and interpretation of the comparatist's writing by his readership. Counter-intuitively perhaps, I claim that, in fact, comparatists do not gain 'better' access to foreign law by subtracting mediators but rather by increasing them: the more readings are garnered, the more interpretations are generated, the more writings are produced — in sum, the more singularity is elicited — the more insightful any understanding of foreign law is likely to prove. Accordingly, I argue that the comparatist-at-law must keep formulating new re-presentations of the different law-worlds that he has made into his 'object' of study so as to favour the incorporation of new points of view within his horizon in order, in effect, to de-horizonize it. Again, rather than concern himself with objectivity and truth, I suggest that the comparatist must worry about foreign laws as they manifest themselves to him by emphasizing, explaining, and justifying each law's singularity: 'The more *attachments* it has, the more it exists'.³⁹¹ Therefore, comparison-at-law's goal must be unceasingly to iterate the existence of discrepant epistemological reservoirs of ideas that, between them, offer legal/cultural forms, often inscribed over the long term, through which others-in-the-law have fashioned a sense of identity (on the understanding that 'identity' is always in flux, that it is never attained).

I also want to encourage the comparatist-at-law to ask himself how he can, instead of settling upon a view of foreign law deemed to afford objectivity or truth, continue to accomplish himself through self-creation. Specifically, while the comparatist-at-law need not (vainly) seek to become an other, he would strive for an 'experience of self-differentiability',³⁹² that is, he would attempt to be other, to affirm the foreigner within him, the foreigner that he can be for himself. Now, the inaccessibility of objectivity and truth — one can never leave one's self no matter how far one goes — challenges comparatists-at-law to make genuine normative choices (that is, something other than decisions that would be dictated to them by metricity). Instead of relying on objectivity and truth, of delegating the authority underwriting their discourse to a transcendental order or a fictitious referent, comparatists-at-law must acknowledge their constructive input into the fabrication of foreign law — indeed, '[t]he simple act of recording anything on paper is already an immense transformation that requires as much skill and just as much artifice as painting a landscape or setting up some elaborate biochemical reaction'.³⁹³ Along the way, even as no comparative investigation is effectuated under the full control of consciousness, comparatists-at-law are invited to assume substantial responsibility for the normative (and fallible) inventions pursuant to which they enjoy the re-presentative authority to make a foreign law look 'good' or 'bad' to their readerships or audiences.

To accept that he is situated firmly within radical contingency is for the comparatist-at-law to begin to take responsibility for his own perspectival appreciations. To refute objectivity and truth, to acknowledge incommensurability across law-worlds, is, in the end, the way for comparatists to avoid intellectual complacency — which is precisely what engulfs one when one stops thinking of one's re-presentation as a re-presentation and begins to see it as being endowed with a transcendental quality that would make it objective or permit it access to truth (that is, when one turns a provisional private vocabulary into a

³⁹¹ Latour, B *Reassembling the Social* supra note 97 at 217 [emphasis original].

³⁹² Terada, R (2001) *Feeling in Theory* Harvard University Press at 156.

³⁹³ Latour, B *Reassembling the Social* supra note 97 at 136.

permanent public one). As it allows for ethical space, incommensurability enhances agency — both as responsibility and opportunity. It forces the comparatist-at-law to engage in a task of self-edification in order to be able to fabricate an evermore responsive, insightful, and persuasive differential comparison in response to a singular foreign law. Under such circumstances, 're-describing [oneself] is the most important thing [one] can do', the idea being 'to take [oneself] out of [one's] old sel[f] by the power of strangeness'.³⁹⁴

While comparatists-at-law may appear as if they have managed to emancipate themselves from the strictures of solipsism, they have in fact been extolling their selves through the intimation that such selves have access to objectivity and truth. In Derrida's words, 'one will apparently avoid ethnocentrism at the very moment when it will have operated in depth'.³⁹⁵ 'Post-objective' or 'post-école de vérité' comparative interventions, then, would sensibly accept that comparatists-at-law can only reach so far and, specifically, that they are not in a position to operate beyond immanence (either the foreign law's or theirs). Admitting that they will inevitably fail to bridge the gap between self-in-the-law and other-in-the-law, comparatists must agree that they can '[f]ail better' than through comparisons-at-law seeking objectively to identify the true law and engaging in the intoxicating reductionism that is consubstantial to such positivist epistemologies.³⁹⁶ (Comparative legal studies is partial. It is so in the sense that it does not deal in totalities or wholes but in particulars, specificities, singularities. It is also partial in the way in which it is the product of the comparatist's epistemological encumbrances.)

All that comparatists-at-law can marshal as they envisage the disorienting fact of the multiplicity of laws-in-co-presence and as, out of the differend across laws, they elect to re-present and perhaps defend one law rather than an other, are more or less tenacious convictions based on more or less insightful experiences that they can eventually turn into more or less persuasive arguments. If they wish to promote one foreign law, what they can assert, all that they can ultimately maintain, is not that this or that law is, objectively speaking, 'true' or 'right' or 'exact' or 'correct', but that it fits within their strategy of world-making for now. To the extent that a discourse on foreign law will be attributed any authority, it will receive it from the pragmatic effectivity of its rhetorical motions, the coerciveness of the structure of its argument, the will of appropriation and mastery

³⁹⁴ Rorty, R *Philosophy and the Mirror of Nature* supra note 390 at 358-59 and 360, respectively. I am asked whether I see myself as a 'virtue epistemologist'. In other words, I am invited to confirm that I deliberately collapse, or at least entangle, epistemology and ethics. As I address this question, I confess that I have not sought to cast my claim in the kind of analytical terms that would either challenge or confirm philosophy's traditional distinctions into various fields. What I can reiterate is that I am concerned with comparatists as they engage in their inquiries and deliberations into foreign law, that I am unable to accept that any such investigations and reflections can be framed as exercises in the objective acquisition of propositional knowledge that would ultimately be true, and that I expect the comparatist to bring to bear such dispositions as integrity, attentiveness, sophistication, insightfulness, thoroughness, perseverance, introspection, transparency, and humility to his comparative endeavours. I argue that a comparatist who consciously integrates these 'virtues' into his research can be expected to yield information about foreign law displaying heightened recognition and respect for it. In other words, the comparatist-at-law will then generate a comparison that is more ethical. Whether I qualify as a 'virtue epistemologist' in the way in which the expression is understood by analytical philosophers is at once unclear and indifferent to me. But I maintain that, as regards comparative legal studies at any rate, a creditable epistemology promotes a creditable ethics.

³⁹⁵ Derrida, J *De la grammatologie* supra note 36 at 178.

³⁹⁶ I am thinking of Beckett's injunction: Beckett, S (2006) [1983] *Worstward Ho* in *The Grove Centenary Edition* Auster, P (ed) vol IV Grove Press at 471.

that expresses itself in it, and the symbolic violence that hides within it: 'Knowledge is not simply true. [...] It reveals the initial mistake, the madness of being a self, of reducing any *other* to an object of pleasure for the self. I possess it, I dispose of it, I use it, I know it, I appreciate it'.³⁹⁷

Comparative legal studies does not rest on any foundations but on incessant inconstancy (that of the foreign law being studied, that of the comparatist studying it). It is not that foundations (say, objectivity or truth) have gone missing. They were never there. To be sure, if only because the singularity of foreign law is as untractable as it is unsaturable (comparison-at-law is an allegory of the necessity of misreading), the comparatist, acting qua localizer of the foreign, must lower his sights and, intervening realistically and modestly, aim to provide no more than (and no less than) a *verging* account of the other's law. Whether 'vergency' is attained through the meandering ways, the painstaking itineraries, characterizing comparative work on foreign law (shall we call it 'slow-comp.?'?) will largely depend on the comparatist producing a felicitous assemblage of astute observation and discerning documentation combined with a judicious framing of the relevant legal issues making reference to meaningful cultural data (such as will seek to explain, for example, why value-pluralism has developed into a central ordering principle for social actors, political parties, intellectual leaders, and legal institutions in Canada but not in France). However, *vergency is all that can be achieved*.

Now, the claim for objectivity and truth, on the one hand, and that for vergency, on the other, are, ultimately, 'absolutely irreconcilable' — in the way in which Husserl and Joyce prove discrepant. The fact is that 'proponents of competing paradigms must fail to make complete contact with each other's viewpoints'.³⁹⁸ While orthodox comparatists-at-law 'see[k] to decipher, drea[m] of deciphering a truth', 'the reassuring foundation', 'the end of play', other comparatists-at-law, acknowledging that vergency is all there is, 'asser[t] the play' and engage in 'the joyful affirmation of the play of the world'.³⁹⁹ (Note, again, that incommensurability does not prevent comparability.) I claim, then, that law can signify otherwise (differently) or, more accurately, *other-wise* (that is, in a manner that shows enhanced attunement to the foreign, the other, its complexity, its singularity). I argue for a heterodidactic approach to comparative legal studies and urge comparatists-at-law, as they act to discontinue the symbolic proceedings that associate the development of the law on the world stage with the denigration of singularity, to embrace something like '*Gelassenheit*' — which Heidegger defines as 'the self-withdrawal from transcendental imagination'.⁴⁰⁰

As comparison other-wise is the death of comparison-at-law in the sense that it must destroy what comparison-at-law has been and has wanted to be, it is also the genesis of comparison-at-law as it marks differential comparison's emergence. It launches the comparative legal studies that is yet to come and fosters the primordially of otherness-in-the-law through a narrative or parable of the trace, thus allowing the other to be recognized and respected. (Etymologically, 'parable' is derived from the Greek '*paraballein*', which means 'to compare'.) It initiates the comparison-at-law that accepts how, when one

³⁹⁷ Lyotard, J-F (2008) [1987] *Que peindre?* Hermann at 119-20 [emphasis original].

³⁹⁸ Kuhn, TS *The Structure of Scientific Revolutions* supra note 215 at 48.

³⁹⁹ Derrida, J (1967) *L'Écriture et la différence* Editions du Seuil at 427 [emphasis original].

