PARADOXICALLY, DERRIDA:
FOR A COMPARATIVE LEGAL STUDIES

Pierre Legrand*

I. A FIELD AND A DOXA

Courses, programs of studies, chairs, institutes, conferences, and journals are some of the most significant markers recognized within the academic world as delineating a relatively discrete field of study, any such field being characterized in part by a specific rationality—including particular epistemological assumptions regarding validity claims and truth regime—by idiomatic discursive practices, and by identifiable cognitive goals. Academics teaching courses devoted to the comparison of laws, occasionally within specialized postgraduate programs, sometimes holding specialized chairs (perhaps within specialized institutes), organizing specialized conferences, and writing in specialized journals thus point to the existence of “comparative legal studies,” or of comparative research having constituted “law” as its object, as a “field” (an arena, a socio-intellectual space or place). Not unlike what is the case with other emerging fields, the crystallization of comparative legal studies as a “field” is the outcome of a process of differentiation leading to the gradual appearance of an idiosyncratic construction of the law-world (and of the world) based on a combination of pre-reflexive faith and reflexive thought in the value of that construction.

Like other fields, comparative legal studies is a structured space. And this structure owes much to the antagonistic interaction between the various agents within the field who, although complicit as regards some most basic values inhering to the field, are engaged in the battle for the acquisition of hegemonic discursive authority within the field. Through the marshalling of institutional authority (Where did he study

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* B.C.L., 1982, McGill; LL.B., 1982, McGill; D.E.A., 1985, Panthéon-Sorbonne; M.Litt., 1986, Oxford; Ph.D., 1993, Lancaster; Ph.D., 2000, Panthéon-Sorbonne. Professor of Law and Director of Postgraduate Comparative Legal Studies at the Université Panthéon-Sorbonne, Paris; Visiting Professor, University of San Diego Law School; Senior Fellow, Faculty of Law, University of Melbourne; Distinguished Visitor, Faculty of Law, University of Toronto. Unless otherwise indicated, translations are my own. This paper is for Casimir and Imogene, to whom I wish the emancipatory gift of deconstruction. Auch für die, die weiterhin andere Wege öffnet.
and who was his dissertation supervisor? Where is he teaching? Where is he publishing his articles and his books? Where is he invited to speak and teach?); of intellectual authority (Who has he read? How much has he read?); of monetary authority (How much funding does he enjoy?); of collegial authority (How does he thank in the author notes of his papers and in the forewords of his books?); of scriptural authority (How well does he write? How assuredly does he write?); of linguistic authority (How many languages does he speak? How many languages does he read? How many languages does he write? Has his work been translated?); of geographical authority (Where does he lecture, teach, or visit? Where is he known and read? Where is he on the reading list?); of social authority (Who are the individuals who value his work? Who are his academic friends?), the agents within the field fight for the acquisition of the intellectual capital that is specific to the field. But this capital—and the profits associated with it in terms of authoritative status and of power within the field—is a scarce resource. As such, it is inevitably the cause of violent power struggles within the field. This is why the field usually displays two simultaneous and adversarial strategies: the one, pursued by those who for whatever reasons enjoy the use of the intellectual capital, aiming to preserve this scarce resource; the other, pursued by those who for whatever reasons do not enjoy the use of the intellectual capital, aiming to acquire it.¹

Using “doxa” to connote the idea of a powerful and indeed hegemonic language that routinely and daily instills itself everywhere into the field,² I argue that, at this writing, comparative legal studies’s doxa is chiefly incorporated in Hein Kötz and principally embodied in his textbook, An Introduction to Comparative Law.³ A brief sketch of the reasons why Kötz has assumed this authoritatively dominant position within the field would, in my view, include the following—which, of course, all have to do with something like “intellectual capital” rather than with direct coercion. The book was written under the auspices of the Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg—a prominent institutional agent within the field, notably on account of the financial support it can muster.⁴ Kötz’s co-author, the late Konrad Zweigert, was at the time of first publication a director of the “Max-Planck,” as the institute is

¹ See generally PIERRE BOURDIEU, SCIENCE DE LA SCIENCE ET REFLEXIVITE (2001).
³ KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 3d ed. 1998) [hereinafter ZWEIGERT & KÖTZ, INTRODUCTION]. The current German edition is KONRAD ZWEIGERT & HEIN KÖTZ, EINFÜHRUNG IN DIE RECHTSGESELLSCHAFT (3d ed. 1996) [hereinafter ZWEIGERT & KÖTZ, EINFÜHRUNG].
⁴ This institute is known in particular for its publication of the RABELSZ, a journal devoted to comparative legal studies, and for its sponsorship of the INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (1971).
known to Anglophone comparatists-at-law. Kötz later succeeded him in that post. Thus, the book was immediately invested with a significant institutional aura. Moreover, the text was translated into English by an academic who enjoys considerable status in his own right. Indeed, Tony Weir is an acknowledged expert in Roman law, a recognized specialist in English tort law, and a noted comparatist-at-law. In addition to his personal reputation, Weir brought with him his own considerable institutional aura. First, he was until recently a “Reader in the University of Cambridge.” As anyone familiar with English academic culture will confirm, a “readership” connotes significant institutional recognition anywhere in the English academic world especially so, many would argue, when it is attached to one of the ancient universities. Second, he is a Fellow of Trinity College, a particularly prestigious institution which, at one time or other, has counted the likes of Isaac Newton, Bertrand Russell, Ludwig Wittgenstein, and Amartya Sen within its fellowship. Needless to add, the fact that the text appeared in English allowed for its widespread dissemination and commodification.\(^5\) As if Kötz’s book needed yet another layer of institutional aura, the English version soon found itself on Oxford University Press’s law list. The book appeared with “O.U.P.” as of its second (English) edition in 1987. Although this fact is not widely known, the release of the book under the “Clarendon” imprint means, according to the publishers’ in-house practice, a conferment of particularly distinguished academic status.

At the time when Oxford University Press began marketing the Introduction, the competition in terms of textbooks within the field of comparative legal studies (I leave to one side the two or three U.S. casebooks then available) consisted mainly of René David’s Les grands systèmes de droit contemporains, which had appeared in a third English edition in 1985.\(^6\) Given the specific institutional context in which David’s book had been written and because of the particular academic circumstances it had sought to address (and, I would add, because of its Frenchness),\(^7\) David could not withstand Kötz’s assault for any sustained period of time. Before long, no doubt helped by the fact that his book did not operate an epistemological break with David’s in that it did not advocate in any Kuhnian sense a discontinuous discursivity with the project already familiar to comparatists-at-law, Kötz found himself overtaking his predecessor and establishing himself as the author of

\(^5\) In conversation on a New Orleans streetcar in early November 2000, Kötz voiced this rhetorical question: “Where would I be today without Tony Weir?.”


\(^7\) The “Gallic” issue is raised in Basil Markesinis, *Comparative Law—A Subject in Search of an Audience*, 53 MOD. L. REV. 1, 9-10 (1990).
what came to be regarded, largely uncontroversedly, as the new texte éminent within comparative legal studies. Although David’s book is still appearing in French, there has been no new English edition in the last twenty years.

Besides these impeccable institutional credentials, other features accounting for the doxic character of Kötz’s book would relate to its longevity (twenty-eight years in English, as I write); to its accessibility (a notion which ranges widely and encompasses both the absence of what could be perceived as vague or obfuscatory language and the fact that the book is available in German, English, and Italian, not to mention Japanese, Russian, and Chinese); to its perceived technical competence, that is, to a narrative comfortably descriptive, reliably analytical, and keeping errancy over the map of meaning in strict check (in other words, to the fact that the text presents itself as being at once solid and stolid); to a fervently expressed concern for methodological issues, such as data collection and analysis, eschewing anything in the nature of hesitations, ambiguities, and incoherences while more intractable, allegedly “non-legal,” dimensions—whether political, social, or cultural—are for all intents and purposes excluded or outlawed (a pragmatism and utilitarianism that would have found favor at once with most comparatists-at-law in most schools and faculties); to its purported reach (an orientation towards systematic treatment would readily have been ascribed epistemic value by lawyers incessantly in search of cohesive relations and exhaustivity); and, importantly, to the expression of its views with a conclusiveness lending them an informed, undisputable, and official air. Indeed, despite the existence of a compelling critique of his book, Kötz has shunned dialogue (or Auseinandersetzung). He has elected to remove himself from the sphere of contact with alternative views. Thus, not a single challenge to Kötz’s positions—not a single “counter-signature”—is addressed in the book, not even in the most recent edition. This non-interactive attitude towards contemporaneity, this distant relationship with critique, this

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8 For a brief account of this shift, see B.S. Markesinis, A Matter of Style, 110 L.Q. REV. 607, 607 (1994).
10 It must be noted, however, that the “David” model has known something of a revival (though at a much higher level of sophistication) with H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (2000). According to the author, his book “owes a great deal” to David (id. at 142 n. 98). A second edition of Glenn’s text appeared in 2004.
refusal to respond to acts of dérogance, this valorized emphasis on something like “writing sub specie aeternitatis”—what Kötz’s translator may have unwittingly captured by referring to the book’s “calm authority”\textsuperscript{13}—confers a lofty grandeur to the text that is bound to contribute to its aura in a noticeable way.\textsuperscript{14} Thus, as well as being commended for its “rich and focused material” the book has been saluted as “[c]risp, specific, complete, and reliable.”\textsuperscript{15} It has further been hailed as the “Baedeker” of comparative legal studies.\textsuperscript{16}

All these factors (and no doubt others also) combine to bestow on this particular text the benefits of significant symbolic efficacy (independently of its truth-value), to make it a credentialed book. In other words, this book is a sign—it points in a certain intellectual direction—that is at once authoritatively alive and active. But, even without reducing scholarly dynamics to power relations, symbolic efficacy is consonant with symbolic violence in so far as this book, subtly and invisibly even, offers an epistemological policing purporting to establish an intellectual order. Emerging victorious from its struggle with other discursivities, Kötz seeks to posit his own conception of comparative legal studies—and through it, his own construction of the law-world—as the transcendental and universal referent. In his text, Kötz propounds a framework for the practice of comparative legal studies for which he solicits and expects the adhesion of his readership. As he seeks to inculcate in his readers a set of durable dispositions concerning practical schemes of perception, appreciation, and action, Kötz commits to the making of comparatists-at-law. In this sense, the structure he advocates for comparative legal studies is meant deliberately to structure the comparatists’ minds. It is a structure that pursues the aim of structuring all comparisons (and, thus highlighting the disciplinary nature of the field, of allowing one to distinguish between “good” and “bad” comparisons in a way, for instance, that will centralize newcomers to the field or marginalize them as unaccommodated comparatists-at-law). Of course, this structuring structure did not simply arrive on the scene from nowhere. It is itself structured by Kötz’s own intellectual allegiances—conscious or otherwise—which, although they cannot be examined here, deserve

\textsuperscript{13} Tony Weir, Translator’s Foreword to Konrad Zweigert & Hein Kötz, An Introduction to Comparative Law at vii (Tony Weir trans., 2d ed. 1992).

\textsuperscript{14} At times, Kötz’s authoritative stance is particularly dismissive as when he elects not to justify his methodological options on the most fragile ground that “comparatists all over the world are perfectly unembarrassed about their methodology.” Zweigert & Kötz, Introduction, supra note 3, at 33 (emphasis added); Zweigert & Kötz, Einführung, supra note 3, at 31.

\textsuperscript{15} Markesinis, supra note 8, at 607.

\textsuperscript{16} This endorsement is Richard Fentiman’s and appears on the back cover of the third, current, paper, English, edition. Fentiman also refers to the book’s “authority”, its “accuracy”, and its “handiness.”
serious consideration (notice, though, that nowhere in his book does Kötz ever mark his positionality as investigating subject). There is in fact another dimension to this process of institutionalization that calls for further treatment. Why were comparatists-at-law disposed to have faith in an author and in his book such as to legitimize a certain approach—and, specifically, this particular approach—to comparative legal studies? Why, in other terms, this willingness to subordinate oneself to an omniscient authority conceived as beneficent? Why this willingness to be called to order by Kötz and his text? These questions raise major issues—those surrounding belief in the text—that simply cannot be developed in this paper. Be that as it may, the impact of the doxa within an emerging field such as comparative legal studies can hardly be overstated. In terms of the conditions of disciplinary “imposability”—that is, “the conditions under which arguments, categories, and values impose and maintain a certain authority”—this unstated dogma points to prevailing institutional and structural constraints and shows the manner in which, through politically-conditioned criteria of validity, normalizing power is exercised, for example, as regards the acceptance of papers for publication in journals, the invitation to speak at conferences, or the funding of research projects.

Thus, one can say of comparatists-at-law what has been claimed of individuals generally: “We are governed by texts.” In the case of comparative legal studies, the governing text is without doubt Hein Kötz’s primer.

II. KÖTZ ON KÖTZ

What, then, is Hein Kötz saying? I want him to answer for himself. I want him to address us in his own words. In the same way comparative legal studies has habitually focused on the textual character of law, I propose to concentrate on Kötz’s text. In the process of

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17 One of the crucial questions is formulated by Derrida: “how can autobiographical writing, in the abyss of an unfinished auto-analysis, give birth to an institution on a world scale?” JACQUES DERRIDA, LA CARTE POSTALE 325 (1980) [hereinafter DERRIDA, CARTE POSTALE]. Note that the argument for situatedness does not deny the pertinence of impersonal processes constructing the subject and of impersonal conditions in the formulation of knowledge claims. There is a clear sense in which situatedness acts as an identitarian revendication which, in fact, stands for a “deidentification of oneself” through the insistence on the inherited lifeworld in which one dwells. GAYATRI CHAKRAVORTY SPIVAK, OUTSIDE IN THE TEACHING MACHINE 6 (1993). For an exploration of the rhetoric of situatedness, see DAVID SIMPSON, SITUATEDNESS 192-247, 19-57 (2002).
18 See PIERRE LEGENDRE, PAROLES POÉTIQUES ÉCHAPPÉES DU TEXTE 82 (1982), who refers to “the political necessity of introducing the question of belief in the Text.”
19 SAMUEL WEBER, INSTITUTION AND INTERPRETATION 19 (2d ed. 2001).
20 LEGENDRE, supra note 18, at 114.
selecting the quotations that I regard as representative of his thought, I have confined my range almost exclusively to the first section of Kötz’s textbook, that which devotes sixty-two pages (out of the book’s seven-hundred-and-fourteen) to fundamental theoretical matters such as the “concept,” the “functions,” the “aims,” the “method,” and the “history” of comparative legal studies. Moreover, I have elected purposefully to limit my re-presentation to ten excerpts or clusters of excerpts which their apodictic character reveals as being specifically programmatic and which, in various cases, have long acquired canonical status within the field. I have sought to keep literary figuration to the bare minimum. I have genuinely attempted to identify those passages which properly encapsulate Kötz’s thought and I have not wanted to scandalize his views in any way. Ultimately, all I can say is that, initially at least, I have found it more honest to quote Hein Kötz than to rewrite him. Only after he has spoken shall I seek to re-fashion his statements. There is one more point to make. As I write of Kötz, and as will become clear below, I write against authority. But even as I write against authority, I am aware that I write within authority—which is a way of saying that Hein Kötz’s discourse has marked my own itinerary as a comparatist-at-law including what I now offer as my critique of his project.21

So to Hein Kötz on comparative legal studies:

1. “One can speak of comparative law only if there are specific comparative reflections on the problem to which the work is devoted.”22 “[L]eave aside the topics which are heavily impressed by moral views or values, mainly to be found in family law and in the law of succession, and concentrate on those parts of private law which are relatively ‘unpolitical’.”23

2. “[O]ne of the aims of comparative law is to discover which solution of a problem is the best,” “to decide which of the possible solutions is most suitable and just.”24 “Often . . . one solution is clearly superior.”25 “[A] textbook of comparative law should . . . indicate which is the best solution here and now.”26 “Comparative law is an ‘école de vérité’.”27

3. “[Comparative lawyers] . . . know that they must cut themselves loose from their own doctrinal and juridical preconceptions and liberate

21 See RICHARD SENNERT, AUTHORITY 33 (1980).
22 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 6.
23 Id. at 40; ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 39.
24 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 8, 47 (respectively); ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 8, 46 (respectively).
25 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 47; ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 46.
26 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 23. This formulation does not feature in the German text. ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 23.
27 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 15. The formulation also appears in French in the German edition. ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 14.
themselves from their own cultural context in order to discover 'neutral' concepts with which to describe . . . problems."28 "One must never allow one's vision to be clouded by the concepts of one's own national system."29 "[T]he comparatist must eradicate the preconceptions of his native legal system."30

4. "[T]he solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function."31

5. "[Reports on the different legal systems] should be objective, that is, free from any critical evaluation."32

6. "[T]he comparatist must sometimes look outside the law."33

7. "The basic methodological principle of all comparative law is that of functionality. . . . The question to which any comparative study is devoted must be posed in purely functional terms."34

8. "The gap between the Common Law and the Continental systems in history, structure, and method must have seemed unbridgeable; to cross it was a challenge to comparative law, but it was a challenge which let scholars see that if one poses one's questions properly, that is, in terms of function, and if one investigates a legal system in its entirety, such differences are really immaterial."35 "[O]ne can almost speak of a basic rule of comparative law: different legal systems give the same or very similar solutions, even as to detail, to the same problems of life . . . . Indeed it almost amounts to a 'praesumptio similitudinis', a presumption that the practical results are similar. As a working rule, this is very useful, and useful in two ways. At the outset of a comparative study it serves as a heuristic principle—it tells us where to look in the law and legal life of the foreign system in order to discover similarities and substitutes. And at the end of the study the same presumption acts as a means of checking our results: the comparatist can rest content if his researches through all the relevant material lead to the conclusion that the systems he has compared reach the same or similar practical results, but if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again whether the terms in which he posed

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28 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 10.
29 Id. at 35.
30 Id.
31 Id. at 44.
32 Id. at 43; ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 42. Kötz also refers to "[t]he objective report." ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 43; ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 43.
33 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 39.
34 Id. at 34; ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 33.
35 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 62.
his original question were indeed purely functional, and whether he has spread the net of his researches quite wide enough.”