⁴⁰⁰ Heidegger, M (2002) [1959] *Gelassenheit* in *Gesamtausgabe* (2nd ed) vol XIII V Klostermann at 62.

researches the law, one cannot allow oneself to be blinded by the reassuring familiarity of long-standing interpretive practices that fail to recognize that the (surviving) trace is the life of the law-text, that the law-text is an inherently fluid, mutable, dynamic, unstable force that lives in its orientation to the trace. Comparison other-wise inaugurates the realization of the fact that when one reads a statute or judicial decision with full response, one is implicated in a matrix that is just as thoroughly heteroglossic as it is inexhaustibly specific, that one is effectively doomed to the pursuit of an interminable process of ascription of meaning that only the exhaustion of the comparatist-at-law or the editor's deadline will interrupt (any ending will be an interruption, a cut, an unwilling cut in a way, a cut that comes at a cost). If the issue is how the comparatist-at-law must live 'this unlivable discord between worlds, histories, memories, discourses, languages',⁴⁰¹ the answer has to be that he can only do so through a configuration of knowledge that 'convey[s] in [its] plurality [...] [a] new kind of arrangement not entailing harmony, concordance, or conciliation, but [...] accept[ing] disjunction or divergence as the infinite centre whence, through speech, relation is to be created: an arrangement that does not compose but juxtaposes, that is to say, leaves each of the terms that come into relation *outside* one another, respecting and preserving this *exteriority* and this distance as the principle — always already undermined — of all signification. Juxtaposition and interruption here assume an extraordinary force of justice'.⁴⁰²

Purporting to step beyond one's law (and, in the process, beyond oneself) in order to engage in a negotiation with the other law and with the other's law is precisely what allows one to acknowledge the legal and axiological plurality of the world. Through the disruption of one's 'comfort zone' (since an undisruptive comparison is pointless, one way to gauge the epistemological usefulness of a differential comparison is to ask *whom does it annoy*), one thus mobilizes the law and oneself for the best possible cause, that is, the recognition and respect of an otherness that, because it can be approached as interruption, enriches one's perception of what there exists in the world as law and one's capacity to act on that in the name of what can still (perhaps) be called *justice*. Ultimately, therefore, since a conception of 'comparison' has a direct impact on the kind of knowledge being apprehended as 'legally' relevant (or as 'legally' insignificant), the stakes are sufficiently momentous for one militantly to advocate a strategy allowing for the recognition and respect of the radical singularity of the other, of the other's law, and of the other-in-the-law. On account of the valorization of otherness that it promotes, one can discern how the study of foreign law — quite apart from allowing law-as-we-have-known-it-in-our-law-schools to be less inevitable and despairful — conceals capital issues for existence, collective life, and indeed the future of the world. 'In the face of planetary depredation, the vast exploitation of human and other populations, the proliferating spectacle of human and other suffering, the powers of [comparison-at-law] seem more limited and constrained than ever. But [...] if there is a future for [comparison], it consists [...] in *affirming the radical demand that comes from the other*'.⁴⁰³ A politics of difference suggests that negotiation with otherness rather than its elimination is the most productive approach to address situations

⁴⁰¹ Derrida, J (1988) *Mémoires Galilée* at 154.

⁴⁰² Blanchot, M (1969) *L'Entretien infini* 1969 at 453 [emphasis original].

⁴⁰³ Hill, L (2010) *Radical Indecision* University of Notre Dame Press at 336 [emphasis added]. I adopt and adapt Hill's observation as regards literary criticism.

characterized by the co-presence of more than one law even though (and indeed because) this negotiation is without resolution.

One of the many forms that this negotiation may adopt in terms of the comparatist-at-law's writing is the formulation of what Lorenzo Bonoli calls an '*agrammaticality effect*', the idea being to recognize and respect foreign law through the insertion of foreign words (what the Germans call '*Fremdwörter*'), the coining of neologisms, the writing of a sentence through a syntactic construction that would be modelled on the foreign — all of these motions aiming for a 'foreignly' writing ultimately being 'impertinent'.⁴⁰⁴ The comparatist's aim must indeed be to preserve something of the difference of the foreign law-text on account of the recognition and respect that one owes it, especially as one purports to displace it across languages. Once more, comparison-at-law is 'a practice producing difference out of incommensurability (rather than equivalence out of difference)'.⁴⁰⁵ This is one of the many ways in which comparison-at-law very much operates like translation. Thus, in order to resist the attraction of seamless domestication of foreign texts, Heidegger's or Derrida's translators did not hesitate to fashion translations modifying current usage in the host languages.⁴⁰⁶ In other words, these translators, as they heeded the original texts' summonses, were unwilling fully to concede to their local readerships. In effect, they compelled foreign readers of Heidegger and Derrida to defamiliarize themselves, to make themselves aware that they were reading a *translation*, that there was a 'non-present' text — or that a 'non-present' text was not absent. As a mark of recognition of the foreign law-text and respect for it, as an expression of the heterothesis that governs the 'thirthing' of knowledge, the comparatist must similarly ensure that his reader realizes that she/he is reading *foreign law*.

Even as the comparatist-at-law is faced with the matter of ineffability (since foreign law is singular, one cannot understand it), his task is to marshal his singularity so as to make available the highest possible 'yield' out of foreign law's singularity.⁴⁰⁷ To assume its primordial condition of being-toward-another-law, indeed of being *for* the other's law, of speaking in the cause of the other's law, comparative legal studies must get wise as regards the fact that otherness is uncondusive to apprehension through purportedly transcendental models, on the one hand, and concerning otherness's claims for recognition and respect, on the other. It must become *other-wise* in this sense also. Not pointing to a method — '[t]here is no empirical methodology for learning how to disclose a world'⁴⁰⁸ — but to a disposition towards the construction of knowledge featuring at once, aporetically, distance from the other law and intimacy with it, this strategy could harbour as its motto the following injunction: 'Singularize, write, singularize, write' (I could also say 'Differentiate, write, differentiate, write' or even 'Trace, write, trace, write').⁴⁰⁹ Note, again, that at no point is differential comparison aiming to keep foreign laws intact and, in reaction to the orthodox indifference to difference, simply seeking to give difference more 'play'.

⁴⁰⁴ Bonoli, L (2008) *Lire les cultures* Kimé at 98 [emphasis original].

⁴⁰⁵ *Supra* note 73.

⁴⁰⁶ Eg: Heidegger, *supra*, note 6; Derrida, J (1997) [1967] *Of Grammatology* (rev Eng ed) Spivak, GC (trans) Johns Hopkins University Press.

⁴⁰⁷ *Supra* note 222.

⁴⁰⁸ Kompridis, N *Critique and Disclosure* *supra* note 347 at 108. The author emphasizes the point by adding that 'disclosure is not *learnable* in the relevant sense': id at 109 [emphasis original].

⁴⁰⁹ I adopt and adapt Latour, B *Reassembling the Social* *supra* note 97 at 149.

Comparative legal studies is not, then, about legitimating the *status quo* or normalizing the logic of the singular as the way things are.

ITERATION

Though it consists of lines upon lines of text, comparison-at-law is not linear. It comes and goes, it ebbs and flows. It is associative and multi-directional. It operates along ever-changing pathways. At times, the comparatist-at-law feels secure in his intuitions only to realize that he must soon reconsider them. On other occasions, he is led to track unexpected courses and follow uncharted routes. No tracing is categorical and the apparent solidity of any singularization is deceptive. As he incessantly reworks his *bricolage* on account of his progressively augmenting acquaintance with the unfamiliar foreign law, the comparatist is constantly retracing his steps — even as he forges ahead. In its rhetorical organization, in its mode of exposition of knowledge deemed relevant, in its staging of its thesis, in its articulation of its argument, in its specific configuration of textuality, this Article purports to convey some of the comparatist-at-law's inexorable meandering. It too proceeds in complicated ways. It too detours and at times repeats itself. Like the comparatist's intervention on foreign law-texts, it features interfaces, intersections, and overlaps. It splits itself and multiplies itself. It refers to itself. It supplements itself. It exceeds itself. In the way the comparatist-at-law produces his comparison, it constitutes itself through a seemingly infinite tracing of references to other texts, which it transforms and from which it differs (but which it cannot appropriate absolutely to do whatever it wants just as the comparatist cannot confiscate foreign law in order to serve his ideological agenda in favour of uniformization of laws). It offers an arrangement that twists itself out of positivism, that circulates upon itself, that is not static or stagnant.

In the way it painstakingly knots the interlacing traces to constitute a text, it implements the thought of the thread and the strategy of entanglement. It scrapes. It rakes. It inscribes information not initially destined to be 'legal'. Out of these grafts and intrusions, it generates meaning. It seems at times interminable not unlike the way in which comparative research occasionally appears to be endless. It breaks with the constituted normality within the field of comparative legal studies as comparison other-wise must do. It is idiomatic. As such, it is irruptive rather than serene, fervent rather than impassive, it is fragmentary rather than totalizing, it is autobiographical rather than withdrawn. It eschews univocity instead of seeking indisputability, it foments perplexity instead of implementing convention. (And the coda? It would mark a *concession*.) It abrades. It is interpretive instead of objective or true. It says 'I'. It says other things than what it wants to say. It does not say all that it wants to say: it interrupts itself. It offers new insights and seeks to promote original connections. It is adventurous. It is located within my intellectual trajectory: it defends ideas that I want to promote at this juncture. It is situated in terms of the sources of inspiration that I have encountered over the years, the texts that have become available to me, the colleagues and friends who have agreed to engage in conversation with me even as I was working on the argument. It took a long time to write. If it had been written five years ago, this Article would be different. And if I had waited a further five years to write it, it would be different also. In this regard too the production of this text is analogous to the fabrication of comparisons-at-law. And my claim has much to do with my perception of comparative legal studies as a field where it may find itself instituted. Also, it concerns in significant ways how I see my task within the field. This Article is inadequate rather than right. It

is maladjusted. It is not achieved. It remains unfinished. It is vulnerable. As comparison other-wise must aim to do, it wants to be progressive. It is different. It is singular. It is inventive.

Making specific reference to the field of comparative legal studies, then, this Article asks for a major shift in the comparative sensibility that must inform the study of foreign law. It claims that comparatists-at-law require to take an interest in law as culture, in culture as trace, and in trace as law (again, this argument's leitmotiv could be rendered as LCTL). It also defends the irreducibility of the differend across laws and enjoins comparatists to acknowledge it. Rather than recycling implausible hegemonic claims that obscure the singularity of foreign laws, comparatists must do justice to the dignity of the foreign by recognizing and respecting it as foreign — which involves a constitutive engagement with foreign law rather than a dualist detachment from it. In the process, comparatists-at-law are asked to accept that both the foreign law and the comparatist are constituted as open-ended becomings. Because these becomings are irrevocably entangled with one another — that is, since there takes place a constantly decentered interplay — neither the trajectory of the re-presentation of foreign law nor its end-point can be known in advance. Foreign law, therefore, is temporally emergent, which means that it crystallizes over the time of the comparison. What can be ascertained, however, is that the response will never exhaust the summons and that no comparatist's account will ever reach beyond the verge of foreign law. In case it should be necessary to make this point once more, let me say again that I do not defend the eradication of posited law from comparative interventions. I do not seek to dispense with statutes and judicial decisions. What I claim must be removed from the comparatist-at-law's epistemological tool-box are the ideas of 'objectivity' and 'truth'. Instead of indulging their hallucinations, I encourage comparatists-at-law to affirm pluralism and cosmopolitanism and to assert difference, itself the principle of multiplicity and diversity. In sum, I invite comparatists to practice comparative legal studies other-wise.