9. “[C]omparative law offers the only way by which law can become international and consequently a science.”

“After a period of national legal developments, producing academically and doctrinally sophisticated structures, each apparently peculiar and incomparable, private law can once again become, as it was in the era of natural law, a proper object for international research, without losing its claim to scientific exactitude and objectivity.”

“[Comparative law] . . . permits us . . . to deepen our belief in the existence of a unitary sense of justice.”

10. “Comparative law must now go beyond national systems and provide a comparative basis on which to develop a system of law for all Europe.”

III. THE MEANINGS OF KÖTZ

Driven by a sense of philological responsibility; inspired by the interpretive value of “close reading” or reading-for-the-detail; aiming to grasp beyond Kötz’s words what they effectively mean; animated by the (non-contradictory) view that utterances cannot simply be held to mean what the writer wanted them to mean; mindful that discursive structures must be analyzed as much for what they exclude or keep under erasure as for what they determine; subscribing to a hermeneutics of suspicion (more than to a hermeneutics of recovery); reluctant to

36 Id. at 39-40. For an illustration of how popular this stance continues to be with comparatists-at-law, see Markesinis, supra note 8, at 607: “what is for me just as important, [Zweigert and Kötz] have been quick to emphasise similarities of result and even methodology.” Even such a discerning comparatist as Bernhard Großfeld appears to have fallen under the spell of the “praesumptio similitudinis.” See BERNHARD GRÖßFELD, KERNFRAGEN DER RECHTSVERGLEICHUNG 283 (1996).

37 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 15.

38 Id. at 45; ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 44.

39 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 3; ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 3.

40 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 29.

41 Any interpretive practice falling short of this exigency could be regarded as demeaning to Kötz’s book as an act of institution, that is, to the place it has assumed (and has wanted to assume) within comparative legal studies. Incidentally, and even before I turn to Jacques Derrida, it is important to observe that “close reading” is one of this philosopher’s signal contributions to philosophical discourse—as even his critics have acknowledged. See, e.g., EDWARD W. SAID, THE WORLD, THE TEXT, AND THE CRITIC 224 (1983).

42 “If . . . a book is communication, the author is but a link uniting different readings.” VI GEORGES BATAILLE, ŒUVRES COMPLETES 408 (1973).

concede the signifier’s necessary supremacy over the signified; persuaded that cognitive rationality and sociality (in the sense of ideological and professional considerations) cannot be dissociated; governed by the conviction not that one is to examine how one can be an activist and be interested in comparative legal studies at the same time, but that one cannot help being an activist once one is interested in comparative legal studies; guided by the idea that “it can be very important and productive to ask questions the text does not encourage one to ask about it”; and inspired by the dictates of charitable interpretation and indeed of respect for the text (which, again, cannot mean that it is immune from critique), I propose to engage in three successive archeological-cum-genealogical exercises in ascription of meaning and then suggest an explanation by drawing an analogy between Kötz and Descartes. (Let it be said proleptically that, as I proceed, I remain aware that my strategy of readerliness of Kötz, no matter how much it purports to place itself under the influence of Kötz’s words themselves, inevitably involves, at some level at least, a misreading if only because it is my reading that I submit as reading and that my reading is based on my appropriation of the text and that I have an interest. But such misreading is felicitous in the sense that it is productive, that it “enable[s]” critical practice.)

My first reconfiguration purports to distill each statement or cluster of statements into one succinct (and loyal) proposition, which I formulate in my own words with the avowed aim of linking or connecting the various statements and of making them appear more like elements of an intellectually-cohesive whole than an heterogeneous jumble of ideas. Here, my interpretive input is admittedly significant. Yet, I purport to stay within the contiguity of the text and my goal remains essentially explanatory (and certainly not polemical in any way). I aim to eschew an overinterpretation of Kötz’s book (that is, a disconnected reading) and, specifically, I do not want to ascribe a fantasmatic coherence to it. Taking the statements or clusters of statements in the same sequence as above, I shall rewrite them as follows.

1. Comparison requires an actual, black-on-white comparative excursus that eschews the political dimension.

2. Some legal solutions are truly better than others and comparatists can/must tell us what these are.


45 I have benefited from MIEKE BAL, TRAVELLING CONCEPTS 291 (2002). The quotation regarding the enabling virtues of misreading is from GAYATRI CHAKRAVORTY SPIVAK, A CRITIQUE OF POSTCOLONIAL REASON 39 (1999).

46 I remain mindful of Foucault’s cautionary note regarding the fictitious character of “discursive unity.” See MICHEL FOUCAULT, L’ARCHELOGIE DU SAVOIR 31-43 (1969).
3. Comparatists must transcendentalize themselves.
4. Comparatists must transcendentalize their data.
5. Comparatists must transcendentalize their reports.
6. Occasionally, comparatists must search for information outside "the law."
7. Comparisons must be functional.
8. If comparisons are functional, it will be clear that laws are similar and that comparatists can/must bring this similarity to light.
9. Comparative legal studies can take us back to natural law, that is, to a transcendental law (characterized by its scientificity, exactness, and objectivity) and to a transcendental and unitary view of justice.
10. Comparatists must develop a uniform law for the European Community.

With my second reconfiguration (which applies even more interpretive pressure than before), I propose to structure Kötz's argument around a few leading ideas. Each formulation is followed by a parenthetical reference to the relevant statement or cluster of statements.

Comparative legal studies is a logocentric practice (1): words are what matter (for instance, if there are no words recording an actual comparison there is no comparison). It is also a nomocentric practice: the law is what matters and only occasionally will comparative legal studies go outside the law (1, 6). Primordially, the comparison of laws must be an unremittingly objective exercise—in the sense of generating a "politics-free" scientificity and exactness—(1, 3, 4, 5, 9). Being objective, the comparison will allow the comparatist to identify the better law (2). Along the way, and with the benefit of functionalism as the only acceptable method (7), the comparatist will have seen how laws are ad idem (8) and will have adopted the "ad idem" view of law both at the descriptive (8) and prescriptive (10) levels—thus generating a kind of "natural law" (9).\footnote{The goal of "better-law" comparative research, which must assume difference across laws, cannot be reconciled with the "praesumptio similitudinis." Other contradictions can be identified. Thus, Kötz cautions comparatists who reach conclusions to the effect that there are differences across laws that they "should be warned and go back to check again." ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 41. Yet, he also writes as follows: "If we find that different countries meet the same need in different ways, we must ask why. This is a particularly demanding task, since the reasons may lie anywhere in the whole realm of social life, and one may have to venture into the domains of other social sciences, such as economics, sociology or political science." Id. at 44. But this passage is a hapax.}
My third reconfiguration takes the form of the briefest recapitulative/ampliative summary.

For Hein Kötz, the comparison of laws is logocentric, nomocentric, and objective (thus guaranteeing its correspondence with "reality"). It is also scientific and apolitical—and, as such, reveals a focus on apodicticity and *elegantia juris*—let us say, a geometrical sensibility. Moreover, the comparison of laws according to Kötz must be methodologically sound, that is, functional. If it is so, it will record similarities across laws, identify the better law "irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied," and promote uniformization of law (hegemony's homogenized law!). In sum, the implementation of the correct method will lead to the identification of the correct posited law which (somehow untainted by the "participatory" dimension of method that always brings with it a specified path of inquiry) will present itself as correct to the objective comparatist who can then foster its universal application.

In a remarkable display of immobilization of thought revealing a kind of congealed irreducibility of self-consciousness to critical reflection, Kötz has held fast to his views, even as to detail, for three decades. With the exception of the statement concerning the development of a system of law for Europe and that regarding the political dimension of law, all other nineteen utterances included in the above list can be traced *verbatim* from the third (1998) to the second (1987) English edition of the book. With four insignificant exceptions, all passages can also be traced *verbatim* from the second to the first (1977) English edition of the book. Indeed, there is more, for

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48 Governing Council of Unidroit, *Introduction to Unidroit, Principles of International Commercial Contracts*, at viii (1994). This international body's agenda is at one with Kötz's, which is why I feel at liberty to borrow this quotation. Indeed, see Zweigert & Kötz, *Introduction*, supra note 3, at 46: "Every legal system in the world is open to the same questions and subject to the same standards, even countries of different social structures or different stages of development."

49 My remark about method refers to the fact that although Kötz's method is regarded by him as being adequate to its object (i.e., the comparison of laws), it is the case that, by definition so to speak, a method is a tool deemed necessary to discover its object and indeed constitute it. After all, who, if not the comparatist-at-law, decides what is the function fulfilled by this or that manifestation of posited law? The assignment of function is emphatically a process of ascription. In this sense, method is not "outside" thought and even method carries an ideology.

50 With respect to the political dimension of law, the second edition has the following: "In those areas which are particularly marked by strong political or moral views and values [the presumption of similarity] has no application, but in other areas of law which are more technical and morally more neutral one may assume as a useful working hypothesis that the practical results will be similar." Zweigert & Kötz, *Introduction*, supra note 13, at 36.

51 Thus, the passage to the effect that "[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," which appears in Zweigert & Kötz, *Introduction*, supra note 3, at 10, is absent from the first edition. I Konrad Zweigert & Hein Kötz, *An Introduction* to
in all three editions, Kötz remains imperturbably silent on the matter of law’s language (except to cast a negative light on the “diverse vocabularies of the different systems” and imply that such differentiation must be overcome).\(^{52}\) Although one could be forgiven for thinking that translation must lie at the heart of comparative analysis and that it must figure, therefore, within any theoretical statement concerning comparative legal studies, Kötz is not prepared to devote even a sentence to the matter. One legitimate conclusion would be that for Kötz translation is unproblematic: signifieds are *ad idem* and there are no phantom referents. But then what of Nietzsche’s view that two neighbours cannot understand one another?\(^{53}\)

Even as he argues in favor of the deterritorialization of the study of law and claims that comparative legal studies can be understood as a model site for the critique of national-legal rationalization, Kötz adopts a rigidly formalistic approach to “the legal.” For him, deterritorialization means the incorporation within the frame of analysis of posited law outside the national territory. But he is not prepared to countenance deterritorialization at another, more sophisticated level. Specifically, Kötz does not entertain deterritorialization of thought, the kind of process that would allow thinking about law to move beyond logocentrism, nomocentrism, scientificity, and objectivity. For Kötz, the comparative process essentially involves an interaction between two or more logocentrics, two or more nomocentrics, two or more scientificities, and two or more objectivities. As Kötz attempts a distanciation from the strictures of national law—which he rejects on the ground that it is *national* law—he remains unwilling to move away from “law” as habitually understood. To him, “law” is “law”—and there is no need to consider the matter any further.\(^{54}\) There is, then, a crucial sense in which even as he claims to be situating himself beyond conformism, Kötz simply replicates the conformist attitude. Ultimately, he promotes the selfsame values being defended by mainstream exponents of the national law, those lawyers known as “positivists.” Like them, he is concerned with legal technique and rationalization of legal technique. Like them, he fosters “legal dogmatics” in that he aims to organize in the form of an orderly, coherent, and systematic

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\(^{52}\) ZWEIGERT & KÖZT, INTRODUCTION, supra note 3, at 46. For the German text, see ZWEIGERT & KÖZT, EINFÜHRUNG, supra note 3, at 46.

\(^{53}\) FRIEDRICH NIETZSCHE, ALSO SPRACH ZARATHUSTRA, in VI/1 NIETZSCHE’S WERKE 57 (Giorgio Colli & Mazzino Montinari eds., 1968) (1883-85).

\(^{54}\) For an analogously unreflective disposition, see Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems*, 45 AM. J. COMP. L. 5, 13 n.37 (1997): “I do not wish to enter into the largely sterile and boring discussion of what can be considered law.”
presentation the different rules adopted by the state (or by “a” state). Like them, he seeks to present an interpretive commentary of the legal provisions in force that would be judicious and rational—that would explain their reach and their potential, that would eliminate or reduce their apparent flaws, obscurities, gaps, or contradictions. Like them, he pursues fixity of meaning. Like them, he adopts a tone that is falsely neutral: in the name of “scientificity” his writing purports to offer itself in an unproblematic and unsituated mode, seeking to deny any political commitment or personal investment. As he strives to liberate himself from the symbolic violence wrought by national law, Kötz, through the truth-effects he attempts to make as compelling as possible, institutes another symbolic violence within comparative legal studies, which mimes that prevailing nationally. Moreover, he does so in a way that claims to naturalize this symbolic violence. In other words, the order he advocates is presented as necessary and evident, as something that almost goes without saying and that certainly goes without justification. After all, who could be against objectivity? Who could be against making comparative work about law scientific? And who could dispute the fact that uniform law is a good thing? Who after all could disagree that the order of “the one” is preferable to the chaos of “the many”? And who could pretend that intercultural communication is not possible? Why, then, bother with superfluous theoretical reflections on translation and on the translatability of law? In sum, Kötz’s “exit” in the direction of a comparative practice that would be an antidote to its other (national law) is but a “false exit,” which ultimately reveals “the strength and efficacy of the system.”

Yet logocentrism, nomocentrism, objectivity, scientificity, “no-politics,” functionalism, “better-law,” sembling, and uniformization are the ubiquitous (and paradigmatic) hallmarks of mainstream comparative practice in the field. These ideas have now been naturalized such that they constitute the kind of received wisdom that is deemed to lie beyond contest. They stand for what is regarded as evidently defining sound comparative research. They allow established comparatists-at-law to

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56 The replication of the national doctrinal model is hardly surprising since comparative legal studies is situated within legal studies. Thus, Kötz was trained as a “national lawyer” before he fashioned himself as a “comparatist.” As a “national lawyer” in Germany, he is in fact the author of a textbook. HEIN KÖTZ, DELIKTSRECHT (8th ed. 1998). Now, even as a “comparatist” Kötz must partake in the epistemological assumptions prevailing in the field of legal studies since the preservation of his standing as a “lawyer” (at least within his national legal culture) depends on expert recognition by the (national) legal community as a whole.

57 Note that Kötz excludes tradition and culture (including language) from “legal” thought rather than from thought in general. It is “legal” thought whose objectivity, whose purity, needs to be guaranteed.

58 JACQUES DERRIDA, MARGES 162 (1972) [hereinafter DERRIDA, MARGES].
exclude or marginalize research that does not meet the operative criteria (as understood by the established comparatists-at-law themselves).

IV. KÖTZ AS DESCARTES

To explain Kötz’s commitments, I suggest that it is illuminating to approach them within a Cartesian framework. As is well known, Descartes sought to exercise dominion over the universe through thought. But it was soon evident to him that the scope of human comprehension is limited. For example, by virtue of our finitude, we cannot comprehend the universe in the sense of holding it whole within the grasp of the mind. Our finite intelligence will simply not allow for a comprehension of the infinite. Descartes’s control strategy, then, was to move from a “thought of the whole” to “pure thought.” For him, “pure thought” demands the disentangling of the various objects of knowledge from the whole. The idea is to beam a light on each object in order to reveal it as it is, in its essential separateness. “Pure thought” thus requires to be free of the distortions of subjectivity. It simply cannot be that there is nothing more epistemologically trustworthy than the power of one’s upbringing, that one’s cognitive capacity actually turns on whether one was raised with the French, the Germans, the Chinese, or the cannibals. Accordingly, Descartes’s agenda is to deliver man from his state of epistemological fallenness.

Descartes’s goal is to provide new epistemological sophistication in order to sustain the idea of cognitive assessments going beyond a mere sense of personal conviction. Only if the knower is “purified” of

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59 Anyone familiar with Susan Bordo’s essays on Descartes and Cartesianism will recognize her ideas and her words in the argument that follows. See SUSAN R. BORDO, THE FLIGHT TO OBJECTIVITY (1987). Bordo’s claims in turn tally with my own, which I wrote and published before I had become aware of her work. See Pierre Legrand, Perspectives du dehors sur le civilisme français, in LE DROIT CIVIL, AVANT TOUT UN STYLE? 153 (Nicholas Kasriner ed., 2003). Interestingly, Bordo’s argument situates Descartes’s claims culturally, noting for instance how “experience” found itself discredited after the Ptolemaic universe and the geocentric apprehension that had made it possible had been disproven. See generally I HANS BLUMENBERG, DIE GENESIS DER KOPERNIKASCHEN WELT 47-65 (1981). Other important influences include Ramism. See WALTER J. ONG S.J., RAMUS, METHOD, AND THE DECAY OF DIALOGUE (1983); ANDRE ROBINET, AUX SOURCES DE L’ESPRIT CARTESIEN (1996); Kees Meerhoff, Ramus et l’université, in RAMUS ET L’UNIVERSITE 89 (2004); NELLY BRUYERE, METHODE ET DIALECTIQUE DANS L’OEUVRE DE LA RAMEE (1984).

60 See, e.g., Letter from Descartes to Mersenne (May 27, 1630), in I OEUVRES PHILOSOPIQUES 267 (Ferdinand Alquié ed., 1997). Descartes emphasizes that “our soul being finite,” it can neither “embrace nor conceive” infinity.

61 For a sophisticated reflection on Descartes’s “pure thought or understanding”, see DESMOND M. CLARKE, DESCARTES’S THEORY OF MIND 198-206 (2003).