I shall (not-)finish where I began, that is, with Pinter. In his Nobel lecture, in addition to claiming that '[t]here never is any such thing as one truth', that '[t]here are many', that they 'challenge each other', and that they are 'blind to each other', Pinter said that '[y]ou never quite find [truth] but the search for it is compulsive'. He added: 'The search is clearly what drives the endeavour'.⁴¹⁰ Although there can never be access to any such thing as truth, the search for it would be irresistible. I have argued for a way beyond Pinter's predicament, such that comparatists-at-law do not keep running on the treadmill of futility and in order for them, through the affirmation of a poetics of singularity, to 'restore to the singular, to the unexchangeable, to muteness, the attributes of power and, therefore, of health, of sovereignty — given that language, communication, exchange have attributed to *gregarious conformity* what is healthy, powerful, sovereign'.⁴¹¹

As comparatists emerge from the despondent gloom of the orthodox thought reigning over comparative legal studies, blinking under the bright lights of more than one episteme, would that they, like Pinter, appreciate how they cannot have 'access to any such thing as one truth'. While they extract their work from the two powerful tropisms that objectivity and truth continue to be, they can move away from pallid comparison-at-law and, at long

⁴¹⁰ Pinter, H 'Art, Truth and Politics' supra note 5.

⁴¹¹ Klossowski, P (1969) *Nietzsche et le cercle vicieux* Mercure de France at 118 [emphasis original].

last, attest to the fact that they are in the other's debt. Indeed, it is the other who makes comparative legal studies and its immense benefits possible (in effect, the elimination of the other would mark the impossibility of comparison-at-law). Although vis-à-vis the other the comparatist-at-law can generate only perspectives without objectivity and readings without truth, which then find themselves exscribed from the other's law-world to be inscribed in the comparatist's differential language, comparative legal studies must attempt, at least attempt — let me claim it yet one more time — to do the other's law and the other-in-the-law justice by aiming to account for foreign law's *ownmostness*.⁴¹²

⁴¹² I have avoided making reference to my published work in English in the course of this Article. For interested readers, the argument that I develop here intersects in particular with Legrand, P (2011) 'Siting Foreign Law: How Derrida Can Help' (21) *Duke Journal of Comparative and International Law* 595; Legrand, P (2011) 'Jacques in the Book (On Apophasis)' (23) *Law & Literature* 282; Legrand, P (2008) "'Il n'y a pas de hors-texte'": Intimations of Jacques Derrida As Comparatist-at-Law' in Goodrich, P et al (eds) *Derrida and Legal Philosophy* Palgrave Macmillan at 125-51; Legrand, P (2006) 'Comparative Legal Studies and the Matter of Authenticity' (1) *Journal of Comparative Law* 365; and Legrand, P (2006) 'On the Singularity of Law' (47) *Harvard International Law Journal* 517. For a review of Goodrich, P et al (eds) (2008) *Derrida and Legal Philosophy* Palgrave Macmillan, see Glendinning, S (2011) 'Sentencing Derrida' (74) *Modern Law Review* 306. In his appraisal, Glendinning does more than to spend a number of pages informing his readership of the topics he was surprised not to find addressed in the book. For example, he offers a primer on deconstruction. In this context, he reminds us how Derrida emphasized that deconstruction could not be reduced to a rejection of the intellectual heritage. He quotes Derrida thus: 'I love very much everything that I deconstruct in my own manner; the texts I want to read from the deconstructive point of view are texts I love, with that impulse of identification which is indispensable for reading' (at 313-14 referring to Derrida, J (1988) [1984] *The Ear of the Other* McDonald, C (ed) Kamuf, P (trans) University of Nebraska Press at 87). In addition, Glendinning addresses each of the contributions in the book under review. In time, he offers a reaction to my critique of comparative legal studies's orthodox epistemology suggesting that Derrida has much to teach comparatists wanting to edify an alternative model more responsive to the foreign. With specific reference to my argument, Glendinning writes as follows (I omit some of the page references to my text): '[A]s Pierre Legrand elegantly puts it, Derrida's work calls into question "the institutionalization of a textual paradigm" that supposes it knows what it means "to write like a lawyer". In this regard, Legrand's call for a "deterritorialisation of thought" is especially welcome. On the other hand, Legrand's own counterblast generally lacks the intimacy of a reading, and is more like an injunction to the reader to confess, and to accept that one must mend one's way. He writes from a position of a self-authorised militant or radical, one stubbornly insisting that others need Derridean help so that they too can resist and equally stubbornly "remain unprepared" to allow the dominant orthodoxy "to seize hold of them". There is in this none of "that impulse of identification which is indispensable for reading" that Derrida stresses. For Legrand, deterritorialisation calls for wiping the slate clean in a kind of new year zero. There is no question here of engaging in a movement through the heritage which would assist those who are in the grip of the orthodox textual paradigm to retrace their steps' (at 319). I am in Glendinning's debt for his good words and the opportunity to make four points. First, unlike Derrida vis-à-vis the texts he read, I do not 'love' the books and articles produced by orthodox comparatists-at-law that I find myself having to address. But then Derrida and I hardly get to work on writings of the same intellectual calibre. To be frank, I find the bulk of publications by orthodox comparatists-at-law rabidly anti-intellectual and utterly boring. In fact, I resent having to read such materials and do not want to be more complaisant to them than I need minimally be in order to find myself in a position allowing me creditably to reject them. Beyond this point, I purposefully interrupt my hospitality. Secondly, I feel no 'impulse of identification' whatsoever with orthodox comparatists-at-law apart from the fact that, like them, I too take an interest in foreign law and I too regard foreign law as having a measure of normative purchase locally. *Pace* Derrida, I am not sure how much this lack of empathy or complicity with the *doxa* makes me a poorer reader of its production. I accept that it certainly makes me a less enthusiastic one. Thirdly, the only way in which I am willing to 'engag[e] in a movement through the heritage' is with a view to moving away from it. There is indeed very little that I would want to preserve within orthodox comparative law. Again, though, there is hardly anything in common between the intellectual heritage Derrida was handling and that which confronts me. Fourthly, I do not think that 'those who are in the grip of the orthodox textual paradigm' can be helped. As I indicate in the abstract to this Article, in the knowledge that my claim would find the stoniest ground I am not speaking to positivists. This leaves a pair of observations. Glendinning opines that I 'writ[e] from a position of a self-authorised militant or radical, one stubbornly insisting that others need Derridean help'. Leaving to one side the extent to which this passage is meant to be reprehending or not, I fail to see how one's militancy or radicalism can be other than 'self-authorised'. Surely, one does not wait for permission from the *doxa* before one begins one's resistance. Just

as certainly, it seems to me, one has to be prepared for the orthodoxy to defend its own epistemological claims if only because it is those very arguments that have established it as the orthodoxy with all the advantages that authority and power are known to bestow. Perseverance, or 'stubborn[ness]' if one wants to call it that, therefore seems rather a *sine qua non* if one's opposition is to have even the merest tenability. As regards the matter of 'Derridean help', I am not saying that Derrida must become compulsory reading for comparatists-at-law, but that his insights into textuality and otherness offer most interesting intellectual avenues out of the philistine soup into which comparison-at-law has been stuck because of orthodox comparatists.

Coda

Understanding of Foreign Law Is Not What You Understand

1 Understanding of foreign law is not what you understand.

1.1 Understanding of foreign law is not what you understand if you understand that there is the mind of the comparatist over here and the world of foreign law over there.

1.2 There is no essential difference between the mind of the comparatist and the world of foreign law, the one that would be a 'subject' and the other an 'object'.

2 The comparatist's text is not an intermediary between his mind and the world of foreign law, but the space in which a working delineation can be drawn.

3 Understanding of foreign law is not foreign law.

3.1 Foreign law does not have a referent.

3.2. Understanding of foreign law is not true.

3.2.1 Any 'truth' is a comparatist's 'truth'.

3.2.2 A comparatist's 'truth' is not truth.

3.2.2.1 A comparatist is always already epistemologically encumbered.

3.2.2.2 Epistemological encumbrance is an insurpassable horizon pertaining to the comparatist's existential condition.

3.2.2.2.1 'T' is plural.

3.2.2.2.2 The comparatist is haunted.

3.2.2.3 'Truth' is culturally constructed.

3.3 Understanding of foreign law is not objective.

3.3.1 Any 'objectivity' is a comparatist's 'objectivity'.

3.3.2 A comparatist's 'objectivity' is not objectivity.

3.3.2.1 A comparatist is always already epistemologically encumbered.

3.3.2.2 Epistemological encumbrance is an insurpassable horizon pertaining to the comparatist's existential condition.

3.3.2.2.1 'I' is plural.

3.3.2.2.2 The comparatist is haunted.

3.3.2.3 'Objectivity' is culturally constructed.

4 Understanding of foreign law is at once respectful and violent.

4.1 The comparatist is imbricated in the text of foreign law that he purports to understand.

4.2 The comparatist cannot ignore what the text of foreign law that he purports to understand affirms as to its own understanding.

4.3 The comparatist leaves a trace in the text of foreign law that he purports to understand.

4.4 Understanding of foreign law excludes piety vis-à-vis the text.

5 There is understanding of foreign law, then there is understanding of foreign law.

5.1 Understanding of foreign law is hearkening to foreign law.

5.2 Understanding of foreign law is traced.

5.2.1 The text of foreign law is haunted.

5.2.2 Ascription of meaning to foreign law is interpretation of spectrality.

5.2.3 Any tracing of foreign law is provisional.

5.3 Understanding of foreign law is invented.

5.3.1 Understanding of foreign law is errant.

5.3.1.1 Understanding of foreign law meanders.

5.3.1.2 Understanding of foreign law errs.

5.3.2 Negotiation takes place.

5.3.3 There are different understandings of foreign law.

5.3.4 The comparatist must assume responsibility for his understanding of foreign law.

- 5.3.5 The usual detractors can be expected to make their usual detractions.
- 5.4 Understanding of foreign law is always interrupted before saturation.
- 5.5 There is an ethics of understanding.
 - 5.5.1 Interpretation must be charitable in as much as foreign law must be assumed to be sensible.
 - 5.5.2 Charitable interpretation does not exclude critique.
- 6 An understanding of foreign law carries over another because it is understood to generate a more persuasive interpretive yield.
 - 6.1 A comparatist who desires an understanding of foreign law and decides for one is epistemologically encumbered.
 - 6.2 Epistemological encumbrance is an insurpassable horizon pertaining to the comparatist's existential condition.
 - 6.2.1 'T' is plural.
 - 6.2.2 The comparatist is haunted.
 - 6.3 Understanding of the comparatist's understanding of foreign law is not that understanding.
 - 6.3.1 Understanding of the comparatist's understanding of foreign law is epistemologically encumbered.
 - 6.3.2 Epistemological encumbrance is an insurpassable horizon pertaining to the comparatist's existential condition.
 - 6.4 The authority of the comparatist inventing foreign law through tracing matters.
 - 6.4.1 Authority is disciplinary rather than charismatic.
 - 6.4.2 A comparatist can be a disciple or a combatant.
 - 6.5 Any interpretive yield is inherently defeasible.
- 7 Understanding of foreign law is impossible.
- 8 Understanding of foreign law must happen.
- 9 Understanding of foreign law happens.
- 10 What happens as understanding of foreign law is impossible.

FAQ

I am very grateful to Tresmin G.O. Lane, MSc (UCLA), JD (USD), for having suggested an interview and agreed to prepare it for publication, thus allowing for a challenge to more conventional forms of writing in the field of comparative legal studies. Our extended conversation took place at Monica's at the Park in San Diego over five two-hour sessions from 20 to 23 September 2010. The text that follows is Ms Lane's abridged and edited version of the initial transcript. I subsequently revised her account. In the main, we have sought to elide all disturbances or suspensions and all hesitations or repetitions. Because of these various contractions and emendations, the interview has therefore not remained intact. However, no attempt has been made to bridge the incommensurability between question and answer. Needless to add, our report is simply unable to convey the specific theatricality that surrounded the staging of our meetings. While aspects of the informality governing these sessions may have been lost in the passage from speech to writing, we have wanted to retain some at least of the oral flavour of our exchanges, though no doubt with mixed success only.

What is this culture 'thing'?

To come to foreign law as an expression of culture allows the comparatist to configure law as always already embedded in a complex historical, political, social, and epistemological situation to which it has to be traced if it is to be ascribed significant meaning. Also, to appreciate interpretation as itself being an expression of culture prompts the comparatist to configure understanding as always already embedded in a complex historical, political, social, and epistemological situation to which it has to be traced if it is to be ascribed significant meaning. In other words, the culture 'thing' helps the comparatist to realize that wherever and whenever he begins his interaction with foreign law, the foreign law's page is never white and his own slate is never clean. In terms of the field of comparative legal studies, it is about changing the coinage in which we trade as comparatists-at-law. Incidentally, it is also a matter of epistemological modesty, of becoming more humble concerning what can be achieved in terms of our interpretive work on foreign law. Given the constraints arising from the fact that law is cultural and from the further fact that interpretation is cultural also, only a certain kind of understanding can be had and only so much of that understanding is possible.

Is law necessarily cultural?

How could law exist outside culture? Consider the best-known sources of law. Statutes are drafted by individuals, by human beings. Judicial decisions are written by women and men who were educated somewhere, who learned to think about the law over there rather than over here. The same argument goes for textbooks, monographs, and articles. Now, let me bring to your attention the work of an anthropologist who discusses the imposition of linguistic categorization on 'nature' or, if you will, on 'reality'. Her findings lead her to say the following: 'It is a grave mistake to assume that any given speaker's intuitions about what is natural in perception represent a transparent reflection of [...] noncultural experience. We cannot assume that our perceptual intuitions, no matter how persuasive,

are sealed off from cultural penetration'.⁴¹³ If this conclusion obtains as regards 'nature' or 'reality', how could it not apply to law, which is, through and through, a fabrication, a product, something *made*?

Briefly stated, what is culturalism's critique of positivism?

There is a passage in Derrida where he says, in another context, that what he wants to accomplish is 'first and foremost [...] calling into question a certain scene of reading and of evaluation with its comforts, its interests, its programmes of all kinds'.⁴¹⁴ We can usefully start with this quotation, if only on account of its general reach. But since you are expressly asking me to be brief, let me focus on how positivism is premised on an opposition between law and non-law. I say that this contrast is artificial and needs to be undone. It does not work for comparative research. When one comes to foreign law and the matter of understanding the foreign, such a demarcation is rapidly found to be debilitating. While a positivist will readily think of a statute as being only a statute, in effect it is much more than — and other than — what it appears literally to be. And this complexity is a fact that culturalism allows one to appreciate much more clearly. Through a culturalist lens, the statute is seen to convey much more than it seems to be doing. Economically, of course, elliptically even, but no less meaningfully, it is revealed to be haunted by a history, a politics, a philosophy, an epistemology, and so on and so forth. Culturalism's point is that there is no legal essence, no 'being-legal' of law in the sense of a 'being-legal' that would be exclusive of all other discourses. In order to get to the gist of the foreign, comparison-at-law must therefore traverse both what has traditionally been held as the legal and what has classically been approached as the non-legal, all the while not allowing itself to be governed by either. Culturalism creates an opening in the law-text within which another understanding of foreign law can intervene and transform what we know or think we know about it. You could say that culturalism's deepest concern has to do with overcoming a set of limits within which positivism has long sought to cabin comparative work about law.

Legal rules, then, should no longer be the focus of comparative legal studies?

During my years of teaching in the Netherlands, one of my Dutch colleagues, who regards and presents himself as a 'comparatist', invited me to attend a postgraduate seminar (note, a *postgraduate* seminar) that he was directing. The topic of the day concerned recent developments in French law in the field of civil liability. By way of 'comparison', my colleague proceeded to read excerpts from the '*Informations rapides*' section of the Dalloz law reports, as it was then called (and which literally translates as 'Quick News'), where the decisions of French courts — which, as you know, are as terse as can be — were further reduced still to just a few lines of text. And that was the seminar that was: a compilation of the briefest summaries imaginable! No history, no politics, no philosophy, nothing, except pinpoint judicial solutions very loosely strung together. In my experience, as extraordinary as this may seem, this approach is typical — although, of course, not all

⁴¹³ Danziger, E (2005) 'The Eye of the Beholder: How Linguistic Categorization Affects "Natural" Experience' in McKinnon, S and Silverman, S (eds) *Complexities* University of Chicago Press at 75.

⁴¹⁴ Derrida, J (1992) [1983] *Points de suspension* Weber, E (ed) Galilée at 124.

colleagues confine themselves to Dalloz's *'Informations rapides'*. Clearly, the aim is strictly instrumental. And one could readily add that this brand of instrumentalism rapidly qualifies as poor instrumentalism, because even practitioners will benefit from a measure of tracing rather than simply operate on the basis of the rule in its raw state. It is not, then, that rules are 'out', but that they cannot usefully be skeletonized in the way they have been. I am reminded of Lawrence Friedman's indictment of the members of the American Law Institute as regards their Restatements. In his words, they 'took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones'.⁴¹⁵ It is the law's atrophy that must be avoided, all the more so if one is dealing with the foreign — which makes especial epistemological demands on one.

Perhaps an analogy can assist. Let us say that I was asked to describe a law school. In times past, it used to be a family home until it was bequeathed to the university. I could talk about the type of stone or brick, the colour, the year in which the building was erected. This would be one possible description. Another approach would be to *supplement* this narrative, to *add* that the property used to be a private house inhabited by a wealthy family, to say a little about that family, to explain what that house meant to these people in terms of social status and respectability, and to recall in what circumstances it was bequeathed to the university and converted, say, into a law school. In both instances, I am telling about the law school but in the second case, I have sought to trace it. My claim is that if one proposes to engage in meaningful comparative legal studies, one must aim to avoid talking strictly in stone-and-brick terms.

Can what you call comparison 'other-wise' work for practitioners — or judges, for that matter?

I agree that a lawyer with a busy practice can only devote so much time to tracing the constitutive cultural characteristics (historical, political, social, epistemological, and otherwise) of a foreign statute or judicial decision — and indeed that she has only so much need of tracing. And I accept that a Swiss lawyer who wants to win her case in Switzerland may want to 'import' a French notion and in the process require to attenuate its Frenchness so that it is seen by a Swiss judge to be available to Swiss law. I can understand that such a lawyer would not want to emphasize the way in which the French statute or judicial decision can be traced to its constitutive cultural characteristics (historical, political, social, epistemological, and otherwise) — although it is arguable that even this strategic refusal to trace must assume an appreciation for the traces. And I also acknowledge — to use a helpful illustration of Professor Franz Werro's, which he mentioned in discussion — that a Swiss professor of law testifying as an expert before a US court can only indulge, and only requires to indulge, so much tracing.⁴¹⁶ But I am not specifically addressing practitioners nor am I writing with judges in mind. I am happy to leave this brand of comparative research to others. All the same, tracing can also be good for the courts! For example, it seems clear that the 2003 US Supreme Court's majority opinion in *Lawrence v Texas* could have done more to trace the European Court of Human Rights decision it chose to integrate

⁴¹⁵ Friedman, LM (1985) *A History of American Law* (2nd ed) Simon & Schuster at 676.

⁴¹⁶ Eg: *Mastercard International Inc v Fédération Internationale de Football Association* 464 F Supp 2d 246 (SDNY 2006) excerpted from Merryman, JH, Clark, DS, and Haley, JO (2010) *Comparative Law: Historical Development of the Civil Law Tradition in Europe, Latin America, and East Asia* LexisNexis at 131-42.

into its judgment, if only in order to show how that case was relevant to US constitutional adjudication.⁴¹⁷ And there is no doubt that the Court, although it cannot be expected to provide page after page of detailed comparative analysis, had the institutional resources to engage in some tracing at least. Judicial references to foreign law are a worthwhile initiative as long as the foreign law's relevance is demonstrated. Arguably, if the US Supreme Court had engaged in a tracing exercise that would have allowed its readership to know more about the European judgment, its reference to foreign law might have appeared more warrantable — to some constituencies, at any rate.