63 Some of his metaphors, as they express Descartes’s radical lack of faith in man’s
all bias, all perspective, all emotional attachment, and all the bodily distractions and passions that obscure his thinking, can knowledge be grounded in objectivity and provide epistemological security, that is, representations so compelling that they eschew any dissonance with reality such that their accuracy cannot be doubted. The wish to create a realm untouche by uncertainty and risk assumes the designation, at least implicitly, of a contrasting “impure” domain that can take responsibility for the “messy” or disorderly aspects of life. For Descartes, the role of the unclean is played by the body, which stands to have its warped perception corrected by thought’s purifying scrutiny. Descartes’s philosophical conception is thus characterized by the discrimination between an “in-here” and an “out-there”—indeed, in the title of the sixth Méditation, one finds “the real distinction between the mind and the body of man”64—and by the further assumption that thought can be in possession of some neutrally-transcendent matrix that will allow it to perform conceptual cleansing and relocate all threatening elements “outside” the system in a way that makes them “alien” to it.65

A commentator has referred to a “mauling of the senses.”66 The “offal of experience” may not be extinguished but it is firmly excluded.67 “The principal demand of a full and total certainty pushes experience to the outermost limits of knowledge” and propositional thought;68 in sum, “experience can be envisaged only as the continuation of the system carried by method.”69 “What Descartes calls on us to do is to stop living ‘in’ or ‘through’ the experience, to treat it itself as an object, or what is the same thing, as an experience which could just as well have been someone else’s.”70 Otherwise, experience

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64 See II DESCARTES, Méditation sixième, in OEUVRES PHILOSOPHIQUES 480 (Ferdinand Alquié ed., 1999) (1641).
65 Although Descartes deepens the epistemological chasm characteristic of the “mind-body” dualism further than philosophers (including Plato) had done before him, he takes the (contradictory) view that man is a single whole who has at once a mind and a body. See GENEVIEVE RODIS-LEWIS, L’ANTHROPOLOGIE CARTESIENNE 19-38 (1990).
69 Id. at 60.
could lead us to “err.” 71 One of the governing ideas is that philosophical thought—“the most important thing in the world” 72—occupies a space that is removed from cultural conversation, that it stands detached, at a distance, from unruly experience. Descartes’s view is thus marked by its commitment to intellectual separation, demarcation, and order. Strict rules against mixing categories or blurring boundaries must be maintained. 73 As one of Descartes’s best-known commentators notes, his method emphatically illustrates a “general mathematicization of reality.” 74 Descartes himself refers to his theory as a “mathesis universalis.” 75 He leaves no one in doubt that for him mathematical truth reigns supreme.

In sum, Descartes aims for “a grasp at once mathematical and technical of reality.” 76 His is a “technically-oriented thought” for which “order and measure govern in the mind and in the object.” 77 Indeed, Leibniz—hardly an anarchist in matters of method and order—chastised Descartes for having “a rather limited mind,” for “having found nothing useful to the life that falls under the senses,” and for providing a program that “could almost be declared similar to the protocol of any chemist: take what is required, operate as is required, and you shall get what you want.” 78 There is, however, no doubt that Descartes heralds the idea that “the infinite totality of being in general is as such a rational all-encompassing totality” to be dominated by “a universal science, without anything being excluded.” In other words, Descartes inaugurates the *Neuzeit* with a mechanical understanding of the physical world epitomized in “the completely new idea of a mathematical science of nature.” 79

72 DESCARTES, Discours, supra note 62, at pt II, 590.
73 Thus, in the Méditation seconde, which features the celebrated reflection on a piece of wax, Descartes asserts that philosophy’s central question is one of delineation: do any objects exist outside one’s mind? See II DESCARTES, Méditation seconde, in OEUVRRES PHILOSOPHIQUES 414-29 (Ferdinand Alquié ed., 1999) (1641).
74 ALEXIS PHILONENKO, RELIRE DESCARTES: LE GÉNIE DE LA PENSEE FRANÇAISE 120 (1994).
76 FERDINAND ALQUIÉ, LEÇONS SUR DESCARTES 81 (2005) (repr. 1955 ed.).
77 PHILONENKO, supra note 74, at 48, 51.
Hein Kötz's is comparative legal studies's actualized version of Descartes. Like his philosophical forebear, his principal goals—as notable as they are problematical—are foreclosure and withdrawal. I have already mentioned Kötz's refusal to engage with his critics. In this respect, Kötz is in effect definitely more Cartesian than Descartes himself who, although he claimed that "anyone who understands [his opinions] correctly will have no occasion to dispute them," was perfectly happy to include along with the first edition of his *Meditations* (which ran for one-hundred-and-nine pages) fully four-hundred-and-eighty-five pages of "objections" (to his text) and "replies" (by himself). Perhaps Kötz and Descartes are closer when it comes to their defiance of erudition. For example, Kötz, as we know, is "perfectly unembarrassed about [his] methodology." The lack of reference to theoretical studies on comparative methodology is mirrored in the complete absence of any literature being addressed on "objectivity" or "functionalism," for instance. Descartes also despised the idea that he could learn from others and specifically from their books. Yet, his goal was emphatically to reach "a state of systematic perfection." It is precisely this brand of "systematic perfection" (one must build a system, says Kötz) that will allow comparatists-at-law to identify "the best solution here and now."

Another basic affinity has to do with the fact that Kötz aims to develop "a universal comparative legal science." It has indeed been said of Descartes that many of his key texts "bear the mark of the same ambition": "to found a universal science." One can also find echoes of Descartes's predilection for distinctness and delineation in the way in which Kötz engages in "boundary maintenance" and thus proceeds to belabor the analytical demarcations between comparative legal studies, on the one hand, and "private international law," "public international law," "legal history," "legal ethnology," and "sociology," on the other. But there are many additional specific resonances to note.

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80 See supra text accompanying notes 11-14.
81 Letter from Descartes to Regius, i.e., Henri Le Roy (July 1645), in IV OEUVRES DE DESCARTES 248 (Charles Adam & Paul Tannery eds., 2d ed. 1976).
83 ZWEIGERT & KÖTZ, INTRODUCTION; see supra text accompanying note 14 (emphasis added).
84 YVON BELAVAL, LEIBNIZ CRITIQUE DE DESCARTES 92-99 (1960); see also THOMAS M. CONLEY, RHETORIC IN THE EUROPEAN TRADITION 171-73 (1990).
85 HANS BLUMENBERG, DIE LEGITIMITÄT DER NEUZEIT 94 (1966).
86 See infra text accompanying note 100 (on "system"); supra text accompanying note 47 (on "better-law").
87 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 46. For the German text, see ZWEIGERT & KÖZT, EINFÜHRUNG, supra note 3, at 45.
88 ALQUIÉ, supra note 76, at 18.
89 ZWEIGERT & KÖZT, INTRODUCTION, supra note 3, at 6-12. All of this, Kötz explicitly
In the same manner as Descartes "gave to the new scientificity its form and its procedural order," Kötz wants to ascribe to comparative legal studies a logical structure. Kötz thus purports to enter into a pure relation with "his" objects of knowledge or, more accurately, with "his" laws understood as objects of knowledge (for Kötz, English law is an "object" that is entirely external to him). The underlying goal is one of commensuration: to get to the "real" data and achieve an exact representation of it through an adaequatio intellectus et rei. Indeed, the idea of "purity" figures prominently in Kötz's text; he too is driven by the "purification urge." For him, just as for Descartes, the drive to "purity," which connotes "separation" and "demarcation," seeks "to impose system on an inherently untidy experience." It reveals "the desire to be all-powerful, to control the meanings of experience before encounter so as not to be overwhelmed." Not only does he assert that comparative study must be framed "in purely functional terms," that solutions should be seen "purely in the light of their function," but he describes comparative legal studies as a "science pure," observes that comparative investigation may be "pure and disinterested," and endorses a statement concerning "the pure comparison of laws."

Like Descartes, Kötz fashions a world of concepts ("neutral concepts"); "higher concept"; "all the conceptual apparatus for ordering, organizing, and transmitting . . . material"). Like Descartes still, he develops a world of system (the comparatist is told "to build a systematics" and reference is made to "the system of comparative law" and to "new systematic concepts"). Incidentally, the mechanics of

informs us, is what comparative legal studies "is not." Id. at 6 (emphasis original).

90. BLUMENBERG, supra note 85, at 465.
93. SENNERT, supra note 91, at 116.
94. See supra text accompanying note 34 (emphasis added).
95. See supra text accompanying note 31 (emphasis added).
96. ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 6; ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 6. The formulation appears in French in both the English and German editions. In the same spirit, Kötz refers to "the essence . . . of comparative law." ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 3; ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 1.
97. ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 34; ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 33.
98. ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 47; ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 46.
99. ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 10, 44, 46 (respectively). For the German text, see ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 11, 44, 45 (respectively).
100. ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 44, 44, 46 (respectively). For the German text, see ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 43, 43, 46 (respectively). Interestingly, the German edition also has the comparatist-at-law developing "eine eigene Systematik und eigene Systembegriffe." Id. at 46 ("a specific systematics and specific systematic concepts"). The English translation does not account for this formulation.
this system must be “functionally coherent”).

Through “concepts” and “system,” Kötz, like Descartes, projects an unemotive or ascetic image. He sterilizes the comparative process in thrall to a scientificity that would resolutely erase all experience, all facticity, all libidinal investment from the discursive formation he defends. At the outset, Kötz pronounces comparative research to be “an intellectual activity” and later asks the comparatist-at-law to “proceed with intelligence.”

Affect or desire—“in legal terms...the most undesirable of forces”—remains outside the space defined for comparative legal studies (let us recall Kötz’s injunction to “leave aside the topics which are heavily impressed by moral views or values”).

As he embarks on his reflection, Descartes, subscribing to a hermetic conception of thought purporting to reach “naked knowledge, rid of the affective components that mix with it and obscure it,” asserts how grateful he is to be “untroubled by any passion.” He then proceeds to “shut [his] eyes,” “close [his] ears,” “divert all [his] senses,” “even erase from [his] thought all images of corporeal things.” In whatever situation, clear and distinct intellection carries over obscure and confused sensuality (thus, for Descartes: “bodies themselves are not properly known by the senses, but only by the mind”).

There is another important respect in which the drive for certainty is common to philosopher and comparatist-at-law. Descartes expressly rejects all knowledge that is “only probable”; indeed, a famous commentator refers to his “radical elimination of the probable.” This strategy immediately reminds one of Kötz’s unwillingness to accommodate notions like “tradition” and “culture” in the search for the foreign legal system’s rules presumably because, quite apart from partaking in the non-law (an example of the relevance of categorical thinking), they lack the requisite analytical precision.

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101 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 45. For the German text, see ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 44.

102 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 2, 17 (respectively). For the German formulations, see ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 1, 16 (respectively).


104 See supra text accompanying note 23.


106 DESCARTES, Discours, supra note 62, at pt II, 579.


109 DESCARTES, Regles, supra note 75, at 80 (rule II).


111 For a tepid reaction to an open-textured conception of “the legal”, see, e.g., ZWEIGERT &
Just as Descartes had sought to "reduce the knowable world to the unity of a homogeneous matter,"\textsuperscript{112} to simplify,\textsuperscript{113} Kötz confines the comparatist's object of study to what is classically, recognizably, "the legal"—"whatever the lawyers... would treat as a source of law."\textsuperscript{114} And, one could add, just as Descartes's mos geometricus has compelled him "to replace the real world with an imaginary world" and "the living man, the real man, with an imaginary man,"\textsuperscript{115} Kötz has replaced the student of law with "der Jurist als solcher," the "jurist-as-such."\textsuperscript{116} Arguably, though, Kötz is more Cartesian than Descartes, for the philosopher valued the idea of interconnectedness of knowledge. For Descartes, although his "view of reason as most pure and solid when it was free of corruption by the world's confusions implied nothing less than the attempt to break free of all social and cultural experience,"\textsuperscript{117} one must not confine one's attention to one branch of knowledge to the exclusion of others.\textsuperscript{118}

Now, like Descartes also, Kötz accepts perception's ability to overwhelm us and to render us passive in the face of its strength: our passivity in the face of a clear and distinct idea is a mark of its truth, a mark of epistemological reassurance.\textsuperscript{119} When Kötz, concluding his comparative analysis, writes that "the critic is forced to conclude" to the superiority of German law on the question at issue, he is resorting to a formulation that eschews even the minimally requisite sensitivity for opening the possibility of dialogical relations within comparative legal studies and with respect to which the comment directed at Descartes concerning "the dogmatism of clear and distinct ideas" could well be applied.\textsuperscript{120} The aim is that the comparatist-at-law may be pacified by the purity and authority of the object—in this instance, of the better law. The goal is for fixity to rule. The underlying themes of submissiveness

\textsuperscript{112} ALQUIÉ, supra note 76, at 77.
\textsuperscript{113} This preoccupation is, in fact, presented as Descartes's "first concern." ALQUIÉ, supra note 76, at 46.
\textsuperscript{114} ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 35-6.
\textsuperscript{115} ALQUIÉ, supra note 76, at 66-7.
\textsuperscript{116} The expression is used by Bernhard Windscheid, Die Aufgaben der Rechtswissenschaft, in BERNHARD WINDSCHEID, GESAMMELTE REDEN UND ABHANDLUNGEN 111 (1904) (1884). Windscheid's "jurist-as-such" ignores "ethical, political, [or] economic considerations": id. at 112.
\textsuperscript{118} See, e.g., DANIEL GARBER, DESCARTES' METAPHYSICAL PHYSICS 1-62 (1992).
\textsuperscript{119} For illustrations of Descartes's expressed views on this question, see, e.g., Letter from Descartes to Regius (May 24, 1640), in III ŒUVRES DE DESCARTES 64 (Charles Adam & Paul Tannery eds., 2d ed. 1988). "Our mind is of such a nature that it cannot help assenting to what it clearly conceives"; Letter from Descartes to Mesland (May 2, 1644), in DESCARTES, IV ŒUVRES DE DESCARTES 115-16 (Charles Adam & Paul Tannery eds., 2d ed. 1976); II DESCARTES, Méditation quatrième, in ŒUVRES PHILOSOPHIQUES 463 (Ferdinand Alquié ed., 1999) (1641).
\textsuperscript{120} PHILONENKO, supra note 74, at 359.
and receptivity—the mind as “inert receptacle”—suggest spectatorship rather than participation.\textsuperscript{122} Of course, for the process to operate some method of purification must be supplied. And here one meets Descartes again for whom clear and distinct perception—which he expressly connects with truth—\textsuperscript{123} can only be achieved through rules that will direct understanding and overcome the legacy of prejudice that leads to the inability properly to distinguish between subject and object. One must “remove prejudices” for they are an obstacle to discernment.\textsuperscript{124} Through rules, one can conquer all physical processes whatsoever: if sufficient industry is applied, the possibility for a complete intellectual transcendence of the body is at hand. For Kötz too, “prejudices” and “constraints” must be surmounted.\textsuperscript{125} For him too, subjective evaluation will be corrected.\textsuperscript{126}

Evidently, Kötz envisages transcendence as the cardinal goal. As is the case with Descartes, whose thesis is “profoundly transcendental,”\textsuperscript{127} only a guarantee “from above” can alleviate Kötz’s epistemological anxiety. Acts of “pure understanding” must be phenomenologically independent of the comparatists themselves, of their data, and of their reports on that data. The comparatists must be cleansed of their embeddedness. The data must be delivered from its embeddedness. The reports must be liberated from their embeddedness. If circumspection (or the atraditional or acultural attitude) is thus maintained (with, for instance, the right topics being excluded from the range of comparative research),\textsuperscript{128} if prejudices are thus methodically toppled, comparative legal studies will overcome the need for any place.\textsuperscript{129} As such, comparative research will naturally be apprehended as being coextensive with uniformization of law: Rechtsvergleichung \textit{als Rechtsvereinheitlichung}.\textsuperscript{130}

\begin{itemize}
\item \textsuperscript{121} \textit{id.} at 215.
\item \textsuperscript{122} Indeed, Descartes revels in his role as “spectator rather than actor”: DESCARTES, \textit{Discours}, supra note 62, at pt IV, at 599.
\item \textsuperscript{123} II DESCARTES, \textit{Méditation troisième}, in \textit{OEUVRES PHILOSOPHIQUES} 431 (Ferdinand Alquié ed., 1999) (1641). For an important examination of the connection Descartes draws between “certainty” and “truth,” see LAPORTE, \textit{supra} note 105, at 139-72.
\item \textsuperscript{124} II DESCARTES, \textit{Réponses … aux cinquièmes objections}, in \textit{OEUVRES PHILOSOPHIQUES} 804 (Ferdinand Alquié ed., 1999) (1647).
\item \textsuperscript{125} ZWEIGERT & KÖTZ, \textit{INTRODUCTION}, \textit{supra} note 3, at 46; ZWEIGERT & KÖTZ, EINFÜHRUNG, \textit{supra} note 3, at 46.
\item \textsuperscript{126} ZWEIGERT & KÖTZ, \textit{INTRODUCTION}, \textit{supra} note 3, at 47; ZWEIGERT & KÖTZ, EINFÜHRUNG, \textit{supra} note 3, at 47.
\item \textsuperscript{127} PHILONENKO, \textit{supra} note 74, at 63.
\item \textsuperscript{128} ZWEIGERT & KÖTZ, \textit{INTRODUCTION}, \textit{supra} note 3, at 40 (“leave aside the topics which are heavily impressed by moral views or values.”) This delineation appears to exclude the whole of “public law.”
\item \textsuperscript{129} Descartes explicitly asserts that his proposed grounding of conviction has “no need of any place.” DESCARTES, \textit{Discours}, \textit{supra} note 62, at pt IV, at 604.
\item \textsuperscript{130} A uniform law, as Kötz reminds his readership, “makes international legal business easier”: ZWEIGERT & KÖTZ, \textit{INTRODUCTION}, \textit{supra} note 3, at 25. Judging from this passage, uniformization
\end{itemize}
Envisaging method as science and as system, Descartes tells us that "one cannot do without a method on the way to one’s quest for the truth of things" and that "all method consists in the order and arrangement of objects towards which one must turn the gaze of the mind so as to discover some truth." Thus, correct methodology will allow comparatists-at-law to relate with absolute neutrality to the laws they survey, unfettered by the perspectival and located character of embodied vision. For Kötz, there is one correct method and one correct method only (no Methodenstreit here!): "The basic methodological principle of all comparative law is that of functionality." And, in the same way as Descartes’ method will lead him to truth, Kötz’s method—the gold standard in comparative legal studies—will "giv[e] the right results."