Is it not pessimistic to say that a French lawyer can never think like an English lawyer and vice-versa, that legal epistemologies are incommensurable with each other?

In French, ducks do 'coin-coin'. In English, they do 'quack-quack'. You're laughing...! But in what way can these onomatopoeic forms usefully be said to be commensurable other than on account of the comparatist's designed and ascribed commensuration? To mention another example: only through a 'thirthing' of knowledge can there be commensurability between 'nature morte' and 'still life'. The situation that obtains as between French and English law is not significantly different from these two illustrations. Here also, it is key to understand that whatever commensuration there is said to be, it is the comparatist's commensuration. Other than through the comparatist, these two laws have nothing to say to each other. They are but two monologues. Now, the acknowledgment of the differend as fact has nothing whatsoever to do with pessimism. Indeed, to say that a French lawyer cannot think like his English counterpart — which, with respect, seems such an *evident* proposition to advance — does not at all disqualify his insights on English law. On the contrary, it is precisely because he thinks differently — because he thinks from a distance — that his critical interpretations of English law are so valuable. Difference is opportunity. The point, say, for a French comparatist, cannot be to show how 'quack-quack' is in fact like 'coin-coin'. What could there be for him to *learn* here? What is there to *learn* from sameness? (And why should 'coin-coin' serve as reference anyway?) The point is that without the differend, no thinking is possible. The French comparatist's onomatopoeic challenge is therefore to assess what makes 'quack-quack' singular vis-à-vis 'coin-coin'. It is the bringing forth of this singularity that makes a study of 'quack-quack' worthwhile. And in order to stage this interaction, the comparatist will invent a 'third space' such as 'transliteration of bird vocalization'. It is only through this 'thirthing' of knowledge — which is of the comparatist's own doing — that 'coin-coin' and 'quack-quack' will prove commensurable. And this resolutely optimistic gesture is, in effect, the comparatist's motion in favour of an increase in knowledge through comparison. Other than that, these onomatopoeias have nothing to say to each other. If the study of foreign law can achieve one thing, it is therefore to get the comparatist to call into question the existence of a common ground of shared understandings, to challenge the idea of universally-acknowledged 'truths', to overcome these disingenuous and ultimately oppressive fantasies. Ludwig Wittgenstein is reputed to have exclaimed: '[M]y interest is in showing that things which look the same are really

⁴¹⁷ Supra note 161.

quite different. I was thinking of using as a motto for my book [*Philosophical Investigations*] a quotation from *King Lear*: “I’ll teach you differences”⁴¹⁸ I agree.

But is it not pessimistic to say ‘no objectivity’, ‘no truth’, ‘no method’, ‘no understanding’...?

I am not suggesting that anyone should devote hours upon hours to a reading of my published work, far from it. But if one is willing to take a genuine interest in my scholarship, one will readily recognize that my writing is not pessimistic. Having accepted the fact of the spatialization of law, I am committed to the *valorization* of foreign law. I am arguing that, normatively speaking, foreign law *matters*. What is pessimistic about such ideas? Do they not express, in effect, a decision of generosity towards the foreign? And how could this expression of interest for other laws — this recognition, this respect — be said to be pessimistic? I also defend the view that the comparatist-at-law must carve his own path to foreign law and make his own decisions about it, all the while accepting that he will miss some questions, on the one hand, and that some issues will remain unanswerable to him, on the other. Is this pessimistic? I do not think so, not for a moment.

One of my arguments is simply that comparison-at-law must overcome its longstanding credulity and become aware that there are cognitive or epistemological constraints as to what comparatists can do, which a thoughtful comparatist-at-law must want to acknowledge and factor into his research. Ultimately, it is about being intellectually creditable. Surely, to militate for creditability is not to be pessimistic. Rather, it is to demonstrate a keen, optimistic, commitment to comparison-at-law so that it is recognized as the worthy intellectual endeavour that it can be. Again, the point is not at all that one ought not to be studying foreign law. As it happens, I have devoted my entire academic life to this task! But one must realize that, cognitively or epistemologically speaking, there is only so much that one can accomplish, indeed only so much that one should want to accomplish. For instance, in my opinion, there is no way in which the comparatist can ever become a native or should ever want to be. Let me quote the French linguist and ethnographer, Georges Dumézil: ‘If I were to make my way to the cannibals, I would try to know as much as possible about them but I would stay away from the cauldron’.⁴¹⁹ The fact is that no matter how hard one tries, the self simply will not be the other — which, importantly, is nothing to regret because should the self ever become the other, we would no longer have the *other*. And comparatists need their others, they need to have their Nambikwara.

While most lawyers remain obstinately parochial (we see it in law school), comparatists have the immense merit of going beyond national law. Should the work being done in the field of comparative legal studies attract so much critique?

Criticality is creativity! But let me answer at greater length by recounting an anecdote. When Dr Roderick Munday and I convened our August 2000 commemorative conference in Cambridge to mark the 100th anniversary of the Paris *Congrès international de droit comparé*,

⁴¹⁸ Drury, M O’C (1984) [1948] ‘Conversations with Wittgenstein’ in Rhees, R (ed) *Recollections of Wittgenstein* Oxford University Press at 157. The Shakespearean reference is to *King Lear* I iv.

⁴¹⁹ Dumézil, G ‘Les festins secrets de Georges Dumézil’ *Le Nouvel observateur* (Paris) 14 January 1983 at 23. The words, being the transcript of an interview with Maurice Olender, are Dumézil’s.

we invited a distinguished Princeton anthropologist to act as commentator-at-large and keynote speaker. Now, quite apart from his eminence as an anthropologist, our colleague had been teaching law for years at a leading US law school. In other words, he was in an excellent position to assess comparison-at-law both from 'within' law and from 'without'. However, our colleague, being principally an anthropologist, was not thoroughly familiar with the epistemological orthodoxy governing the field of comparative legal studies. His reaction upon discovering what was being written by mainstream comparatists-at-law makes for very interesting reading indeed. Consider this passage from his contribution to the published conference proceedings. He begins by quoting a few lines from Kötz: 'Convinced, *perhaps from living by the sea*, that life will controvert the best-laid plans, the Englishman is more at home with case-law proceeding cautiously step-by-step than with legislation that purports to lay down rules for the solution of all future cases'.⁴²⁰ And here is our colleague's retort: 'I had thought if comparative studies had demonstrated anything it was that the perverse attachment by the British to the common law was, in fact, due to a surfeit of marmite at a formative stage of youth, combined with the restricted blood flow to the brain that comes from wearing rubber wellies and fingerless gloves!'.⁴²¹ So, yes: I am critical! I am critical, if only out of embarrassment.

Most fortunately, there are comparatists-at-law who do very important, thoughtful, and progressive work (no names need be named...). But the difficulty is that there are not enough of those academics and that they are not influential enough within comparative legal studies to relegate the orthodoxy's threadbare strategy to the oblivion it deserves (which, of course, is hardly their fault given the field's deployment of some pretty efficient protectionist or exclusionary measures). It is unclear, though, what will happen in the foreseeable future, if only because the connection between one's action and the outcome one gets is so indeterminate. Yet, it seems hard to dispute the fact that as orthodox comparatists-at-law assess the costs and benefits of accommodating new knowledge, path dependence can be expected to lead to resistance and rejection. After all, the acquisition of more sophisticated knowledge does not automatically trump the decision to remain less informed, if only because it can be 'cheaper' to ignore a bit of new knowledge rather than jettison a lot of old knowledge. Remember that Galileo's critics refused to look through his telescope! And then, there is the fact, as Pierre Schlag puts it, that '[t]o [have been] legally trained is to [have undergone] a serious reduction of one's cognitive possibilities'.⁴²²

Whitehead writes that '[t]he importance of an individual thinker owes something to chance'.⁴²³ Very well! But I think the 'chance' that Whitehead had in mind is unlikely to smile very benevolently on those who are writing against *consensus gentium*, something which is very much what I am doing (even though, quite apart from trying to break and destroy, I also attempt to foresee and project). Because I take the view that the 'reality' of the present must dictate my realism about the future, I do not labour under any illusion. Within comparative legal studies — within any field — the margin is decidedly a vulnerable place.

⁴²⁰ Zweigert, K and Kötz, H *Introduction to Comparative Law* supra note 116 at 70 [emphasis added].

⁴²¹ Rosen, L (2003) 'Beyond Compare' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press at 494.

⁴²² Schlag, P (1998) *The Enchantment of Reason* Duke University Press at 143-44.

⁴²³ Whitehead, AN (1926) *Science and the Modern World* Cambridge University Press at 40.

Incidentally, I would argue that the epistemological situation is far worse in continental Europe than, say, in the US. In the 1990s, I taught doctoral seminars in the Netherlands for five years. In the second year, I was told that some students and, primarily, their doctoral supervisors, to whom they had been reporting, no longer wanted to hear the kind of theoretical arguments that I was making in class. The colleague who informed me of this fact had the good grace to admit that this was because they found my claims 'unsettling'. In other words, my contentions fell outside an epistemological comfort zone defined by the traditional practice of comparative legal studies. Within that zone, one is allowed to argue *pro* and *con*. But one is not permitted to re-define the zone itself. So, there you had a situation where the anxiety of uniformity and conformity typical of the civil-law world carried over the dissemination of new ideas (the sort of ideas which, needless to add, would hardly have raised an eyebrow in the US or Australia). Historically, civilians have not been expected to think for themselves. As I discuss in a couple of articles,⁴²⁴ ultimately the civil-law tradition disqualifies independent reflection. It is concerned with authority rather than inquiry. Little wonder that the earliest sense of '*jus*' evoked a precisely confined sphere of action!⁴²⁵ In the Netherlands, I discovered that the didactic purpose of a doctoral seminar in a civilian jurisdiction is to provide students with categorical imperatives that fit within the positivist framework of their supervisors' expectations.

Are you not asking too much of the comparatist?