Another connection concerns the matter of sequentiality. Contrary to what is often assumed, Descartes’s Discours came long after the enunciation of the method itself; it came, so to speak, after the methodological fact. In the word of literary critic Pascal Quignard, "method is the road after one has traveled it." I have never been able quite to overcome the feeling that a similar reversal is at work with Kötz. He would have us accept that the method—functionalism—is enunciated before anything else and that irrespective of any preordained ideological agenda, it is on the basis of this method that one is then led to similarities across laws and ultimately to uniform law. But is it not possible that the goal to be reached—uniform law—was identified first and that a method conducive to that goal—functionalism—was then fashioned? Given a proper methodological protocol (which, for Descartes as for Kötz, must mean “certain and easy rules” since ambiguity and complexity are the avowed enemies of methodology), given "a permanent framework for inquiry," tradition and culture are no longer determinants of cognitive experience. In this way, the specter of subjectivity or inwardness or locatedness is laid to rest. Indeed, impersonality is turned to advantage as it becomes the mark of the truth of the known (which is now immune to every effort on the part of the knower to make it what he would want it to be rather than what it is).

of law appears to be an unmitigated blessing and not to entail any detrimental consequences whatsoever.

131 DESCARTES, Regles, supra note 75, at 90, 100 (respectively rules IV & V). Indeed, the long title of the Discours, supra note 62, is “Discourse on the Method to Conduct Rightly One’s Reason and Seek Truth in the Sciences.” Martin Jay refers to “a fetish of method.” MARTIN JAY, SONGS OF EXPERIENCE 32 (2005).

132 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 34 (I have substituted my emphasis for that of the authors).

133 Id. at 34. For the German text, see ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 32.

134 The Discours, supra note 62, dates from 1637; the Regles, supra note 75, from 1628.

135 PACAL QUIGNARD, ABIMES 161 (2002).

136 DESCARTES, Regles, supra note 75, at 91 (rule IV).

Interested and ideological assumptions yield to foundations for knowledge and epistemic objectivity.

As he insists on the uniformization of law as a goal for comparative legal studies, Kötz, like Descartes, emphasizes a principle of continuity that transcends the discontinuities of human life experience. A unified system of absolute knowledge imposed on untidy experience and perfectly mirrored “laws” in the comparatists’ representations allows an escape from the contingency of tradition and the vagaries of culture, from the vacillation of anxiety associated with insecurity and uncertainty over the possibility of reaching the law “as it is.” Achievement within the field is measured in terms of detachment (of comparatists, of data, of reports) from the world. A clear sense of boundaries between comparison and world is emphasized, even fetishized. As they extol detachment, transcendence, distinctness, and clarity—in other words, rigor—Descartes and Kötz, unwittingly or not, promote an androcentric or phallogocentric model of knowledge in which the more “feminine” elements, that is, the intuitive, connected, empathic, associational dimensions—in sum, knowledge as merging with the object rather than dominating it, understanding as participatory or dependent rather than controlling—are, somewhat disdainfully, excluded.

In this regard, though, Kötz is more Cartesian even than Descartes himself, as in other respects addressed above, for the philosopher, while “[he] has carefully erased and negated the traces of his historical heritage so as to constitute the myth of the radical beginning of reason,” repeatedly refers to his life experience, the assumption being that through the operation of method there occurs an abstraction from self such that a life is transformed into a rational system entrusted with ascription of meaning. Kötz, as one knows, engages in a revocation of his own historicity and does not tell us anything about his life apart from his institutional affiliation.

“The texts we are addressing here share [another] common feature: they normalize, they govern, they anticipate on any answer by decreeing in advance what is the best discourse, the best attitude, the best research to conduct, etc., given the standpoint of a power and according to its demands which are, as a matter of principle, legitimate.”

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138 For Descartes’s thought on this issue, see, e.g., DESCARTES, Méditation troisième, in II ŒUVRES PHILOSOPHIQUES 430-54 (Ferdinand Alquié ed., 1999) (1641).
139 For a leading argument regarding the specificity of embodied thought which masculinization ignores, see, e.g., EVELYN FOX KELLER, REFLECTIONS ON GENDER AND SCIENCE 79 (1985).
140 BLUMENBERG, supra note 85, at 210.
141 Indeed, Descartes’s project is said to have been “radically first-personal.” BERNARD WILLIAMS, DESCARTES: THE PROJECT OF PURE ENQUIRY 52 (1978).
142 LEGENDRE, supra note 18, at 26.
V. Not-Knowledge

I argue that indifference to the fact of the inscription of all texts of law in a tradition and in a culture is primarily a remarkable indifference to thinking—and, therefore, places an epistemological obstacle in the way of the acquisition of useful knowledge aimed at an informed understanding of law. Now, the eclipse of tradition or culture (and, thus, of language), envisaged in an important way as a historicity which is other than (and more than) the historicity of the comparing comparatists-at-law themselves, is not innocent in the sense that it would simply illustrate lack of concern or neglect. Rather, the indifference I address is most conscious of the implications of disinterest, and even wills them. In this sense, the brand of foreclosure or planned indifference advocated by Kötz indicates more than a coded failure of re-presentation—which it emphatically does—but also signifies a refutation, a negation, that is ethical in character. In effect, the delineation of their materials to “binding-law-as-such” approached as a self-reflexive totality and the correlative exclusion as so many “contaminations” of the constitutive factors that would permit the ascription of deep or thick meaning to that “binding-law-as-such” guarantee comparatists-at-law their status within the community of lawyers.

Specifically, the “power” and the “expertise” that they crave is conceded to comparatists-at-law as soon as “the law” is re-presented (to others) as consisting exclusively of technically arcane materials inaccessible to anyone but the high priests of comparative legalese themselves. Comparatists-at-law, who wish to act as the lawyers they have been socialized to be rather than as comparatists, thus relentlessly pursue a systematic elegantia juris or purification of “the legal,” which they claim to regard as something that was never constituted, except in the most formalistic or procedural (and, accordingly, negligible) meaning of the word.

In the name of a theoreticized and militant comparative practice that simply cannot be satisfied with the alignment of epigrammatic answers from foreign laws, that pursues a hermeneutic understanding of foreignness-in-the-law, that purports to maintain alterity in its specificity (while at all times avoiding the tendency to essentialize it), that aims at making sense of the diversity of discourses around different traditional and cultural forms, and that wishes to counter the intellectual inclination towards the axiomatization of sameness, I claim that comparatists-at-law require to challenge Kötz’s law. This challenge is first and foremost compelled by Hein Kötz’s unrelenting display of “not-knowledge.”
It should go without saying that I do not fault Kötz for not knowing everything. Evidently, no comparatist-at-law can know all that there is to know and all that should be known about laws. My difficulty with Kötz’s heuristic approach lies elsewhere and concerns the fact that throughout his book, he eschews the rhizomic (and, thus, interdisciplinary) character of knowledge, its provisional and transitional quality, that he overlooks how the acquisition of knowledge is a “never-accomplished” process and how the construction of knowledge calls for constant reservation and interminable revision of judgment. Kötz takes a strikingly different view of the condition of knowledge. Mostly, he purports to suspend doubt. He proffers an array of asseverations that attest to certainty of thought. A particularly striking illustration is on display as Kötz writes that, with respect to a given question, “[t]he critic is forced to conclude that . . . the German system is best.”

Under Kötz’s guardian eye and in the name of “bestness,” disconcerting or distracting singularities are overlooked, difference is suppressed in a way that illustrates very well how knowledge-production and repression are not external to each other, how they operate simultaneously, how knowledge-production is repression. Violence (“The critic is forced to conclude . . .”) is thus shown to be inherent to the comparative gaze that seeks to instrumentalize and totalize the disruptive mystery of difference, that purports to articulate a power and, through it, an order.

In fact, though, Kötz speaks with the certainty that only not-knowing makes possible. What he says about similarity, for example, is only possible because he does not (want to) know about alterity. What he says about objectivity, for instance, is only possible because he does not (want to) know about “the insuppressible perception of self,” on the one hand, and about being-in-the-world, on the other. What he says about normocentrism and logocentrism is only possible because he does not (want to) know about the presence of the unconcealed. What he says about law-as-intellection is only possible because he does not (want to) know about the imbrication of affectivity within normativity. I argue that it is his blindness to his blindesses that

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143 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 362 (emphasis added). For the German text, see ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 356.

144 SAMUEL BECKETT, COMÉDIE ET ACTES DIVERS 113 (1972). For a striking example of the way in which Kötz’s ineliminable self emerges throughout his book, consider the chapter on method where twenty-two out of twenty-three references are to German authors, the other one being to Kelsen. ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 32-47. Admittedly, the book was written for a German readership but it is easy to observe that it has been circulating in English since 1969. Note also the ubiquitous presence of Ernst Rabel, an early predecessor of Kötz’s at the helm of the research institute he eventually directed. Rabel’s name appears at least thirty-three times, often with copious quotations, in the initial sixty-two pages of ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3.

145 For ample demonstration of this interaction, see, e.g., Goodrich & Carlson, supra note 103.
allows him to say what he says. I do not dispute that his blindness may be necessary to him in order to appear as a “good” lawyer to other lawyers: “[t]o be really good at ‘doing law’, one has to have serious blind spots and a stunningly selective sense of curiosity.”\textsuperscript{146} But I claim that his blindness should prevent him from appearing as a “good” comparatist-at-law (not least to other comparatists-at-law).

In the light of the interlogocentrism, internomocentrism, interobjectivity, and interscientificity characteristic of the field of comparative legal studies, it must suffice for me to offer a brief and somewhat arbitrary selection of examples illustrating within the great mimetic rivalry (so typical of the scholastic world and its disciplemships) how the brand of “not-knowledge” promoted by Hein Kötz continues to demand almost automatic deference and thus remains insistently published, read, and valued as “good” comparative research by “gentlemen-comparatists” whose amused interest in matters transnational can seemingly be teased only so far. (“Here, to think means to adhere.”)\textsuperscript{147}

Writing with specific reference to the Europeanization of law, Alan Watson registers, without any felt need to justify his stance, an unquestioned application of the praesumptio similitudinis: “The private law of the countries of the EU is not all that different.”\textsuperscript{148} (Such brusque philistinism might also prompt one to observe that wombats and airplanes are not all that different either for neither can make marmalade.) But even this kind of bromide does not go far enough for another writer who, seemingly bereft of any ethical insight, feels able squarely to call for the “manipulation” of research data such that laws “can be made to look [similar].”\textsuperscript{149} Although the relevant paper was

\textsuperscript{146} PIERRE SCHLAG, THE ENCHANTMENT OF REASON 140 (1998).
\textsuperscript{147} LEGENDRE, supra note 18, at 33.
\textsuperscript{149} Basil S. Markesinis, Why a Code is Not the Best Way to Advance the Cause of European Legal Unity, 5 EUR. REV. PRIV. L. 519, 520 (1997). A recurrent “manipulative” strategy consists in translating the common law into civilian terms and evaluating it by civilian standards such as when it is posited that U.S. scholarship about law differs from German scholarship (which it most certainly does as anyone who has taught in both jurisdictions can confirm), that U.S. scholarship about law differs from English scholarship (which it does, as Patrick Atiyah and Robert Summers have shown), and that, mirabile dictu, English scholarship is similar to German scholarship. For these contentions, see Reinhard Zimmermann, Savigny’s Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science, 112 L.Q. REV. 576, 584 (1996). The author adds that “[t]he briefest comparative glance at the Law Quarterly Review reveals that in approach, outlook and focus it is much closer to the Juristenzzeitung than to the Harvard Law Review.” Id. The obvious difficulty has to do with the nature of the glance. For an analysis which, though avowedly brief, purports to go beyond the glimpse and therefore is able to disclose radically different approaches, outlooks, and foci as between English and German scholarship about law, see Pierre Legrand & Geoffrey Samuel, Brèves épistémologiques sur le droit anglais tel qu’en lui-même, [2005/54] REVUE INTERDISCIPLINAIRE D’ETUDES JURIDIQUES 1. For a discussion of scholarship about law in the U.S. and in England, see P.S. ATIYAH & ROBERT S.
published nearly ten years ago, it has yet to generate, as far as I am able to tell, a single expression of concern within the field of comparative legal studies (I except my own critique).

The unwillingness to accommodate alterity (and the concomitant assertion of "not-knowledge" of alterity) is further demonstrated by an author being prepared in the hallowed name of "scientificity" (or, rather, on account of what is understood by him to constitute "scientificity"), to cover his vaunted incomprehension of U.S. legal scholarship by deprecating it with specific, although not exclusive, reference to Peter Gabel and Duncan Kennedy. The same author suggests as an inspirational model for European comparatists-at-law an academic whose nationalistic historicism was always inimical to comparative legal studies and whose abiding commitment lay with the institution of a Romanist Rechtsstaat in Germany.\(^{150}\) Here, the hurrying of material combines a strong display of "betterness" (German scholarship is better—that is, more "scientific"—than U.S. scholarship) with a mimetism seeking to replicate within comparative legal studies a national scenario (Savigny is a hero to the German legal community: he can be a hero for comparatists-at-law all over Europe).

For his part, an Italian academic—who appears to find theory about just as useful as fish do oceanography\(^ {151}\)—blandly notes as follows: "The identity of a people is not only tied to linguistic and cultural aspects. The law and the institutions are an important aspect of

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\(^{150}\) See Zimmermann, supra note 149, at 583, (referring to Peter Gabel & Duncan Kennedy, Roll Over Beethoven, 36 STAN. L. REV. 1 (1984)). One of Gabel and Kennedy's cardinal sins is that they are insufficiently sensitive to "the wholeness of our legal systems." Zimmermann, supra note 149, at 583. This expression of condescension had been rehearsed in Reinhard Zimmermann, 'Law Reviews'—Ein Streifzug durch eine fremde Welt, in AMERIKANISCHE RECHTSKULTUR UND EUROPAISCHES PRIVATRECHT 118 (Reinhard Zimmermann ed., 1995). For a contemporaneous reflection, contrast ROGER COTTERELL, LAW'S COMMUNITY 206-07 (1995), where the author strives, in good faith, to elicit meaning from the same scholarly endeavor: "Peter Gabel's and Duncan Kennedy's (1984) 'Roll Over Beethoven' paper (whose form of presentation no doubt conforms to Kennedy's determination to puncture pomposity and play down abstractions as much as possible) is one of the few CLS papers that confront squarely some of these central 'foundation problems'—about the role and nature of theory as such, about the significance of general concepts in critical analysis, about the philosophy of praxis, about the relevance of utopian thought, about the fundamental aims of critique, and about its epistemological foundations—in a way that shows just how difficult and important they are." For Savigny's nationalism, see III/2 ERNST LANDSBERG, GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT 207-17 (1910). In his fine book, James Whitman situates Savigny within a "schoo[l] of Rechtsstaat thought." JAMES Q. WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA 150 (1990). There is one more point. It is unclear to me that as he refers to the "wholeness" of the law (so sadly overlooked by Gabel and Kennedy), Zimmermann did not actually mean to write about the "holiness" of the law—a characterization of "the legal" that has traditionally fashioned scholarly subservience to the law-making authorities in the civil-law world, not least in Germany. For a general argument on law's theologians, see Pierre Legrand, Antiqui juris civilis fabulas, 45 U. TORONTO L.J. 311 (1995).

\(^{151}\) For an example of resistance to theory, see Mattei, supra note 54.
This (inelegant) statement reveals the “fast-thinking” logocentrism and the nomocentrism that are made to govern the practice of comparative legal studies: language and culture on one side, law and institutions on the other—which is to say that language and law or culture and law do not have anything to do with each other. Through this expressed dedication to the positivity of law suggesting an unreconstructed Kelsenianism seeking to “outkelsen” Kelsen, law is presented as a kind of *prima donna assoluta*—untainted by language or culture, “pure.” The selfsame denial of law’s embeddedness readily appears from a declaration (so improbable as to suggest the possibility of a rhetorical feint) to the effect that a uniform law within the European Community must be—and can be—“impartial,” “dispassionate,” and “neutral.” Clearly, the goal is fixed, final, monologically authoritative meaning. Once again, the values of logocentrism/nomocentrism and scientificity/objectivity/apoliticality are extolled without any room being left for any doubt or dissentence.

I argue that this series of excerpts attests to the prevailing “atmospherics” within comparative legal studies, a resolutely “anti-intellectual” ambiance indebted in significant respects to Hein Kötz’s authoritative injunctions that assume—irrespective of what the fields of philosophy, sociology, anthropology, history, literary criticism, comparative literature, translation studies, and science studies have to teach us—that logocentrism is achievable, that nomocentrism is commendable, that scientificity is implementable, that apodicticity is desirable, that objectivity is reachable, and that apoliticality is attainable. The following paper, devoted to abortion in francophone jurisdictions, is typical.

The co-authors address French law—which they regard as the cornerstone of their analysis—in one and a half pages. Luxembourg is explored in one paragraph and Belgium in just over a page. “Other Francophone Countries” are discussed in sixteen lines while “Hybrid Francophone States” are treated in slightly less than a page. This congeries of dryly affirmative “reports” is almost exclusively concerned with references to extant legislated texts although three Belgian decisions are briefly summarized. The twenty-two page “comparative” survey that follows is organized around topics such as “definition [of

154 For a more detailed critique of uniformization of law and of strategies of assimilation of other to self through hegemonic appropriation, see Pierre Legrand, *Antivonbar*, 1 J. COMP. L. 13 (2006)
abortion],“grounds for abortion,”“procedural conditions,”and so forth. It also consists in a descriptive account of the posited law as understood by the co-authors with frequent, if cursory, reference to legislative materials and occasional inclusion (without discussion) of judicial decisions. Some mention of scholarly commentaries deemed apposite completes the summary. (Introductory texts and entries in encyclopedias better suited to harried practitioners than to academics purporting to specialize in comparative scholarship feature prominently although they clearly cannot be regarded as adequate substitutes for the richer examinations published in the indigenous languages.) The following passage is representative of the co-authors’ descriptive stance: “Morocco is the only country considered in this study where there is a positive requirement that the husband give his consent to the abortion.” Another example is this: “Unlike the other countries looked at in this section, the Belgian legislators have determined that it would be excessive to punish someone whose actions had, in fact, brought no result (i.e., where the child survives the attempt).” A brief protocol and a shorter conclusion inform the reader that “[a] multitude of conflicting factors make legislating in this area supremely complex” and that “[e]ven when... liberalization is achieved through the decriminalization of abortion... it is rendered meaningless when procedural or geographical constraints make access difficult or impossible.” Neither of these statements is further substantiated by any critical consideration of relevant data. I wish to emphasize that, in its approach to comparative legal studies, this paper affords one example inter alia rather than an isolated instance. In other words, I am individuating this article on account of its representative character and not because of its idiosyncrasies.