You want to be careful here lest you begin to sound like a French colleague of mine! A few years ago, she wrote that comparatists ought not to pursue interdisciplinary research because it was too complicated or too complex. In fact, this observation was prompted by a short book advocating an interdisciplinary approach to comparison-at-law that appeared in France under my signature. The cruel irony is that my colleague inscribed her fear of interdisciplinary research just as she was arguing elsewhere in the same paper that French research in comparative legal studies (or '*droit comparé*', as it is styled locally) boasts an illustrious history. Well, if you want to assert the distinguished history of French comparative scholarship (which is a very strange claim to make in any event since French scholarship is so notoriously monolingual, parochial, and self-serving), it is rather peculiar to come forward as a French comparatist and contend that interdisciplinarity is too hard. I am not sure that my colleague appreciates how much damage she has done to her credibility, a situation that, as I hear fellow comparatists mocking her since the publication of her text (a contribution to the staid *Oxford Companion to Comparative Law*), may well be beyond repair. Be that as it may, let me insist that I do not expect a comparatist-at-law to trace the foreign law-text to all manner of discourses (historical, political, and so on and so forth) and then to produce an expert account of each discourse. The point is rather to acknowledge that the foreign law-text is historical because it features traces of history, that it is political because it features traces of politics, that it is ideological because it features traces of ideology, and so on and so forth — and that it always remains very much 'itself' qua law-text along the way. It is then up to each comparatist-at-law to

⁴²⁴ See Legrand, P (1995) '*Antiqui juris civilis fabulas*' (45) *University of Toronto Law Journal* 311; Legrand, P (1998) '*Are Civilians Educable?*' (18) *Legal Studies* 216.

⁴²⁵ See Dumézil, G (1969) *Idées romaines* (2nd ed) Gallimard at 41.

articulate his own tracing strategy. It seems so obvious that no one can trace everything, especially since not everything is traceable.

You criticize the 'praesumptio similitudinis'. Why do you think there is this urge on the part of orthodox comparatists to promote the uniformization of law?

Many answers are possible. Some of the claims advanced by mainstream comparatists are utilitarian (say, 'uniformity of laws will lower transaction costs'). Other arguments pretend to be more humanistic (say, 'there is but one mankind'). One thing seems clear, though, and it is, if I may quote Claude Lévi-Strauss, that 'our society is anthropoemic, that is, it rejects beings [who are] different from others [who are] "normal"'.⁴²⁶ Difference, if you will, is promptly assimilated to deviance and is therefore impopular. Take Geert Hofstede's extensive empirical study of organizational culture in the various national outposts of the IBM conglomerate. Hofstede generated a considerable database around the idea of 'uncertainty avoidance', that is, the propensity of various cultures to avoid that which is unknown. In conclusion, and by way of summary, he introduced three national perspectives on difference, none of which is positive. He found that what is different is dangerous in France, curious in the US, and ridiculous in the Netherlands.⁴²⁷ This point connects with the more theoretical one to the effect that difference is often apprehended as inadequate. After all, Plato denigrated the copy because it is different from the original!

Now, for comparative legal studies other-wise, it is only *apparently* anachronistic to insist on a heightened sense of cultural difference across legal traditions in a modern, economically globalized, world. The fact is that the emphasis on difference has arguably never been more important than in this era of globalization. As laws are increasingly interacting with each other, there is now a need to understand the other's law in a meaningful way so as to be in a position to appreciate, for instance, why a particular legal culture remains so attached to this or that rule. In this sense, comparatists can show how difference continues to make sense when viewed from a law-as-culture standpoint. Consider the European Union. How could a comparatist regard as an *improvement* a world in which the epistemology that animates the common-law tradition had been completely assimilated to the civil-law world? What I am saying, then, if I can indulge some word-play, is simply that it is high time for comparatists-at-law to seek to comprehend (in the sense of 'understand') foreign law rather than always try to comprehend (in the sense of 'subsume') foreign law!⁴²⁸ The way in which comparative legal studies other-wise spontaneously values difference remains one of the most important political commitments that it can uphold and must steadfastly continue to endorse in the age of globalization of law, which, in effect, is more of a process of glocalization than anything else. Local knowledges — that is to say, the differend — very much continue to matter.

⁴²⁶ Backès, C 'Lévi-Strauss ou la philosophie du non-savoir' *La Quinzaine littéraire* (Paris) 16-31 May 1970 at 13. The words, being the transcript of an interview with Catherine Backès, are Lévi-Strauss's.

⁴²⁷ Hofstede, G (1991) *Cultures and Organizations* McGraw-Hill at 119.

⁴²⁸ Cf Tully, J (1995) *Strange Multiplicity* supra note 208 at 56.

I remain puzzled by your insistence that understanding across laws is not possible.

Again, I wish to answer by referring to the work of a well-known anthropologist, Ernest Gellner. He writes as follows: '[N]o anthropologist, to my knowledge, has come back from a field trip with the following report; *their* concepts are *so* alien that it is impossible to describe their land tenure, their kinship system, their ritual'.⁴²⁹ In advance of empirical research, and with all due respect to Gellner, it seems to me that precisely the opposite would be the case and that all serious anthropologists would report a keen sense of incommensurable knowledge-worlds and attest to the sheer impossibility of description — which, of course, does not mean that they will not then proceed to articulate a commensuration and arrange a description. They will, and they must, because although understanding is impossible, it is, so to speak, not yet impossible enough for a comparison not to take place. But the gap across the self and the other remains uncircumventable. If I may, this uncircumventability is the comparatist's predicament.

Is there not a risk that too much theoretical concern will have the comparatist face something like catatonical incapacitation?

I am not prepared to accept that to instill some dubiety into the orthodox narrative regarding the study of foreign law can have this kind of paralyzing effect. Quite to the contrary, I would think that epistemological melioration would feature empowering virtues for comparatists-at-law. In any event, when you have Kötz's model being hailed as '[c]risp, specific, complete, and reliable' and commended for its 'rich and focused material',⁴³⁰ you know that *something* needs to be done. You get the same impulse to act when you realize that Schlesinger's project continues to be regarded as a valid comparative enterprise.⁴³¹ To me, the favour that Schlesinger's initiative enjoys is a measure of the distance comparative legal studies must still travel before it acquires intellectual creditability. A thoughtful comparatist like John Merryman took his distance from Schlesinger and was very well inspired to do so.⁴³² And other comparatists-at-law have to move away from a situation where to know 'French law' means to be in a position to give a normalized and formalized account of current and relevant French legal rules with a view to showing that they look like German or Italian rules. Ask yourself Jerome Frank's question: 'Are the "solutions" involved in two decisions, one in France and one in the United States, to be deemed substantially the same merely because, in apparently solving in substantially the same way what appears to be the same problem, the two courts stated the same facts — despite important differences in the method of trial, *i.e.*, the methods of "proving" the facts?'.⁴³³ It

⁴²⁹ Gellner, E (1985) *Relativism and the Social Sciences* Cambridge University Press at 86 [emphasis original].

⁴³⁰ Markesinis, BS (1994) 'A Matter of Style' (110) *Law Quarterly Review* 607 at 607.

⁴³¹ See Zekoll, J (1996) 'Kant and Comparative Law — Reflections on a Reform Effort' (70) *Tulane Law Review* 2719 at 2724.

⁴³² Merryman, JH (1974) 'Comparative Law and Scientific Explanation' in Hazard, JN and Wagner, WJ (eds) *Law in the United States of America in Social and Technological Revolution* Bruylant at 98-99. See also Legrand P (1999) 'John Henry Merryman and Comparative Legal Studies: A Dialogue' (47) *American Journal of Comparative Law* 3 at 4: 'It seems so obvious that comparison based on statements of rules of law [...] is a relatively trivial kind of enterprise'. The words are Merryman's.

⁴³³ Frank, J (1956) 'Civil Law Influences on the Common Law — Some Reflections on "Comparative" and "Contrastive" Law' (104) *University of Pennsylvania Law Review* 887 at 903.

simply can no longer be the case that to report on the legal rules in force and pretend that these rules are the same across laws constitutes the act of comparison-at-law.

And it cannot be acceptable either that the comparatist should still be assumed to be able to produce a report that would be objective and true. We need to get beyond Kötz who needs to move away from Rabel. Ernst Rabel appears to be regarded, at least by Germans, as a leading comparatist. Yet, he took what is clearly the problematic view that comparative work could be immune from the background and education of the comparatist-at-law and that for it to be coloured by the comparatist's predispositions, therefore, signaled a weakness or failure that required to be corrected and, presumably, that could be.⁴³⁴ To my mind, this lack of epistemological appreciation for what inevitably takes place as comparison-at-law unfolds is precisely what calls into question the intellectual creditability of comparative legal studies. How can a comparatist, even back in 1951, show such lack of awareness of psychological, anthropological, or sociological research on the inevitability (and, indeed, on the necessity) of an input by the comparatist as he engages in the act of interpretation? Obviously, comparative legal studies needs more theoretical insights than it has been willing to accept.

Realistically, can comparison 'other-wise' work, even for academics?

Once you have the narrow approach that I critique regarding and presenting itself as comparative legal studies, it is clear that an argument like mine, which takes the view that what my Dutch colleague does when he reads from the Dalloz 'stop press' section simply does not qualify as meaningful comparison-at-law, will not be so popular. One important problem, of course, is that my colleague, conditioned as he is by the system into which he was indoctrinated in law school, cannot bring himself to see the value of law-as-culture. Because past investments in learning act as a constraint on what he can choose now, he faces an epistemological demand that outstretches his possibilities. And then, there is the matter of cultural competence. As I indicated a moment ago, no comparatist-at-law can be assumed to be at once a historian, a political scientist, a sociologist, an epistemologist, and what not. This fact should be obvious. But I think it is entirely fair to expect that a comparatist-at-law working within a university should be more than a technician. To be sure, scholarly efforts will be required if tracing is to take place — and I am not even talking of *strong* tracing. Concretely speaking, to move comparative legal studies beyond its technical bias means that a comparatist-at-law will have to expend himself and assimilate information from other disciplines. He will have to step out of the law library and spend some time in the central university library! (If he is lucky, it can be a very pleasant walk, the way it is at the University of San Diego, for example.) It is unfortunate, of course, that, rather than having sought to open his disciplinary horizons, the Dutch colleague I mentioned earlier has been devoting so much of his time over the years advising law firms and government agencies. As if this kind of work had anything to do with comparative scholarship...