156 Id. at 912. The footnote specifies the source of this obligation as royal decree no. 181-66 of July 1, 1967 modifying article 453 of the penal code.
157 Id. at 917. The footnote adduces an entry in a leading multi-volume encyclopedia devoted to Belgian law in general.
158 Id. at 889, 920 (respectively).
159 I came to this paper in the following way. Having elected to confine my search to journals published in English given that I was myself writing in this language, I decided to make my choice out of the American Journal of Comparative Law, the only anglophone review of which I was aware nominally aimed exclusively at the promotion of comparative legal studies. (The Journal of Comparative Law, which recently published its first issue, must now be added to this list of one.) I subsequently determined, at random, to examine the volume for the year 1990. Before I opened the book, I had formed the view that I would consider only the first ten articles listed under “Index of Titles.” As I perused the index, I retained the paper most obviously “comparative” in its design. Interestingly, I thought, the article happened to address a topical and controversial question of great social and political import. It thus had the potential readily and strikingly to illustrate the gap between what could be achieved by comparatists-at-law approaching their subject with responsible, respondent perception and what had effectively been done by the co-authors. For a prominent illustration of other snippet compilations seemingly content to adduce an accumulation of selected titbits extracted largely from legislative texts and appellate judicial decisions, see the volumes issuing from the so-called “Trento” project released...
In a kind of phenomenological move, a sort of epoché, I should like to suspend Hein Kötz and his epigones’ suspension of doubt and claim that, quite apart from the fact that someone is missing (for Hein-Kötzt-as-comparatist-at-law is unacceptably seeking to absent himself from the narrative he tells), something is missing. I argue that “knowledge” is missing, “specifically, the scary knowledge of the not known.” I further argue that if “knowledge” found itself legitimated within comparative legal studies, the “yield” of comparative investigations would be significantly heightened. Thus, I want to restore “knowledge” as a central motif within any theory and practice of comparative legal studies. By “knowledge,” I understand knowledge that is located in the “beyond” of An Introduction to Comparative Law, that moves beyond a simplistic “us”/“them” framework towards a worldly of the law and of the comparison of laws, that is, knowledge that is not hindered by law’s inscription in the world and that is not inconvenienced by the comparatist-at-law’s “complicity” with the world—knowledge, in sum, that admits of its adventitious or circumstantial character. I have in mind, then, “knowledge” that chooses individuality over systemics.

I have in mind knowledge that expands the comparatist’s consciousness of what law is, that does not see it as isolated but as always-already engaged within the tradition and culture from which it has emerged. I have in mind knowledge about the other law and the other-in-the-law that is historical and epistemological, political and sociological, traditional and cultural. I have in mind knowledge that does not foreground those elements that clearly refer to posited law


160 LEGENDRE, supra note 18, at 19 (emphasis original).
162 The word is Spivak’s. SPIVAK, supra note 45, at xii.
163 The tired retort to the effect that comparatists-at-law do not have specialized training in this field or that is, simply, unconvincing. The issue cannot be confined to the matter of degrees and diplomas. It is, first and foremost, about comparatists-at-law doing their homework.
while minimizing or eliding or treating as some sort of toxic residue those that refer to other dimensions of "the legal." I have in mind knowledge that moves away from authorized or naturalized data, from a technical rationality that is too impoverished and restrictive to treat law in any other terms than context-free clusters of data.\footnote{To be fair to Hein Kötz, I must acknowledge that "context" occasionally features in his book as where he suggests a connection between the English legal community's predilection for judicial over legislative law-making with the fact that English lawyers "liv[e] by the sea": ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 70.}

I have in mind knowledge that situates posited law in interdiscursive and intertextual terms, that is, locates it in relation to all other aspects of the law's lifeworld—the basic idea being to unconceal what is latent within the law such that law be optimally present in the fullness of its current meaning in a given situation.\footnote{See, e.g., ISAIAH BERLIN, The Concept of Scientific History, in CONCEPTS AND CATEGORIES 190 (Henry Hardy ed., 1980) (1960) (highlighting the need "to perceive that a certain type of legal structure is 'intimately connected' with, or is part of the same complex as, an economic activity, a moral outlook, a style of writing or of dancing or of worship"); see also Geoffrey Wilson, English Legal Scholarship, 50 MOD. L. REV. 818, 883 (1987). "It would be unwise for example 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." The basic point is Robert Gordon's, who draws the link between the legal sub-culture and the culture tout court. He observes that "the specific legal practices of a culture are simply dialects of a parent social speech" and argues that there is no reason why a legal culture should be expected to "depart drastically from the common stock of understanding in the surrounding culture." Robert W. Gordon, Critical Legal Histories, 36 STAN. L. REV. 57, 90 (1984). This is not to say that "cultural meaning" is transparently translated into legal doctrine nor to assert that all has been said once a law-text has been ascribed "cultural meaning."} Thus, I have in mind knowledge that connotes a maieutic rather than a geometric sensitivity. I have in mind knowledge that does not aim to repress the pertinent differences located in the contextual matrixes within which instantiations of posited law are inevitably ensconced. I have in mind knowledge that accounts for the difference difference makes. I have in mind knowledge that allows for slippage and ambivalence, for recalcitrance and ambiguity, for excess and uncertainty, for contingency and hesitation, for resistance and plasticity, for indiscipline and relativity. I have in mind knowledge as bricolage. I have in mind knowledge that is polyphonic. I have in mind fragmented knowledge. I have in mind knowledge that even as it focuses on pertinent rather than picturesque differences across laws cannot fully capture the pervasiveness of the other’s difference, which, therefore, can never be conquered and, as it remains unresolved, inevitably entails the presence of a "differential surplus." I have in mind knowledge that is interested
in *veritas seditiosa*, that is, in truth-to-us rather than in truth *tout court*. I have in mind knowledge that is committed to the situatedness and positioning of all knowledge-claims (and that is, therefore, inherently anti-essentialist).

I have in mind knowledge that arises from an *expérience-limite*, from the comparatist’s experience happening at the limit of what understanding makes possible, of an experience that confronts the comparatist with the “there is” that lies beyond re-presentation on account of its concreteness, of its embeddedness, of its depth, knowledge that one should not hope to appropriate. I have in mind knowledge that accounts for the fact that “one understands differently, when one understands at all.”\(^{166}\) I have in mind knowledge that allows for the open imbrication into the “data” of something of the comparatist and of the comparatist’s life. I have in mind knowledge that acknowledges and values prejudice (in the Gadamerian sense of the term) not as an obstacle to knowledge, but as a condition of knowledge partaking in a general logic of the *Vorzeit*.\(^{167}\) I have in mind knowledge that accepts subjectivity as what is always at work rather than discuss it as an impurity.

I have in mind knowledge that assumes a sense of continuity between “self” and “world” and between “law” and “world.” I have in mind knowledge that is not produced at a distance from the world and, specifically, at a distance from the other’s world and the other’s law-world but that is generated in “critical intimacy” with it.\(^{168}\) I have in mind knowledge that is derived from a “detextualization of experience” rather than generated methodologically, that allows for facticity, for what befalls the comparatist, for the event, for what occurs contingently without respect to a position in a scheme, for what was not expected and what no method could have contemplated, for the not-happening of method.\(^{169}\) (I have in mind knowledge that recalls that over the centuries “method” has also connoted a circuitous way, a fraud, or a trick.)\(^{170}\) I have in mind knowledge that is speculative rather than specular. I have in mind knowledge that is heterotopic, peripatetic, nomadic. I have in mind knowledge that incessantly interrupts

\(^{166}\) HANS-GEORG GADAMER, WAHRHEIT UND METHODE 302 (6th ed. 1990) (emphasis original) [hereinafter GADAMER, WAHRHEIT UND METHODE].

\(^{167}\) The notion of “*Vorverständnis*” (or “pre-understanding”) is famously developed in GADAMER, WAHRHEIT UND METHODE. Id. at 270-312. It is indebted to Heidegger’s idea of “*Vorgriff*” (or “fore-conception”). See MARTIN HEIDEGGER, SEIN UND ZEIT 150 (18th ed. 2001) (1927).

\(^{168}\) SPIVAK, supra note 45, at 425.

\(^{169}\) JAY, supra note 131, at 38. Gadamer insists that hermeneutics does not raise a problem of method “at all.” GADAMER, WAHRHEIT UND METHODE, supra note 166, at 1.

\(^{170}\) See BRUNO CLEMENT, LE RECIT DE LA METHODE 31, passim (2005). Indeed, Descartes himself refers to method as a “story” or a “fable.” DESCARTES, Discours, supra note 62, at pt I, 571.
ethnocentric thought (rather than confirms it). I have in mind knowledge that is intensely and eminently/immanently local (and thus decentralized).

I have in mind knowledge that intervenes as testimony. I have in mind knowledge that the comparatist can approach while being aware of what it would signify in its "original" place and time although not being confined to these indigenous ascriptions of meaning. I have in mind knowledge that accounts for "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."\(^{171}\) (Observe that, as Rorty underlines, "[i]ncommensurability entails irreducibility but not incompatibility"—and, I would add, not incomparability either.)\(^{172}\) I have in mind knowledge that acknowledges that interpretation of the other and of the other's law is transformation of the other and of the other's law. I have in mind knowledge that, while allowing for the manifestation of alterity in its singularity, recognizes and respects the other and the other's law. I have in mind knowledge that thus attests to a faith in comparison's aporetic fate.

I have in mind knowledge that may other the self, that may grasp or seize it and perhaps disprove it (in a way that shows how collected/constituted data can become a state of mind), that is, knowledge that within the movement of self towards the other does not appropriate the other to the self but rather compels the self to transform itself such that it ceases to be the self that it was and becomes other through and with the other.\(^{173}\) I have in mind knowledge that connotes (inescapably rather than intermittently) epistemological, political, and ethical responsibility. I have in mind knowledge as a performed epistemology, politics, and ethics. I have in mind knowledge that attests to the other's precedence over the self. I have in mind knowledge that is, ultimately and empathically, for the other (and his law). (Returning briefly to the argument from androcentrism, I have in mind knowledge that will allow for comparison as caress, that is, as a gesture that, like the caressing hand, remains open, never tightening into a grip, a gesture that is tentative and exploratory, a gesture that reaches towards the other without any intention of possessing the other and that acts, therefore, as an affirmation of alterity, as opposed, perhaps, to

\(^{171}\) SAMUEL BECKETT, The Capital of the Ruins, in AS THE STORY WAS TOLD: UNCOLLECTED AND LATE PROSE 25 (1990). Note that in as much as the comparison of laws would help the other-in-the-law to tell something about himself, comparative legal studies plays an "anti-hermeneutical" role which combines with the hermeneutical task it sets itself whenever the comparatist purports to elicit meaning from the other's law which he has arranged into his object of study.

\(^{172}\) RORTY, supra note 137, at 388. For the distinction between "incommensurability" and "incomparability", see Legrand, supra note 159, at 281-83.

other erotic gestures of invasion, a gesture that nonetheless fosters increased responsibility of the self towards the other since even as I caress the other, I must answer for the impact of my gesture on the other.)

Thus, I should like to circumnavigate Hein Kötz’s institutionally appointed space for the production of the rules governing a comparative discourse meant to produce rules of posited law. I should like to introduce a thought that circumvents Kötz’s carefully circumscribed master narrative, Kötz’s magisterial law, Kötz’s doxa, a thought that is, literally, paradoxal—a thought that, still unexpectedly and almost contradictorily for comparative legal studies, is not based on “not-knowledge,” that is, on sets of re-presentations that do not recognize the need to explore the epistemological, political, and ethical dimensions of comparative research as an integral part of producing knowledge about others and their laws, that account for the law-world in ways that are truncated and fallacious. I should like to introduce a contrarian challenge to Hein Kötz’s “controlled comparisons” and to his disciples’ sanctioned ignorance, to his normative order to which comparatists-at-law have been subordinated (and to which, helped by a hagiographic inclination, the worshippers have subordinated themselves as agents of production of knowledge in the pursuit of an accumulation of cultural capital, only to forget that what they imagine to be their choices and their voices are in effect also the internalized expression of an order that has manifested itself in subdued—and well-disposed or docile—individual consciousness through the vehicle of textbook language).

How, then, to challenge Kötz’s law? How to disrupt comparative-legal-studies-as-information-retrieval? How to hold Kötz accountable? And how to think otherwise? How to think other-wise, that is, how to think with wisdom or sagacity in relation to the other, to the other’s law, to the other-in-the-law, to the imperative of alterity? Clearly, what is involved in comparatists-at-law learning to unbecome the comparatists-at-law they have been does not simply relate to the overcoming by the comparatist of obstacles that could be described as “external” to him (such as institutional frameworks and other structures legitimating uniformity-as-performativity), but also entails overcoming the self as an agent of censorship (after all, the desire not to know about otherness-in-the-law is not simple ignorance; rather, it assumes a prescience of what it is that one does not want to know—which suggests that the comparatist’s unknown is far from being the simple opposite of his known).

As I look around to assess who could lend a hand in what is clearly a difficult task (contesting the naturalized view cannot be easy) I find

174 I draw on Zygmunt Bauman, who himself derives inspiration from Emmanuel Levinas. See ZYGMUNT BAUMAN, POSTMODERN ETHICS 92-98 (1993).
that one particularly attractive option is to think with Jacques Derrida. Why Derrida? Because he is a cosmopolitan who emphasizes the insufficiency of an ethics of rationality that would not also be an ethics of relationality, that is, that would operate without drawing on the resources or perspectives of the other, and because important aspects of his thought are directly relevant to a cosmopolitan practice such as comparative legal studies (although I wholeheartedly accept that the philosopher did not have the comparison of laws in mind when he wrote what he did). Because he offers a searching articulation of critical thought featuring illuminating meditations on terms and concepts. Because his strategy of readerliness is “unaccusing, unexcusing, attentive, situationally productive through dismantling.”175 And, importantly, because Derrida’s idiomatic thought—a thought of the “surround” (with all the instabilities and undecidabilities that it entails), a thought of the “Übersetzen” also, of the “beyond-the-posed”—impugns Hein Kötz’s standardized brand of aseptic comparison with an example of almost frontal contrarianism. Its always elegant counternarrative stands as a counterpoint to elegantiæ juris and, in as much as it values “sub-systemic” production of meaning and regards it in any event as inevitable, appears as a threat to the dogmatic tradition in that it calls for what many would style a “paradigm shift.”

Derrida’s is another scene, a counterscene (in this sense, an obscene). Between Kötz’s willed closure and Derrida’s commitment to “unfinishedness,” there is so much more than a textual polemics; “there is indeed all the distance between two modes of production and reproduction of knowledge and, more broadly, between two systems of values and two lifestyles or, if you will, between two ways of imagining an accomplished man.”176 Vis-à-vis Kötz’s views at least—which have developed around the figures of denial (of the embeddedness of the comparatist and of the laws being compared) and of prohibition (of the inclusion of certain knowledge and of certain discourses within the comparison-at-law), Derrida’s thought features a redemptive and empowering dimension “whose aim is to edify—to help [his] readers, or society as a whole, break free from outworn vocabularies and attitudes, rather than to provide ‘grounding’ for the intuitions and customs of the present.”177 If “the point of edifying philosophy is to keep the conversation going rather than to find objective truth,”178 it can best be apprehended as an exercise in negative dialectics (in the sense at least of an anti-Hegelian or anti-Aufhebung dialectics).

175 SPIVAK, supra note 45, at 81.
176 PIERRE BOURDIEU, HOMO ACADEMICUS 82-83 (1984).
177 RORTY, supra note 137, at 11-12.
178 Id. at 377.
Negative dialectics, in the expression made famous by Theodor Adorno, refers to a critical mode of reflection which at crucial moments—those moments in the production of knowledge that call upon one to take positions which determine how one gets from one step to the next, from one statement to the next, from one sentence to the next—negates what a discipline affirms. I regard Derrida’s thought as a variation on the theme of negative dialectics in as much as it is largely an argument meant to negate clearly and emphatically the positivistic enterprise that (establishment-minded) comparative legal studies wants to be. In Derrida’s own words, “negativity is a resource.”

Negativity, far from suggesting a “mood”—one certainly need not be a negative person in order to engage in negative dialectics—is a de-position or a dis-position, a distrust in positing and in positivity and in positivists and in the positivistic Zeitgeist, which must be ex-posed as the most important factor suppressing the embedded dimension of meaningful experience within comparative analysis. In this sense, negativity epitomizes the transformative role of theory as counter-discourse. It is, literally, an undisciplined gesture. It effectuates a politics of resistance. It is transgressive (not strictly in a cathartic sense, although it would be unwise to obfuscate the constructive value that the purgative dimension may hold, but in an ecstatic mode, in other words, in the way it is “critically promot[ing] progressive social transformation”).

For Derrida, one cannot adequately identify, interpret, or appreciate arguments so long as they are viewed as disembodied events. There is no argument able to transcend history or language, no neutral framework within which to describe reality or situate other human endeavors. There is no human mode of relatedness to the world in which separateness between self and world, between (legal) experience and world, is at all sharply delineated. The Cartesian or masculine desire for diremption, for mastery through individuation in willful repudiation of the vicissitudes of historical and family ties, in deliberate refutation of the roots of self (a well-known psychoanalytical motif), the idea of starting anew with the guidance of reason alone, must be apprehended not in timeless, ahistorical, or universal terms but as the intellectual rule of one particular model of knowledge and reality having sustained its hold within the intellectual arena by delegitimating

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179 JACQUES DERRIDA, L’ÉCRITURE ET LA DIFFERENDE 381 (1967) (emphasis original) [hereinafter DERRIDA, ÉCRITURE].

180 PATRICIA J. HUNTINGTON, ECSTATIC SUBJECTS, UTOPIA, AND RECOGNITION: KRISTEVA, HEIDEGGER, IRIGARAY 10-11, passim (1998); see JOHANNES FABIAN, ANTHROPOLOGY WITH AN ATTITUDE 7, 93, & 100 (2001); see generally THEODOR W. ADORNO, NEGATIVE DIALECTICS (E. B. Ashton trans., 1973); SUSAN BUCK-MORSS, THE ORIGIN OF NEGATIVE DIALECTICS (1977).

181 Descartes speaks of the dangers of the mind being infected with the errors of the past. DESCARTES, REGLES, supra note 75, at 85-6 (rule III).
and suppressing other modes of knowing. Derrida would say that the object cannot be grasped “rather by measurement than sympathy.”\(^{182}\) Specificity, tentativeness, and valuation emphasize the active, constructive nature of cognition over the Cartesian ideals of precision, certainty, and neutrality—the “geometrical” gaze.\(^{183}\) “Sympathetic” understanding of an object suggests an understanding through union with it. Indeed, it entails placing oneself as “understander” within the full being of an object and allowing it to speak such that it effectively ceases to be an “object” in the usual sense. In other words, the “objective” and the “subjective” merge and participate jointly in the creation of meaning. Through “sympathetic” understanding, the personal or intuitive response is thus afforded positive epistemological value. The argument would be that this is in fact the only mode that respects the object, that is, that allows the variety of its meanings to unfold without coercive interrogation. (The further claim could be that only such an “erotic” orientation towards knowledge can be associated with a feminine consciousness.)

I expect that my politics of citationality will be questioned. After all, there is a sense in which Derrida, because he intervenes as a philosopher, speaks from the “presumed outside” of the law and, as such, is liable not to be taken seriously by lawyers.\(^{184}\) This issue—that of “legitimacy”—is important, for only in demonstrating the pertinence of an alternative mode of knowing within “the legal” and, specifically, within comparative legal studies, does one present a real alternative to Kötz’s Cartesianism. (Observe that this “legitimization” process is not just about the rediscovery of relevant knowledge but about its suppression.) I claim that it cannot be the case that one field’s set of doxic assumptions can confine itself to claustrophobic self-referentiality and avoid any and all challenge from the standpoint of another field—especially when it is not at all clear that an alternative discourse to the Kötzian hegemonic formation could be allowed to emerge within the field of comparative legal studies itself. The inside/outside dichotomy must thus be seen as inadequate and as failing to do justice to the relevance of philosophical thought for law.


\(^{183}\) The value attached by Descartes to geometrical forms is readily apparent throughout his work.

\(^{184}\) But see, e.g., Michel Rosenfeld, Just Interpretations 13-32 (1998). For a learned assessment of the “enjews” for lawyers, see Peter Goodrich, Europe in America: Grammatology, Legal Studies, and the Politics of Transmission, 101 Colum. L. Rev. 2033 (2001). Of course, it is a “lieu commun” to note that Derrida is also marginalized “within” philosophy itself. In a thoughtful commentary on Derrida’s work, fellow philosopher Sarah Kofman notes that his writings are “rejected en bloc, judged to be incomprehensible, unreadable, in a way exiled, set aside.” Sarah Kofman, Lectures de Derrida 20 (1984). She refers to Derrida as an “unheimlich” philosopher.” Id. at 11-21.
There is a clear sense, for example, in which Derrida’s thought, no matter that it issues from the “philosophical” realm, partakes in law not, of course, in the normative sense (it cannot identify the posited law) but in what one might call the “constitutive” sense. It is, if you like, not-quite law and not-quite-not law. Consider the following statements. In order to have any use, law must be interpreted. And in order to be interpreted, it must be assessed and understood. A theory of “meaning” must then be regarded as centrally relevant to law. Such a theory can tell us, for example, whether it makes sense to think of “the legal” in the way in which logocentrism, nomocentrism, objectivity, scientificity, apoliticity, functionalism, semblance, and uniformization would have us do. What if these “foundations” were to be found to be radically fallacious or absurd? Obviously, the law is never more rewarding for its exponents (whether on account of the financial benefits it generates or in terms of the prestige it allows) than when it is perceived by the laity as standing apart from (and, preferably, above) other fields of knowledge, that is, as sharing with Revelation the unique privilege of being essentially beyond the traditionally- and culturally-constructed nature of all other ideologies. But what if, no matter how much a legislative text or judicial decision may project an image of completeness or definitiveness or intemporality or self-governance (and irrespective of how much this autonomy may be wanted by lawyers), in fact such a legislative text or judicial decision is always overdetermined, or constituted by the tradition or culture which it inhabits and which inhabits it? What if, then, the delineation between “law” and “non-law” is unsustainable? What if there cannot be closure? What if “the world is absolutely, completely legal, as you may not know it”—what if “the world is but a monstrous legal theory”?185

My goal is to introduce Derrida’s thought by focusing on aspects of it that I deem particularly relevant for comparative legal studies. Although keenly aware that “one cannot do whatever one wants with language,”186 Derrida seeks to de-format the reader by deliberately treating him to the kind of texts that he is not used to reading.187 Although Derrida adopts a style that wishes to circumvent the very idea that a text would be immediately and fully present, that it would speak its univocal meaning and truth,188 although he regards the “predilection” for “refinement, paradox, and aporia” as a “demand,”189 although the idea of renunciation to “an additional contradiction” because “it will not

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186 JACQUES DERRIDA (with JEAN BIRNBAUM), APPRENDRE A VIVRE ENFIN 38 (2005) [hereinafter DERRIDA, APPRENDRE].
187 Id. at 31-32.
188 JACQUES DERRIDA, EPERONS 30 (1978) [hereinafter DERRIDA, EPERONS].
189 DERRIDA, APPRENDRE, supra note 186, at 28.
be understood" is for him "an unacceptable obscenity," although one of his best-known translators herself claims that "Derrida is hard to read," I aim to make Derrida clear enough for the passage across disciplinary frontiers. As I approach Derrida, I do so with the kind of question in mind that one might want to ask while standing in front of a work of art: not "what is the point?", but "what can it deliver me from?" What are, then, the alleged evidences advocated by Hein Kötz and his disciples that Derrida can deliver us from? What are the authoritative statements that Derrida’s "meta-view" (or "meta-commentary") can emancipate us from?

VI. DERRIDA ON DERRIDA

In the same manner that I allowed Kötz his own words, I want Derrida to speak in his own voice. This raises the matter of Derrida’s language, which, although always polished, may appear overwhelming (especially to the uninitiated reader) on account of its marked singularity (characterized in part by a keen neologistic propensity and virtuosity), of its semantic saturation, of the daunting range and depth of his philosophical thought, all features combining to provide a compelling illustration of the philosopher’s relentless drive for incessantly meticulous exposition (a strategy having rather little to do with the deliberate obscuration of which he has repeatedly stood accused). Yet, in the same way that I introduced Kötz’s thought around a series of statements or clusters of statements, I want to organize Derrida’s thought along somewhat fragmented and aphoristic lines, that is, around a series of formulations or groups of formulations—which I will however immediately accompany with a detailed commentary. My basic point is that there are salient aspects of Derrida’s thought that I find particularly useful in order to question and challenge mainstream comparative legal studies. Bearing in mind the particularly hazardous character of any quotation from Derrida’s travail, it is to those features that I now turn.

1. "What is ‘in’ and what is ‘out’ of a text, of this text . . . ?" "There is no out-of-text."

190 Id. at 31.
192 See, e.g., JACQUES DERRIDA, LIMITED INC 129 (Elisabeth Weber trans., 1990) [hereinafter DERRIDA, LIMITED].
193 JACQUES DERRIDA, D’UN TON APOCALYPTIQUE ADOPTÉ NAGUÈRE EN PHILOSOPHIE 97 (1983) (emphasis original) [hereinafter DERRIDA, TON].
194 JACQUES DERRIDA, DE LA GRAMMATOLOGIE 227 (1967) (emphasis original) [hereinafter DERRIDA, GRAMMATOLOGIE].
A fruitful point of departure to make sense of these key statements—an "axial theme," for Derrida\footnote{Id. at 233.}—is to consider what they purport to react \textit{against}. This approach requires a few words about Husserl, to whom Derrida devoted some of his earliest publications and whose continued influence on his work he readily acknowledged.\footnote{Examples of texts bearing directly on Husserl's thought include \textsc{Jacques Derrida, Le probl\`eme de la gen\`ese dans la philosophie de Husserl} (1990); \textsc{Edmund Husserl, L'origine de la géométrie} (Jacques Derrida trans. \& ed., 1962) [reference to Derrida's introductory commentary hereinafter \textsc{Derrida, Origine}]; \textsc{Jacques Derrida, La voix et le phénomène} (1967) [hereinafter \textsc{Derrida, Voix}]. A late example of Husserl's influence is \textsc{Jacques Derrida, Le Toucher, Jean-Luc Nancy} (2000). For an illustration of Derrida's recognition of his indebtedness to Husserl, see \textsc{Jacques Derrida, Sur parole} 84 (1999).}

As is well known, Husserl called his philosophical project "phenomenology."\footnote{For a thorough historical treatment, see \textsc{Jean-François Lyotard, La phénoménologie} 5 (11th ed. 1992) (emphasis original).} "Why phenomenology?", asks Jean-François Lyotard. "The word means a study of 'phenomena', that is, of \textit{that} which appears to consciousness, of \textit{that} which is 'given'. The idea is to explore this given, 'the thing itself' that one perceives, to which one thinks, of which one speaks, while avoiding the forging of hypotheses, whether about the relation linking the phenomenon to the being of \textit{which} it is the phenomenon or about the relation linking it with the \textit{I for whom} it is a phenomenon."\footnote{Jean-François Lyotard, \textit{La phénoménologie} 5 (11th ed. 1992) (emphasis original).} Thus, phenomenology aims to allow access to the being of the phenomenon and, in this way, to reach the thing itself. Husserl accordingly directed philosophical investigations towards a return to the things themselves. In his own words: "We want to return to the things themselves."\footnote{Edmund Husserl, \textit{II/1 Logische Untersuchungen, in XIX/1 Husserliana: Gesammelte Schriften "Einleitung,"} §§ 2, 10 (Ursula Panzer ed., 1984).} (It is important to insist at the outset that fidelity to the phenomenon means for Husserl fidelity to the appearance of the phenomenon since the being of the phenomenon, far from hiding behind appearance, locates itself within the appearance that reveals it.)

Importantly, Husserl rejects the delineation between a "perceiving consciousness" and a "perceived object." If one analyzes one's consciousness, one realizes that consciousness is always—and indeed can only be—consciousness of something. Any consciousness is "consciousness of" something. In Husserl's view, consciousness simply does not exist by itself; it cannot be without an object. Because, according to Husserl, consciousness is inherently \textit{deliberate}, it is thus intrinsically an "intentionality." It is linked to objects—to the world—as "intentionality." Indeed, consciousness constitutes the basic relationship that connects human beings to the world and without which the world could not exist for them. Accordingly, consciousness can be
defined as an activity oriented towards the world, that illuminates the objects of the perceived world much as would a lighthouse beaming on them. If I consider my perception of the speeding car in front of me, there is no way in which I will find the speeding car in my consciousness. Therefore, the speeding car, the object of my perception, is not a mental object that would be immanent to my consciousness. Yet, it is inseparable from the impressions contained in my consciousness since if I were to suppress those, I would then perceive nothing. My consciousness in its quality as “cogito” carries its “cogitatum” within itself as the object of an intention, as aim.

It is crucial to observe that according to Husserl there is, therefore, no “Cartesian dualism” at work. The object, as object of intention or as intentional object, without being a real content within consciousness, does not belong to the outside world. It is, in other words, immanent to intentionality, which means that the object, although it is not interior to consciousness in any real sense of the term, is present to consciousness. For Husserl, while phenomena give themselves to consciousness, it is emphatically the activity of consciousness as objectivizing intentionality that constitutes meaning. The proof is that if I imagine a unicorn, I find the same structure of intentional object as with respect to the speeding car. Phenomenology thus constitutes a knowledge that is simultaneously local (it is a logic of consciousness) and global (since it assigns to itself as object the world as the corollary of consciousness). Given that the local accords access to the global, the world is constituted as world in my consciousness. Thus, consciousness is emphatically not a mere receptacle of images of the world that would take shape on the basis of the physical action of objects on it and that would look more or less like the world. Any thought is not first a thought and then a thought of something. Rather, when one thinks, one is always thinking about something. This unseverability between the “something” that is the object of the thinking and the act of thinking is thought itself.

Accordingly, for Husserl consciousness-as-intentionality is no longer the passive reflection of the world but a constitutive act constituting the world as a collection of more or less coherent meanings. For Husserl, what the world is, the world is through one’s activity of transcendental constitution: it is world having value for one, existing in one’s own acts through which one shows it as world really confirming itself. In other words, transcendental phenomenology is “presuppositionless” in the sense that “it is aware that the world cannot be accepted as ground since consciousness is the true ground and basis.”

literally the "mother-ground."\textsuperscript{201} Making consciousness rather than the world the ground of phenomenology—or, as he put it elsewhere, rendering "the world as the teleological product of the absolute ego"\textsuperscript{202}—is, from his point of view, nothing short of "a 'Copernican' upheaval."\textsuperscript{203}

The deep originality of Husserl's thought thus becomes clearer. For thousands of years, the skeptics had been repeating that one can never know whether the objects of our consciousness have an independent existence from us, that is, an existence independent from the experience that we have of them. For thousands of years, philosophers like Descartes had been striving to establish the existence of the material world. For his part, Husserl observes that there can be no doubt whatsoever that the objects of our consciousness exist for us \textit{as objects of our consciousness}. This statement holds irrespective of the existential status objects may otherwise have. Therefore, we can study objects as objects of our consciousness existing for us as such without having to postulate anything affirmative or negative regarding their independent existence. In other words, one can leave to one side the seemingly eternal ontological questions. For Husserl, philosophy must thus consider consciousness and the objects of consciousness, that is, everything partaking in experience, irrespective of whether or not these objects are objectively such as we experience them. One needs to emphasize how Husserl sets aside the question of the independent existential status of objects. For him, it is not important from the point of view of intentionality to know whether the table exists or not. All that matters is the fact that intentionality takes the view that there is a table in this room. There is then no irrefutable proof of the existence of the table. All there is is an irrefutable proof produced by consciousness. No one can experience anything without intentionality. As it considers that there is a table in this room, my consciousness knows that it takes the view that there is a table in this room. It cannot be mistaken in this regard. Husserl thus asserts both the sovereignty of consciousness and the presence of the world as it gives itself to us.

Despite his expressed disappointment with Descartes, Husserl represents a variation (if a sophisticated one) on the theme of Cartesianism. Husserl, like Descartes, envisages the relationship between human beings and the world according to the following fundamental scheme: the subject who knows objects. Like Descartes, Husserl bases the uncontrovertible foundation of all understanding in

\textsuperscript{201} \textit{Id.}

\textsuperscript{202} \textsc{Edmund Husserl, Außsätze und Vorträge} (1911-1921), \textit{in XXV Husserlliana: Gesammelte Schriften} 276 (Thomas Nenon & Hans Rainer Sepp eds., 1987).

\textsuperscript{203} Letter from Edmund Husserl to Alexander Pfänder (January 6, 1931), \textit{in II Briefwechsel} 181 (Karl Schuhmann ed., 1994).
the indubitable sphere of consciousness. Like Descartes also, Husserl sees no external limit to the constitutive power of the subject.

Derrida disagrees with the basic tenets of Husserl’s phenomenological strategy. For him, the relationship between consciousness and the phenomenon calls for a radical reassessment. Derrida cannot agree with the idea that consciousness may have the kind of originary presence that Husserl postulates. He cannot, for instance, accept Husserl’s assertion, “I stand above the world.” There is, for him, an impossibility for consciousness to sit outside the world and to “process” it in the way that Husserl advocates. The relation between consciousness and phenomena is simply not what has been assumed: consciousness does not enjoy the privileged, Archimedean viewpoint it has been assigned.

An important aspect of Derrida’s argument involves his idiosyncratic notion of “text.” In the explanation that follows, Derrida accounts for his displacement of the conventional meaning of “text” (in the sense of the transcription of oral speech) to one connoting the webs of meanings within which one is always-already embedded—and which, as such, can no longer be reduced to a “sensible or visible graphical presence,” that is, does not consist of signifiers. The basic idea is that any experience, for instance, is structured just like a network of traces referring to something other than themselves—which is why it is apprehended as a text. But let me quote Derrida’s own explanation: “In order to sidle up to [aborder] a text, it would have to have a side [bord]. The question of the text, that which has been developed or transformed for a dozen years or so, has not only affected the side [bord] . . ., all these limits that shape the usual border of what one called a text, of what one thought to be able to identify under that word, that is, the end and the presumed beginning of a work, the unity of a body, the title, the margins, the signatures, the referential hors-cadre, etc. What happened, supposing it did happen, would be a kind of oversidding [débordement] manhandling all these cutting limits, forcing one to extend the accredited concept, the dominant notion of ‘text’ . . . . The text then oversides [déborde], but without blending them into an undifferentiated homogeneity, on the contrary complicating them . . ., all the limits that one had assigned to it until then, all that one wanted to

204 For a full examination of the relation between Derrida and phenomenology, including (importantly) an extensive consideration of the phenomenological inflections in Derrida’s thought, see Tilottama Rajan, Deconstruction and the Remainders of Phenomenology (2002). See generally Leonard Lawlor, Derrida and Husserl: The Basic Problem of Phenomenology (2002); Paola Marrati, Genesis and Trace (2005).
205 HUSSERL, KRISIS, supra note 79, at 155.
206 JACQUES DERRIDA, POSITIONS 87 (1972) [hereinafter DERRIDA, POSITIONS].
207 JACQUES DERRIDA, LA DISSEMINATION 294 (1972) [hereinafter DERRIDA, DISSEMINATION].
distinguish in order to oppose it to writing (speech, life, world, reality, history, what else, all the fields of reference, physical, mental—conscious or unconscious—political, economic, etc.). Whatever the (established) necessity of such an overside [débordement], 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!" Note that for all the centrality of his notion of "text," Derrida disclaims any "idealism," any "theology of Text." The idea that "voice" or, more importantly, "writing" (as the phonetic inscription of "voice") would ultimately allow access to the world (which suggests a distinction from the world) is not acceptable to Derrida. Indeed, for him it is not even that voice or writing—after him, let us now say "text"—will not allow access to the world according to a Husserlian or Husserlian-like framework. It is, more radically, that the very discrimination between "text" and "world" is untenable. Indeed, the world is but a text (again, this is because it—and everything in it—is structured like a network of traces referring to something other than themselves). The whole world is but a text. The implications of this statement are manifold.