Not surprisingly, perhaps, in the face of the intellectual expenditure that is associated with tracing, many comparatists are prompt to sweep away comparison-at-law other-wise

⁴³⁴ Rabel, E (1951) 'Deutsches und Amerikanisches Recht' (16) *Zeitschrift für Ausländisches und Internationales Privatrecht* 340 at 359.

under the proverbial carpet. This strategy can, in fact, adopt a tragi-comic form. My Dutch colleague (still the same individual as before!) once told me in all seriousness that my argument for the relevance of law-as-culture did not apply to the Netherlands because, well, the Dutch did not have culture... — a claim that, for one thing, shows how one will try to protect one's world-view from being questioned howsoever one can! I wonder what the Princeton anthropologist I mentioned earlier would make of such an assertion. Honestly...! As I just indicated, there are very commendable comparative endeavours that are being conducted by committed comparatists-at-law. On the whole, however, such undertakings remain exoteric since it is the case that the agenda very much continues to be controlled by the likes of my Dutch colleague — not, of course, on account of the intellectual strength of the position they defend, but rather because of the sheer size of their battalions. As a result, there is a kind of Gresham's law at work whereby one form of comparison-at-law drives away the other. Fortunately, no operation of *verrouillage* — which literally consists in trying to 'lock out' alternative voices — ever operates to perfection.

What is the comparatist's most important commitment?

The comparatist has a responsibility to the foreign law-text, which must be read and interpreted scrupulously. This responsibility — a word that, importantly, suggests the idea of 'response', of 'reaction' — involves an exigent fidelity to the singularity of the foreignness of the law-text. Specifically, this loyalty entails the acknowledgment of the irreducibility of the foreign law-text's singularity, of its heterogeneity to texts in other laws. It also implies the mobilization of protocols of rigorous argument, which must integrate the comparatist's own singularity, that is, allow for the fact that the comparatist-at-law is speaking from a situation. Note that there is an active dimension to the notion of 'responsibility'. It entails a duty of vigilance, of lucidity. It is about lending an ear, for example. In my view, this responsibility to singularity — the text's and the comparatist's — is a supremely demanding ethical act. In fact, this standard of engagement is so exacting that it cannot be met. For instance, the comparatist *will* betray the foreign law-text by failing to mention all that could be said about its singularity. In a sense, then, the comparatist's signature is inevitably a counter-signature, which attests to a form of violence being perpetrated on the foreign law-text. And the question is, of course, that of the lesser violence (or of the lesser betrayal). Note that the responsibility to the singularity of the foreign is also a responsibility to the field of comparative legal studies, a fragile spatio-intellectual configuration indeed that needs all the commitment it can get from comparatists. Let me add that to talk about the singularity of the foreign law-text does not mean that one cannot do anything with it, that it cannot serve any purpose other than operate where it is based. A foreign law-text is citable and iterable: it can be re-enacted elsewhere, repeated differently.

Why is betrayal of foreign law inevitable?

Not everything can be known about foreign law. It does not matter how sophisticated the comparatist and his comparison. This is not the point at all. In this regard, as in so many others, comparison is very much like translation. No matter how good the translation, it will never 'be' the original text. Think of it as a second original! As regards foreign law, there is that which is not known not because the comparatist did not work hard enough,

but because it cannot be known. There is, if you will, the constitutive inexhaustibility of any foreign law-text. Incidentally, it hardly matters whether the foreign law-text is a lengthy US Supreme Court judgment featuring five opinions or a one-article French statute. If you will allow an analogy, *Ulysses* is inexhaustible but so is a Char poem. Call it the implacable law of the secret. No matter what the comparatist does, irrespective of how much tracing he achieves, he simply cannot overcome the ultimate recalcitrance or elusiveness of the foreign law-text even as it invites or incites ascription of meaning. There is the foreign law-text's secret. But this argument is emphatically not to suggest that the comparatist should content himself with minimal tracing. To say that there remains an aspect of foreign law beyond access is certainly not to validate expedient compromises.

You often speak of the comparatist's 'bricolage'. Can you say more?

I would have to turn to the intellectual effervescence that characterized Paris in the 1960s and featured not a small number of important philosophical or literary controversies, in particular a quarrel involving Lévi-Strauss and Derrida. In 1962, when he released *La Pensée sauvage*, Lévi-Strauss had already established himself as a prominent anthropologist. In his book, he distinguishes between two modes of thought. He identifies the '*bricoleur*'s and the '*engineer*'s or '*scientist*'s.⁴³⁵ In short, Lévi-Strauss's engineer is someone who pursues truth and does so according to a method. A few years later, Derrida offered a critical reaction to Lévi-Strauss's distinction between the *bricoleur* and the engineer.⁴³⁶ For Derrida, Lévi-Strauss's engineer is mythical. He writes: 'The idea of the engineer who would have broken with all *bricolage* is [...] a theological idea'. According to Derrida, it is imperative that 'one ceases to believe in such an engineer [as Lévi-Strauss's]', accepts that 'the engineer and the scientist are also species of *bricoleurs*', and therefore admits that 'every finite discourse is bound to a certain *bricolage*'. Derrida is emphatic: 'One must say that every discourse is *bricoleur*' — engineer's or scientist's, and comparatist-at-law's, included.⁴³⁷

To what extent does your critique of comparative legal studies have wider implications?

I work as a comparatist-at-law. Perhaps because I learned scholarly integrity from Bernard Rudden during my Oxford years — I think of him often and always with gratitude — I do not hesitate to make what claims appear to me to be required, epistemologically and otherwise (or should I say 'other-wise'?). In answer to your question, I take the view that the comparatist's forays into foreign law can enhance sensitivity, beyond comparative legal studies, to the constructed character of the information that is being disseminated in classrooms as 'the law'. In this way, then, perhaps comparison-at-law has a lesson for

⁴³⁵ See Lévi-Strauss, C (2008) [1962] *La Pensée sauvage* in *Oeuvres* Debaene, V et al (eds) Gallimard at 576-78.

⁴³⁶ Derrida's retort came on the occasion of a famous 1966 colloquium at Johns Hopkins University, which initiated his international career. Other speakers included Roland Barthes and Jacques Lacan. Being very much perceived as a manifesto against structuralism, Derrida's argument launched poststructuralism (and 'French Theory') in North America. See Derrida, J (2007) [1970] 'Structure, Sign, and Play in the Discourse of the Human Sciences' in Macksey, R and Donato, E (eds) *The Structuralist Controversy* Johns Hopkins University Press at 247-72. By the time the proceedings were released in the US in 1970, Derrida had published his paper three years earlier as a chapter in Derrida, J *L'Écriture et la différence* supra note 399 at 409-28.

⁴³⁷ Derrida, J *L'Écriture et la différence* supra note 399 at 418 [emphasis added].

law teachers in general. You see, in the Western world at least, the view favoured by law teachers, to a greater or lesser degree, is that legal rules form a consistent and exhaustive grid from which the answer to any legal question can be logically deduced simply by identifying the applicable rule and applying it to the facts of the relevant case. What matters most, then, are 'arguments' based upon technically ingenious readings of legislative texts or past judicial decisions that often want to appear detached from all conflicts of social life in an attempt to guarantee their neutrality, in other words, their strength or power. Given that this point of view is so widespread, it is a small step for law teachers (and law students alike) to equate this approach to law with 'the law' itself. Since the task of the law teacher is to find 'the' meaning and to bring 'the' cohesion to light (in law school, I was always told that I had to 'reconcile' the cases!), it becomes easy to conclude that the determination of the meaning conveyed by legal materials cannot but be univocal. 'The' meaning is assumed to be there and, moreover, to fit within the whole. Legal education, it seems, exists to train students to think in precisely this way. And given that law teachers rarely offer meaningful discussion of the cultural framework that underpins the law (although there clearly *is* such a framework, since the law is undeniably the product of culturally-situated human minds), the unstated message is, in Roberto Unger's words, that 'the authoritative legal materials — the system of statutes, cases, and accepted legal ideas — embody and sustain a defensible scheme of human association'.⁴³⁸

In fact, though, the law teacher, as she organizes the law-world, does not merely render a 'something' that was there, that pre-existed her, and that she therefore merely had to discover and describe. For one thing, she had to select a language in which to account for the law-world that she saw, which involves a strong evaluative element. Given the law teacher's presuppositions, which are necessarily non-neutral because they are the outcome of human experience, the law-world, once 'rendered', will appear in a particular manner. But there is no way in which it can be cogently argued that a decision regarding the framing of 'the law' can be compelled by a purely 'legal' reasoning. At the end of the day, any such determination rests on a culturally-informed interpretation.

Now, there is, in my view, nothing particularly tragic to this conclusion, for what choice do we have? But it follows that if the rendition of the law-world is irrepressibly contingent because one cannot dispense with cultural input, it must, rather than have its aleatory character de-emphasized, be introduced *as contingent* to the law students to whom it is taught. Students must be told — something which is only rarely done largely because, I suspect, law teachers feel that to admit to the contingent character of their treatment of the law-world would ultimately discredit both them and 'the law'. Assumed theoretical innocence and claimed political neutrality are emphatically preferred options for at least one other reason, which is that law teachers do not ultimately want to accept responsibility for what they are uttering. To say that one's rendition of 'the law' is *one's* rendition of the law would mean, if I can quote Clifford Geertz, having to 'tak[e] personal responsibility for the cogency of what one says or writes, because one has, after all, said or written it, rather than displacing that responsibility onto [...] some [...] vague and capacious reservoir of incontaminate truth'.⁴³⁹ I think there is much to this argument. My point is that comparison-at-law, the study of foreign law, can assist law teachers in

⁴³⁸ Unger, RM (1986) *The Critical Legal Studies Movement* Harvard University Press at 2.

⁴³⁹ Geertz, C (1995) *After the Fact* Harvard University Press at 62.

discerning what is ultimately at issue in any claim being advanced about 'the law' and perhaps help in making them more comfortable with this process of re-presentation. Many times, I have been asked questions along the following lines: 'But what you say about the study of foreign law — invention and all that — would also apply to national law, would it not?'. You can sense the incredulity, the reluctance... However, you can also discern the awareness, the glimmer of appreciation... Indeed, a theorized practice of comparison-at-law can teach a few important lessons of general application. It can help. The idea of 'help' evokes Beckett: 'What else, opinions, comparisons, anything rather than laughter, all helps, can't help helping'.⁴⁴⁰

You are linking comparison to justice?