Specifically, if the world is but a text, the idea that there could be unmediated access to the world "itself" or "as such" rapidly becomes unsustainable. Rather, Husserl's phenomenological strategy is itself textual and, as text, mediates access to the world, which means ultimately that access to the world is inevitably transacted through text. Another way of making this point is to say that there is no possibility for any consciousness to situate itself outside the text, for instance, outside its discourse, outside its language. Other consequences concern the challenge to the received idea of the dichotomy between "inside" and "outside" as regards consciousness's (allegedly constitutive) relation to the world. If the world is but a text, and since there is nothing but the world, it must follow that there is nothing that is outside the text. The idea that thought could be outside the world and constitute it from some external vantage point cannot hold. Thus, "if every we try to lay aside the enframing texts of Plato and Aristotle and look 'directly' at the things themselves of which they spoke, we will do so only through other frames, other horizons, other socio-historico-linguistic-political presuppositions." In other words, "there is no

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208 JACQUES DERRIDA, PARAGES 118-9 (2d ed. 2003) (emphasis original). This text was first published in 1979.
209 DERRIDA, POSITIONS, supra note 206, at 88.
210 DERRIDA, DISSEMINATION, supra note 207, at 290.
211 CAPUTO, supra note 12, at 80.
reference without difference, that is, without recourse to the differential systems—be they literary or mathematical—we have at our disposal.”

There is more, for Derrida’s statement also applies to that which one reads and interprets. Thus, not only is the reader or interpreter embedded in various sets of circumstances (traditional, cultural, and otherwise) but the interpretandum is also situated: there is no “act of absolute transcendence by means of which one lifts oneself out of one’s textual boots or peeks around behind the text to some sort of naked, prelinguistic, hors-textual, ahistorical, uninterpreted fact of the matter.” Derrida’s point is not so much that the interpreter brings to the text his referents and that the text itself has its referents—although he does advance this argument also—but that no referent is in the nature of “a pure transcendental signified.” Every signifier refers to other signifiers: one never gets to a signified that only refers to itself. In other words, “no one ever gets privileged access to the Secret that sits smiling behind all language and interpretation waiting for us but to knock; we are all in the same textual boat together, forced to do the best we can with such signs and traces as we can piece together, working out of one worldwide-web site or another.” Even self-understanding is acquired in context, for example in the context of a semiotic network into whose structure a meaning of “self” and a meaning of “understanding” have developed.

In his own words, Derrida’s task is to challenge “the calm assurance that leaps over the text towards its presumed content on the side of the pure signified.” Derrida’s argument about an inevitable referentiality and the inevitably referential character of this referentiality (the mise en abyme) means that on account of this endless substitutability there can be no unique or final meaning to the text. All that one can adduce is “the endless multiplication of folds, unfoldings, foldouts, foldures, folders, and manifolds.” Everything is divisible and each division is divisible in its turn—“there is no atom”—this process of self-differentiation stopping only when it is made to stop. Therefore, given that “repetitious structure” (from referentiality to

212 Id.
213 Id. at 79. One is reminded of Gadamer, supra text accompanying note 166. For the intersections between Derrida and Gadamer, see generally DIALOGUE AND DECONSTRUCTION (Diane P. Michelfelder & Richard E. Palmer ed., 1989); EMIL ANGEHRN, INTERPRETATION UND DEKONSTRUKTION (2003); GEORG W. BERTRAM, HERMENEUTIK UND DEKONSTRUKTION (2002); JEAN GRONDIN, LE TOURNANT HERMENEUTIQUE DE LA PHENOMENOLOGIE 103-18 (2003).
214 CAPUTO, supra note 12, at 80.
215 Id.
216 DERRIDA, GRAMMATOLOGIE, supra note 194, at 228.
217 DERRIDA, DISSEMINATION, supra note 207, at 301.
218 JACQUES DERRIDA, POINTS DE SUSPENSION 147 (Elisabeth Weber ed., 1992) [hereinafter DERRIDA, POINTS].
referentiality to referentiality and so forth) the "value of truth" no longer "dominate[s]." 219 Instead, there is an endless investigation which extends "as far as the eye can see." 220 This quest introduces "the stairway or escalade of truth, one truth about another, one truth on (top of) another, one above or below the other, each step more or less true than truth." 221 In Derrida's own words, "the non-truth is the truth." 222

Any reading that claims to be in a position to step outside the text in order to reveal its ultimate signified must be disqualified. This reading is but another text within an unstable network of texts and, as such, finds itself open to a reading, which will in turn be open to a reading, which... Yes, one is caught in "a tropological structure that circulates indefinitely upon itself through the incessant supplement of an extra turn." 223 There is, then, an "infinite network" that would require "an infinite analysis," "an interminable archeology" demanding "to continue for a long time." 224 This is the case on account of a "structural necessity inscribed in the text." 225

Note that if all is world and if there is nothing outside the world, and if whatever is is text, the idea of an "inside" of world or of text also falls apart. This is because the notion of "insideness" or "interiority" can only exist relationally. Without an "outside," there cannot be an "inside." To say that there is no "outside something" must mean that there is no "inside something" either (which entails that Derrida could just as well have asserted that there is no inside the text or, as he did in fact say, that "there is no out-of-context": each element of a context is itself a text with its context, and so forth). 226 If there is nothing outside the text, there is nothing inside the text either. Indeed, this conclusion makes sense if one remembers how Derrida sought to reject the idea of text as self-closure, as totality reverting to an ultimate signifying reason or a transcendental signified. Given the structure of the traces that constitute it, a totality cannot form itself. For the text to exclude closing and completeness means that its value as system must also be revisited. The conclusion follows (here with reference to a text from Plato that Derrida has subjected to detailed scrutiny): "In sum, I do not think that, in all rigour, there exists a Platonic text, closed-in on itself, with its inside and its outside." 227

219 DERRIDA, DISSEMINATION, supra note 207, at 194.
220 Id. at 231.
222 DERRIDA, DISSEMINATION, supra note 207, at 194. For a helpful reflection on "truth" for Derrida, see JACOB ROGOZINSKI, CRYPTES DE DERRIDA 93-130 (2005).
223 Id. at 290.
224 Id. at 233, 231, 233, 233 (respectively).
225 Id. at 252.
226 DERRIDA, LIMITED, supra note 192, at 252.
227 DERRIDA, DISSEMINATION, supra note 207, at 149.
Thus, Derrida is advocating an original and subversive topology of thought. He delineates a space where, strictly speaking, there is no longer an outside of thought or an inside of thought. The world is thought and thought is the world. And “every text is a text upon a text under a text.”228 The following excerpt shows how Derrida has moved a long way from Husserl and from Cartesianism generally: “The ‘subject’ of writing does not exist if one means by that some sovereign solitude of the writer. The subject of writing is a system of relations between layers: . . . mental, society, world. Within this scene, the punctual simplicity of the classical subject is nowhere to be found.”229 Elsewhere, Derrida adds to this thought: “What one calls the speaking subject is no longer he who himself or he who alone speaks. He comes to understand himself in an irreducible secondarity, an origin always already stolen from an organized field of speech in which he searches in vain for a place that is always missing.”230 The deflation of the epistemic primacy of the “I” is unmistakable.

2. “The activity or the productivity connoted by the a of différence refer to the generative movement in the play of differences. These did not fall from the sky and are not inscribed once and for all in a closed system, in a static structure that a synchronic and taxonomic operation would exhaust. Differences are the effects of transformations and from this point of view the theme of différence is incompatible with the static, synchronic, taxonomic, ahistorical, etc., motif of the concept of structure. But it goes without saying that this motif is not the only one to define structure and that the production of differences, différence, is not astructural: it produces systematic and regulated transformations . . . . The concept of différence even develops the most legitimate elementary demands of structuralism.”231

Just as he sought to distance himself from salient aspects of phenomenology, Derrida was always keen to distinguish his philosophical project from certain features pertaining to structuralism. Again, one can most usefully begin by outlining what it is that Derrida aimed to move away from. Let us first briefly return to phenomenology. Because Husserl was preoccupied with the things themselves and with the intentionality of consciousness, he was very attentive to lived experience, to concreteness. He assigned to subjectivity a marked predominance. For someone like Maurice Merleau-Ponty, a prominent phenomenologist writing in the 1940s and 1950s, a pure consciousness is idealistic and, as such, unconvincing.

228 GEOFFREY BENNINGTON & JACQUES DERRIDA, JACQUES DERRIDA 90 (1991). The words are Bennington’s.
229 DERRIDA, ECRITURE, supra note 179, at 335 (emphasis original).
230 Id. at 265.
231 DERRIDA, POSITIONS, supra note 206, at 39 (emphasis original).
Although Merleau-Ponty valued phenomenological inquiry (and would
deed pursue it in a very influential way), he was keen to incorporate
into his analysis a dialectical dimension that would distinguish meaning
uttered by the subject from meaning revealed by the object. It is
precisely on account of this approach that Merleau-Ponty was attracted
to a dialogue with the humanities and, specifically, with linguistics and
anthropology. For him, "signs one on one mean nothing, [rather] each
of them expresses not so much a meaning as it marks a gap in meaning
between itself and others."232 It is in that frame of mind that Merleau-
Ponty moved towards the anthropologist Claude Lévi-Strauss and,
indeed, defended Lévi-Strauss' program: "Social facts are neither
things nor ideas, they are structures . . . . Society is itself a structure of
structures."233 Under the direct influence of his friend and colleague
Roman Jakobson, a linguist exiled in New York during the war, just like
himself, and whose courses on the structure of phonology he attended,
Lévi-Strauss had only begun to develop an anthropological theory
which under the label "structuralism" would have enormous intellectual
impact.234

In important respects structuralism fell under the positivistic and
scientistic spell of Auguste Comte, the governing idea being that
knowledge was of interest only if it could borrow from a scientific
model or if it could transform itself into a science. For Lévi-Strauss, a
structure refers to the systemic organization of a group of elements
irrespective of their nature. To say of two groups of elements that they
have the same structure is to claim that these elements share a
systematic organization no matter how heterogeneous their domain. For
example, atoms might have the same structure as surnames. The idea of
"structure" also assumes that the behavior of a system depends on the
way in which the various elements relate to one another, once again
irrespective of their nature. Systems of numbers, myths, or whatever
can thus embody the same structure.235 Lévi-Strauss insists that there
can only be a structure if there is a system and if that system displays
internal cohesion. He adds that this cohesion cannot appear from the
observation of a system in isolation but can only emerge from a study of
other systems in which one finds similar properties even though these
systems may seem to differ in appearance.236 The key for Lévi-Strauss
lies in the notion of "transformation." For him, a system of signs, any
system of signs, is inherently transformable, that is, "translatable" in the

232 Maurice Merleau-Ponty, Signes 49 (1960).
233 Id. at 146-47.
234 The full story is told in I François Dosse, Histoire du structuralisme (1991) & II
Histoire du structuralisme (1992) [hereinafter I Dosse & II Dosse].
235 Claude Lévi-Strauss, Anthropologie structurale 306 (1958) [hereinafter Lévi-
Strauss, Anthropologie].
language of another system. To interpret is to move from one structure to another. It is important to insist that structures cannot be elicited through “mere” empirical observation. For Lévi-Strauss, the structure does not refer to the organization of a reality such as social relations in a given society. Structure is not concerned with the totality of the real. Rather, it is to be understood as having to do with a symbolic totality.

In one of his most famous books, Lévi-Strauss analyzed the basic structures of kinship. Everywhere he looked, he observed a distinction between two categories of members of the social group: possible partners and prohibited partners. Lévi-Strauss did not approach the question of incest as a matter of filiation or consanguinity (which had been the major angle of anthropological analysis up until then). For him, it was rather that sexual alliance is regulated by society. He saw sexual alliance as a social fact. Through this interpretive shift, Lévi-Strauss basically moved from nature to culture: all marriage customs were reducible to the great duality of the incest taboo where everyone is either a potential or a prohibited partner. He thus drew a formal analogy between the structures of family relations and those of phonology—which concerns the manner in which language organizes the phonic data in order to make it into a code able to convey nuances of meaning through phonic oppositions. Interestingly for Lévi-Strauss, phonology seeks to go beyond conscious linguistic phenomena. Rather than look at linguistic units in their specificity, it wants to seize them in terms of their internal relations. It introduces the idea of “system” and seeks to develop general laws. Family relations, for Lévi-Strauss, are structured like a language, that is, as an organization of series of distinct oppositions.

Viewed in this light, “structure” becomes the organization of a given domain of the lived world (like marriage) such as turns it into a symbolic system, that is, a means of communication and of production of intelligibility. This interest for linguistics—and specifically for language patterning—animated many other structuralist projects which emerged during the 1960s, for instance in the field of literary criticism. The various structuralist templates all had defining features in common in as much as they all took the view that meaning is linked to the workings of the structure and to the positioning of the various elements constitutive of the structure. The process, thus, was resolutely formalist and allowed no room for either metaphysics or empiricism. Because structure deprives human beings of the traditional attributes associated with the subject, it was said to amount to a kind of anti-humanism. Ironically, structuralism was criticized for allowing structures to feature

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237 Id. at 29.
238 LEVI-Strauss, ANTHROPOLOGIE, supra note 235, at 305.
239 CLAUDE LEVI-Strauss, LES STRUCTURES ELEMENTAIRES DE LA PARENTÉ (1947).
precisely the kind of transcendentality that it had wanted to eschew. To be sure, Lévi-Strauss looked for the common element of all cultures, the single principle that would hold together the apparently disparate features of all cultures. The idea of “exchange” was the type of all-encompassing notion Lévi-Strauss sought to circumscribe and, ultimately, trace to universal structures embedded deep in the human mind. For example, marriage constituted a fundamental form of exchange. Exchange, in turn, was regarded as a form of reciprocity that served to overcome hostility.

Acknowledging the metaphorical sense in which he uses “structure,”240 Derrida takes the view that the idea is salvageable: “We do not have to bin [this] concep[t] and in any event we cannot afford to do it.”241 For him, “all depends on the work one assigns to [structure].”242 All the same, Derrida directs two major objections at structuralist thought. They concern the nostalgia displayed for a lost human wholeness, on the one hand, and the binary oppositions (the legitimate and the forbidden, reciprocity and hostility, etc.) which structuralism depends upon and fails to sustain, on the other.

The first objection is directed at structuralism’s quest for the invariant element among differences. For Lévi-Strauss, differences are rarely more than superficial. His discourse is animated by an effacement of difference: “Everyone’s favourite uncle, in Lévi-Strauss, is abstracted into the avunculate, which is a characteristic trait of an elementary structure of more complex systems of sociality.”243 To study the Nambikwara, for example, does not mean to take an interest in their difference or singularity but to show how they are “like” the rest of mankind and how they properly belong to humankind.244 Over against Lévi-Strauss’s purported universalism, Derrida wants to draw attention to the contingency of history and to the specificity of the signifier. Roland Barthes’s work, though belonging to a line of descent from structural anthropology, offers a “parody” of structuralism that sets the tone.245

In his S/Z, published in 1970, Barthes mocks what the analysts of narrative have been attempting: “to see all the world’s stories (there are and there have been ever so many) within a single structure: we shall, they thought, extract from each tale its model, then out of these models we shall make a great narrative structure, which we shall reapply (for verification) to any one narrative: an exhausting... and ultimately

240 See DERRIDA, ECRITURE, supra note 179, at 28.
241 DERRIDA, POSITIONS, supra note 206, at 35.
242 Id.
244 See DERRIDA, GRAMMATOLOGIE, supra note 194, at 168.
245 CATHERINE BELSEY, POSTSTRUCTURALISM 44 (2002).
undesirable task, for the text thereby loses its difference."246 Barthes continued: "One must therefore choose: either place all the texts in a demonstrative to-and-fro, equalize them under the eye of an in-different science, force them to join inductively the Copy from which one shall then derive them; or . . . gather [each text] even before it is discussed, within the infinite paradigm of difference."247 Here, Barthes is arguing a point that Jean-François Lyotard would, more or less at the same time, make even more succinctly as he (famously) referred to "the incredulity vis-à-vis meta-narratives."248 The following comment is apposite: "Suddenly, the grand claims of structuralism appear absurd. Once you have found the single determining structure, there is nothing to choose between the universe and a bean. The microcosm simply becomes an illustration of the general pattern, another instance of the same—thrilling for the system-builders, but then what? What can further investigation discover? Only endless repetition. The big questions have been answered in advance."249 When Barthes refers to an "in-different science," he means, of course, "in-different because undifferentiating, but also indifferent because in the end apathetic, bored."250 After all, who could be attracted for any length of time by what is, from the cognitive viewpoint, the least rewarding of all possible situations, namely consensus, the "no-problem" state?