Yes. More specifically, I am connecting comparison with an aspiration to justice. Again, I claim that there is an ethical moment in the comparatist's work because his intervention is a response to the foreign law-text — which is a matter of attempting to do justice to it (a goal, of course, that will ultimately prove impossible to achieve, and here we are back to the idea of 'betrayal'). Inevitably, the foreign law-text is there first; the comparatist comes *to* it in order to respond *to* it. Now, as I have indicated, 'response' connects with 'responsibility'. The comparatist must assume responsibility for his response. To be sure, the response will be performative or inventive. In a way, its singularity will match the singularity of the foreign law-text: singularity meets singularity! To complicate matters a little, I would argue that since the comparatist's response will be performative or inventive, because it will not simply be an act of sheer semantic obedience to the foreign law-text, it will also be a non-response to the law-text — which is evidently what we want, since there is no interest whatsoever in any commentary that would attempt a mere duplication of the law-text. As such, the comparatist's interpretation will be irresponsible. In other words, in the same way as one must want the comparatist to be responsible vis-à-vis the foreign law-text, one requires him to be irresponsible in his responsibility (just as one wants him to be responsible in his irresponsibility because wild irresponsibility would be of little interpretive use). And given the fact that foreign law expresses itself vocatively, that it addresses the comparatist-at-law who responds to it, at once responsibly and irresponsibly, comparative legal studies could be said ultimately to be referring to a *vocation*.

Could you say something about your understanding of difference? Why do you regard difference as such an important feature of your brand of comparative research?

While it has been normalized or domesticated in a number of disciplines, where it may even seem like an overworked idea, the motif of 'difference' has yet to make its epistemological mark in comparative legal studies. Again, though, I have to be brief. Perhaps, after the literary critic Derek Attridge, I can use an example to help with my argument.⁴⁴¹ (I know that the logic of exemplarity is problematic and I appreciate that illustrations have their limitations. In fact, they can be said to act like theoretical shortcuts. But an example is

⁴⁴⁰ Beckett, S *The Unnamable* supra note 44 at 394.

⁴⁴¹ See Attridge, D (2004) 'Encountering the Other in the Classroom' in *Thinking Difference* Wolfreys, J (ed) Fordham University Press at 16-17.

efficient.) I want to stage the epistemologically desirable situation that can obtain within comparative legal studies if a culturalist perspective is brought to bear on the study of a foreign law-text in the classroom. Imagine a group of US law students reading about the French statute on religious dress at school. Imagine further that these US students, hailing from a multicultural society, harbour a certain number of prejudices regarding the way in which France is handling the matter of religious diversity in the public sphere. (Of course, you are familiar with this illustration since you took my course last year.) Now, the prejudices of these US students will vary as between the various individuals in the class according to their backgrounds. To be sure, these US students would not consciously harbour xenophobic or francophobic inclinations. However, their convictions, their view of the world, their appreciation of their own place in the world — specifically, their understanding of the significance of freedom of religion and freedom of speech — turns, at some level of consciousness or other, on their exclusion of the French practice from the range of what is acceptable. From the US students' perspective, the French exclusion of young headscarf-clad Muslim women from the classroom partakes in an otherness that they are required to denigrate in order for them to sustain their own sense of their cultural selves. In other words, for the US students to be the sensible multiculturalists that they want to be, they must form a negative view of the French practice. Put it this way: one cannot be a good multiculturalist *and* accommodate the French statute.

Imagine that a class discussion now takes place under the guidance of a comparatist whose life experience allows for a sense of acceptability that is perhaps more sophisticated than his students'. As the US students bring to the discussion their experience or understanding of religious dress in the classroom, the comparatist, acting as culturalist, invites them to a close reading of the statute informed by French history, French politics, French republicanism, the French configuration of citizenship, the French conception of the school, and, yes, perhaps a measure of French anxiety or even Islamophobia vis-à-vis the growing Muslim presence on French territory (which is not to say that all French think the same in this or any other respect, for there is simply no such homogeneity). And the comparatist explains how all these historical, political, and other traces are constitutive of the statute. This close-reading strategy stands opposed to the positivist's closed reading that would seek to contain difference. If you will, the comparatist is reading out of the text while positivism is so concerned to read into the text — for example, to read into the text all manner of similarities with other law-texts that are simply not there. In the light of the negotiation that would take place in class with two or three more inquisitive students or perhaps with a couple of students proving reluctant to accept what they perceive as an unconvincing narrative on the part of their teacher, it can be expected that some US students — probably not more than that — would begin to question their assumptions and make space for a new interpretation of the French exclusion that they had readily excluded from their understanding of acceptability.

It may well be that the steps being taken towards a new interpretation of the French practice are few and slight. It is quite possible also that only a limited number of students will be willing to come along. But one can imagine that for those US students, the class discussion will be an 'I opener',⁴⁴² such that their intellectual and moral lives will possibly

⁴⁴² Beckett, S (2006) [1964] *How It Is in The Grove Centenary Edition* Auster, P (ed) vol II Grove Press at 479. This novel was initially written in French and subsequently re-written in English by Beckett himself.

be permanently changed. In the process, because it is recognized and respected, the French practice ceases to be unacceptable — or, at least, becomes unacceptable otherwise/otherwise, that is, in a different sense of the term (it is no longer that it must be condemned, but that it is, say, incongruous). The French practice's otherness is not of the kind that must be deemed inadmissible anymore, but of the type that deserves to be understood. If you will, it has been made plausible. There is nothing here to suggest that the US students have to agree with the French model. But at least — and this strikes me as being hugely significant — the tracing that the comparatist will have introduced to them prohibits any ready and reductive appropriation of the French statute to the local idea of discrimination. Because the comparatist has taught the differend by giving it a hearing, by attempting to make sense of it, some of the US students' hostility will have subsided, some of the fear will have disappeared. The French model will no longer be so cavalierly dismissed. In other words, the US law students are learning to acknowledge difference, to come to terms with the singularity of something textual.

I am not saying that the US students now *know* French law — not, at least, in the strong sense of the verb 'to know' — if only because what they 'know' is very much indebted to their teacher's re-presentation, which had to be singular (other comparatists would have suggested other interpretations), which could not be exhaustive (other information might have been conveyed), and which had to be interrupted (other practical considerations needed to be addressed). In an essay on Virginia Woolf's *To the Lighthouse*, Gayatri Spivak observes at the outset that her text is 'not necessarily an attempt to [...] lead [...] to a correct reading' of the novel.⁴⁴³ Likewise, the comparatist in the classroom, as he was tracing the French statute, would not have been seeking to produce a 'correct' reading of it, but rather offer a compelling interpretation. Incidentally, this is where ethics becomes relevant again: the comparatist as mediator must behave with integrity. His exploration must be passionate, of course, but also circumspect and flexible. Certainly, it must be innovative, but also thorough and faithful. Yet, the comparatist's re-presentation remains an intervention and an invention. In the course of his act of re-presentation, as he is making the French statute his 'object' of study and fashioning his relation (or, rather, disrelation) with it, the comparatist is called upon to take any number of decisions, none of which is objective or true, all of which are interpretive, all of which are the outcome of negotiations that he must conduct with his foreign law-text and with himself and that would take him forever to justify (to the extent that he could...).

To say that the US students welcome the French model, that they are now willing to show themselves hospitable to the other, would probably be going too far. But they are no longer so riveted to themselves, some of their prejudices having been dismantled and the range of their knowledge expanded — all of which has valuable progressive political implications. In a way, the other has come along — the differend has emerged — to save the US students' selves from themselves. The US selves in the classroom are emancipated from the facile view that the other must somehow be appropriated to their categories, which is salutary. It is not that the French statute is now being envisaged 'in the air'. Of course, it is still seen through US eyes, so to speak (not only is it 'not us', but it is also 'not US'). However, the US students have learned to talk of the other without experiencing the need to repudiate otherness (note that positivism and its reductionist urge for similarization is

⁴⁴³ Spivak, GC (2006) [1987] *In Other Worlds* Routledge at 41.

unable to foster this kind of responsibility). This is an example, then, of the productive use not just of difference across laws, but of incommensurability.

Beyond that development, the US students might want to militate in order to change the conditions that produced the French statute and to which it can be traced (say, the French conception of citizenship). But for them to have any chance of making an impact in whatever conversation they could have, say, with a French jurist, they must first be willing to recognize and respect the French approach. There is no significant opportunity for persuasion, it seems to me, without this prior acknowledgment and engagement. To quote Gadamer (who, here, sounds more sophisticated in German), the comparatist, by inventing a tracing of the French statute, by directing his US students towards 'an opinion and a possibility that one brings into play and puts at risk', has made it feasible for these US law students to 'other' themselves *jusque-là*.⁴⁴⁴ Should I apologize? I meant to be brief...*

⁴⁴⁴ Gadamer, H-G *Truth and Method* supra note 25 at 390 [*die man ins Spiel bringt und aufs Spiel setzt!*].

* I wrote this text as Professor of Law and Director of Postgraduate Studies in Globalization and Legal Pluralism at the Ecole de droit de la Sorbonne and as Board of Visitors Distinguished Visiting Professor at the University of San Diego Law School. I also developed parts of the article while acting as Visiting Professor at the National University of Singapore's Faculty of Law and as Senior Fellow at the University of Melbourne Law School. I presented versions of the argument at the Center for Transnational Legal Studies in London on 21 January 2009; at the University of San Diego Law School on 24 September 2009; at the Università Ca' Foscari in Venice on 20 May 2010; at the University of California at Irvine Law School on 8 September 2010; at the Centre for the Study of European Contract Law in the University of Amsterdam on 15 November 2010; at Duke Law School on 16 February 2011; and, in my capacity as Visiting Professor, at the Georgetown University Law Center on 1 March 2011. For their generous invitations, I am indebted to Professors Franz Werro and David Cole; Laurence Claus; Michael Palmer and David Nelken; Carrie Menkel-Meadow; Martijn Hesselink; Ralf Michaels; and Kathryn Zeiler. I am grateful to Simone Glanert, Franz Werro, Lama Abu-Odeh, and Karen Knop for their insights and encouragement. I am also beholden to Tresmin G.O. Lane. Through quotations and references, I have deliberately sought to make the text, 'my' text, as polyvocal, as 'differential', as I know how (though I appreciate that hardly anything is as autobiographical as a quotation). In line with this orientation, the notes, despite the fact that they have found themselves inscribed in lower typeface in the inferior margin, are not to be apprehended strictly hierarchically and thus reduced to an auxiliary status. Indeed, many of them are principal texts prescribing the destabilization of the 'principal text' on account of a process of negotiation having as its focus the distribution of space on the page. While there are occasions when I have thought it preferable to refer to a published English translation, in principle I have worked from original versions and offered my own understandings. As I prepared this essay for publication, I was very fortunate in being able repeatedly to depend on the excellent research facilities made available to me at the University of San Diego Law School without, I may add, the least inking of the elaborate regulations to which I am accustomed in Paris, methodically (and no doubt eagerly) designed to keep readers and books apart. The usual disclaimer applies.