One important difficulty, though, follows from the obsolescence of meta-narratives and it is that the dispersion into so many local manifestations whose idiomaticity and heterogeneity challenge communicability makes governance—which has depended and continues to depend to a large extent upon a logic that assumes the commensurability of local elements and the ultimate determinability of the whole as whole—singularly inefficient. "The system" is no longer performing. The reaction of "the powers that be" (intellectual, "scientific," or otherwise) is well captured by Lyotard who, referring to the imposition of a certain "terror," "whether soft or hard,"251 has the globalizers de tout poil—the frequent flyers and the frequent surfers, the frequent faxes and the frequent e-mailers—proclaim: "Be operational, that is to say, commensurable, or disappear."252

To return to Derrida's first preoccupation with structuralism (which, incidentally, manifested itself as early as 1963),253 he is concerned, then, to rehabilitate "difference." As I have mentioned, this

247 Id.
249 BELSEY, supra note 245, at 43.
250 Id. at 44.
251 LYOTARD, supra note 248, at 8.
252 Id.
253 IL DOSSE, supra note 234, at 30.
is emphatically not to say that he rejects all of structuralism’s contributions. Indeed, Derrida has very positive things to say about structuralism, which he notes “consists first in an adventure of the gaze, a conversion in the way to ask questions before any object.”254 Derrida’s position is, thus, intricate. As has been said, his is rather a “historicized or epistemological structuralism.”255 Derrida’s goal is to transform a complex text, to dismantle it so as to elucidate its inherent oppositions and discontinuities. In as much as his thought bears on that which has been constructed, that which has been constituted, Derrida’s project recalls the hard core of the structuralist paradigm. But, unlike the structuralists who focus on structural regularities or invariants, Derrida insists on dysfunctionalities. In this sense, Derrida radicalizes the idea of a structurality of the structure by introducing a constant decentering such that nothing is extra-structural. He remains faithful to the place attributed to the hidden side of the text, but explodes the reference to a structural center, to the unity of a structuring principle. There is, if you like, a “dissemination” effect at work. Everything is now structure and any structurality is an incessant play of dysfunctionalities.

Consider a text. For Derrida, every text is a double text—and it is a kind of proton pseudos, or primal falsehood, to assert otherwise. This is why he writes that “[he] would like to guide us towards the thought of the thread and of the interlacing”—two heterogeneous motifs, incidentally, which disturb the ideas of invariance and totality.256 There are, then, always two-texts-in-one: “Two texts, two hands, two gazes, two auditions. Together at once and separately.”257 The orthodoxy retains the first, and the first only, of these two-texts-in-one. It focuses on the apparent text. This text is written under the authority of presence, of meaning, of reason, and ultimately of truth. The second text—which is the same, yet another text—is that which orthodoxy never deciphers. This is the hidden text. It is important to see that the privilege granted the first text is not a natural superiority but a traditional prioritization (often exercised violently). Derrida insists on this point: “We are not dealing with the peaceful coexistence of a vis-à-vis but with a violent hierarchy. One of the two terms commands to the other (axiologically, logically, etc.), occupies the higher ground.”258 The supremacy of the first text rests on fact; it is not grounded in law. And, says Derrida, the first text, the one that the orthodoxy will agree to

254 DERRIDA, ECRITURE, supra note 179, at 9.
255 Il DOSSE, supra note 234, at 14.
256 JACQUES DERRIDA, LA VERITE EN PEINTURE 24 (1978) (emphasis original) [hereinafter DERRIDA, VERITE].
257 DERRIDA, MARGES, supra note 58, at 75.
258 DERRIDA, POSITIONS, supra note 206, at 56-57 (emphasis original).
read, shows traces gesturing towards the second text (which are, of course, more or less conveniently overlooked). Between the two texts, no synthesis is possible; no fusion in one text is practicable: any reconciliation through an elimination of the two texts' difference is doomed.

Let us turn to the following example borrowed from a question put by Derrida. Assume a text that would say: "In order to approach the Greek king, he pretended to speak Greek." The orthodox or first reading, operating on the basis of the apparent text, would conclude that the individual was simulating an ability in the Greek language. The other text, the hidden text, the second reading, would claim that this simulation was in effect the simulation of a simulation. In other words, as he pretended to be speaking Greek, the individual was in fact speaking Greek. So, it is not so much that he was pretending to speak Greek (text #1), but that in order to pretend speaking Greek he was really speaking Greek or pretending that he was pretending (text #2). What text #1 overlooks is that the character is effectively speaking Greek. But this fact cannot be reconciled with text #1. In other words, one cannot reconcile "pretending to speak Greek" and "speaking Greek." Yet there is only one text, one action, one narrative. What we have is difference in the sense that the two texts do not coincide within the one text that they are. Assumed univocity hides equivocality or a hidden difference. It is the inherent duplicity of the text that makes possible the act of transgression from the manifest to the hidden text. There is a clear sense in which such transgression is literally justified (which is peculiar for an act of transgression and which sends us back to equivocality). The identity of the text cannot lie in its univocity. What that text is requires its equivocality, demands that the differentiation of meanings be regarded as constituting an integral part of it, as being it. Text #2 does not lie outside the text. The idea that the text would be a whole and that outside the text (i.e., outside the whole) there would be text #2 is untenable. If the text is a whole, text #2 must be nothing (since outside the whole there can only be nothing). If text #2 is something rather than nothing, it reveals the fissure in the whole, the fault line in the whole. A whole that tolerates a text #2 admits that it was missing something within itself. The logic of the supplement (say, text #2) does not mean that the supplement comes from the outside to add itself to the whole as an exteriority being integrated "within." Rather, the outside is inside in that what is being added is the fault of that to which it is being added and that fault is inside.

259 DERRIDA, ECRITURE, supra note 179, at 133.
260 See DERRIDA, GRAMMATOLOGIE, supra note 194, at 308.
This difference—what Derrida calls “a displacement at once minute and radical”\textsuperscript{261}—is irreducible. It is not, however, in any way negative. On the contrary, it is structurally empowering as it makes the text dynamic, open, and plural. More abstractly perhaps, but no less significantly, difference is not the mirror image of identity (which, if it were, would make it dialectically “identical” to identity). “To pretend” here marks a difference between simulation (masquerading as Greek) and veracity (really, actually speaking Greek) even as it simultaneously erases that difference since the verb refers at once to the simulation (expressly) and to the veracity (implicitly). Thus, the verb embeds difference within the text at the same time as it suppresses it: the difference between difference (masquerading/speaking Greek) and non-difference (one word: “pretend”) is at once there (two texts) and not there (one word). This point is crucial for Derrida as it encapsulates the debate between a philosophy of presence and a thought of non-presence. Derrida puts it thus: “this privilege of the now-present defines the element itself of philosophical thought, it is the evidence itself, thought conscious of itself, it commands over any possible concept of truth and meaning. One cannot doubt it without beginning to enucleate consciousness itself from an elsewhere of philosophy that removes any possible security and foundation to discourse.”\textsuperscript{262} As Derrida adds, “it is around the privilege of the actual present, of the now, that this debate, which cannot resemble any other, plays out in the last analysis, between philosophy, which is always a philosophy of presence, and a thought of non-presence, which is not inevitably its opposite nor necessarily a meditation on negative absence.”\textsuperscript{263}

For Derrida, the matter of interpretation is about “deciphering the law of [the texts’] internal conflicts, of their heterogeneity, of their contradictions.”\textsuperscript{264} Accordingly, it has become impossible to maintain the strategy whereby “one seeks to determine one meaning through a text, to decide it, to decide that it is a meaning and that it is meaning, posited meaning, positable and transposable as such, a theme.”\textsuperscript{265} This is to say that “the choice does not choose between control and no-control, mastery and no-mastery . . . . It is rather a question, and the ‘logic’ is other, of a ‘choice’ between many configurations of mastery without mastery.”\textsuperscript{266} One implication follows, and it is that it may be impossible to decide which meaning is “true.” Thus, Derrida’s reflection on Nietzsche and women leads him to conclude that “the

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\item \textsuperscript{261} DERRIDA, MARGES, supra note 58, at 15.
\item \textsuperscript{262} DERRIDA, VOIX, supra note 196, at 70 (emphasis original).
\item \textsuperscript{263} Id.
\item \textsuperscript{264} DERRIDA, MARGES, supra note 58, at 362.
\item \textsuperscript{265} DERRIDA, DISSEMINATION, supra note 207, at 276.
\item \textsuperscript{266} JACQUES DERRIDA (with BERNARD STIEGLER), ECHOGRAPHIES 46 (1996).
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question of woman suspends the decidable opposition between the true and the not-true, . . . disqualifies the hermeneutical project postulating the true sense of a text.” The idea that a text could “produce” truth in the sense of one truth that would be there, that would be present in its fullness is objectionable to Derrida. Nothing is ever “simply present or absent.” “There is therefore not a truth in itself, but in addition, even for me, of me, truth is plural.”

Derrida’s second objection to structuralist thought—that having to do with the binary oppositions—may perhaps be illustrated through his reply to Lévi-Strauss. In Tristes tropiques, published in 1955, Lévi-Strauss claims that the Nambikwara are a people without writing. But for Derrida the very idea of a pre-writing innocence of the Nambikwara shows the profoundly ethnocentric character of Lévi-Strauss’s ethnology. Thus, the anthropologist’s refusal to concede “the dignity of writing to the non-alphabetical signs” produced by members of the tribe reflects an ethnocentric idea of writing. Lévi-Strauss’s “binarism” also surfaces as he wishes to establish that while other (i.e., U.S.) explorers believed the Nambikwara to be “bad”—a “regrettable description,” the result, no doubt, of an ethnocentric projection—he, Lévi-Strauss, by way of counterpoint, makes the case that the Nambikwara are good. But, for Derrida, no matter how anti-ethnocentric Lévi-Strauss’s ethnology purports to be, it is but another demonstration of ethnocentric bias. Indeed, Derrida claims that Lévi-Strauss’s ethnocentrism is even deeper and more irreducible given that it thinks of itself as being anti-ethnocentric. “One will seemingly be avoiding ethnocentrism at the very moment when it will have operated in depth silently imposing its current concepts of speech and writing.”

This argument against conceptual oppositions that would be clear and distinct—in sum, this anti-Cartesianism—possibly finds its most celebrated expression in the word “différence,” a neologism created by Derrida in 1968. At the outset, it must be said that this word, perhaps inspired by the psychoanalyst Jacques Lacan, allows Derrida to

267 DERRIDA, EPERONS, supra note 188, at 86.
268 DERRIDA, POSITIONS, supra note 206, at 38.
269 DERRIDA, EPERONS, supra note 188, at 83 (emphasis added).
271 DERRIDA, GRAMMATOLOGIE, supra note 194, at 161.
272 LÉVI-STRAUSS, supra note 270, at 334.
273 Id. at 334-36.
274 DERRIDA, GRAMMATOLOGIE, supra note 194, at 175.
275 Id. at 175-76.
276 Id. at 178.
277 A measure of the fame that this term would acquire is the fact that “différence” was introduced in 2001 in what is widely regarded as the most important contemporary dictionary of the French language: II LE GRAND ROBERT DE LA LANGUE FRANÇAISE, vbo “différence” (Alain Rey ed., 2d ed., 2001).
278 I DOSSE, supra note 234, at 301.
marginalize Lévi-Strauss's thesis, which had argued in favor of the supremacy of phonology. "Différance," for Derrida, shows that there is no phonological writing and indeed calls into question the supremacy of speech over writing.\(^{279}\) Here, "writing cannot be seen as simply the representation of speech."\(^{280}\) In French, "différance" is pronounced exactly like the familiar "différence." Unless it is written, unless, that is, the "a" of "différance" is actually visible, there is no way for the listener to know that this word is meant rather than "différence." But what does "différance" purport to capture?

Again, the basic aim is to fight the ready tendency, inherited from the philosophical tradition, to look for clear and distinct ideas. Thus for Derrida, the notion of "intelligibility" as such is untenable. According to him, "intelligibility" only makes sense as it differs from "sensibility"; it is, if you will, "differed" sensibility. Likewise, a "concept" is but "differed" intuition, that is, it makes sense as it "differs" from "intuition." And "culture" is differed "nature": it makes sense as it "differs" from "nature."\(^{281}\) Derrida notes that "one could thus take back all the couples of oppositions on which philosophy is built and out of which our discourse still lives to see in them not the effacement of opposition but the announcement of a necessity such that one of the terms appears as the différance of the other, as the other differed into the economy of the same."\(^{282}\) Although heterogeneity remains, the opposition, if you like, is then suspended: "When one says différance, one says something else than opposition."\(^{283}\) "Différance," then, as it refers to the act of "differing from," surpasses the logic of opposition which, for Derrida, is a dialectical logic and, therefore, ultimately a logic of sameness. It suggests, because "différance" also connotes the idea of "deferment" (the French verb is "différer"), the idea of a difference "on the move," a difference that is always apprehended dynamically, that is alive, that is being constructed, that is being constituted and that is not yet constituted. For example, there is always a differed relation between the statement and the later interpretation: meaning is therefore built on a separation between the signifier and the signified, which entails that "an element can only operate or signify, can only acquire or ascribe 'meaning' by referring to another element past or future in an economy of traces."\(^{284}\) Thus, "a text always has many

\(^{279}\) JI DOSSE, supra note 234, at 49-50. For Derrida's argument against the prioritization of speech, see DERRIDA, VOIX, supra note 196 passim.

\(^{280}\) JONATHAN CULLER, ON DECONSTRUCTION 97 (1982).

\(^{281}\) DERRIDA, MARGES, supra note 58, at 18.

\(^{282}\) Id.

\(^{283}\) JACQUES DERRIDA (with PIERRE-JEAN LABARBIERE), ALTERITES 83 (1986) [hereinafter DERRIDA, ALTERITES].

\(^{284}\) DERRIDA, POSITIONS, supra note 206, at 40.
ages and reading must resign itself to this.”

Moreover, still on the matter of temporality, a text, any text, is always already inscribed within a consecution. This is what Derrida calls the “logic of obsequence”: no text being first, every text is a text that follows.

Elsewhere, Derrida refers to “a quasi-logic of the ghost that one ought to substitute, because it is stronger, to an ontological logic of the presence.” In order to illustrate his point that “everything begins before it begins,” Derrida starts one of his best-known books with these words: “I shall speak, therefore, of a letter.” This is what Derrida calls “un coup de done”—”done” being the French for “therefore,” a translation might read “a stroke of therefore.”

“Différence” is, thus, a productive idea. Indeed, “différence” is infinite such that much that is “differed” will never in fact be captured. In this regard, Derrida’s theory stands opposed to the static state of structuralism. For Derrida, the way in which “différence” points to a process shows that the act of distinguishing, regarded as one of the foundations of rationality, is inoperative. Looking like a “concept” of “indistinction,” “différence” is, in effect, a figure of anti-conceptualism, that is, an example of resistance to definition, to analysis, and to distinction.

It must be said that Derrida does not claim full credit for this linguistic innovation. For example, he explicitly grants Heidegger a key role: “Nothing of what I am attempting would have been possible without the opening of Heideggerian questions . . . , without the concern for what Heidegger calls the difference between Being and being.”

There is also a discernible influence from the linguist Saussure for whom language is a system of differences in as much as no one term has value in itself, but only in its difference from surrounding terms.

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285 DERRIDA, GRAMMATOLOGIE, supra note 194, at 150.
286 JACQUES DERRIDA, GLAS 134 (1974) [hereinafter DERRIDA, GLAS].
287 JACQUES DERRIDA, FORCÉ DE LOI 68 (1994) [hereinafter DERRIDA, FORCÉ DE LOI].
289 DERRIDA, MARGES, supra note 58, at 3 (emphasis added).
290 Id. at xxv (emphasis original). For another example of a “stroke of therefore”, see supra text accompanying note 269.
291 See DERRIDA, GRAMMATOLOGIE, supra note 194, at 38.
293 DERRIDA, POSITIONS, supra note 206, at 18. Referring to the university town where Heidegger lived and taught for most of his academic life, Derrida writes that “one cannot bypass Freiburg.” DERRIDA, CARTE POSTALE, supra note 17, at 70. Elsewhere, Derrida presents Heidegger as his “contremaitre” or “foreman.” JACQUES DERRIDA (with CATHERINE MALABOU), LA CONTRE-ALLEE 57 (1999). The French word connotes the idea of a “master” (as in “maître”) but also, and more sophisticatedly, the notion of a master against whom (“contre”) one thinks and writes. For the connections between Derrida and Heidegger, see HERMAN RAPAPORT, HEIDEGGER AND DERRIDA (1989).
294 See DERRIDA, POSITIONS, supra note 206, at 28, where Derrida salutes Saussure’s powerful anti-metaphysical moves.
Any signifier or any signified thus has an identity that is only relative or differential. It exists only to the extent that it can distinguish itself from others that are close to it. (Saussure goes so far as to say that in language “there are only differences without positive terms.”)²⁹⁵ For Saussure, therefore, difference lies at the root of any conceptualization, of any significance, of any discursivization. This commentary is helpful: “Rather than thinking of language in the classical way, as a set of exterior signs of already constituted interior thoughts . . . , Derrida, following Saussure and modern linguistics, thinks of users of language invoking coded, that is, repeatable, marks or traces that build up or constitute from within certainunities of meaning as ‘effects’ of the code. These traces are not inherently meaningful in themselves but ‘arbitrary’ and ‘conventional’. Thus it makes no difference whether you say ‘rex,’ ‘roi,’ or ‘king’ so long as ‘we’—those who share these conventions—can tell the difference between rex and lex, roi and loi, and king and sing. The meaning—and reference—is a function of the difference, of the distance or the ‘spacing’ between the traces . . . . A serious dictionary is a good sober example . . . of the differential spacing within which, by means of which, all the users of the language make what sense they are able to make.”²⁹⁶ This is because “[a] word has a ‘place’ in a dictionary . . . , which is a function of its graphic setting (its spelling), but also a semantic place or setting, a position, a range of connotation and denotation relative to other words (places) in the language.”²⁹⁷

There is one other point, which it is essential to note. If one accepts, with Derrida, that “[i]n order to define any term or designate any entity as itself, we set it apart from . . . some other that is excluded from it (what is male is not female, for instance),”²⁹⁸ one must also see that “just by this operation, . . . we make the first term depend on the second and on the relation between them: whatever thinking seeks to exclude leaves its trace in the place from which it has been expelled.”²⁹⁹ It follows that “[t]his unsought addition makes otherness persist wherever sameness seeks to emerge, producing an enduring uncertainty at the heart of every attempt to achieve either logical coherence or consistent self-identity.”³⁰⁰ If, say, a concept “can be what it is supposed to be only in distinguishing itself from another term that it adds to itself,”³⁰¹ one is “le[d] to the recognition of a certain

²⁹⁵ FERDINAND DE SAUSSURE, COURS DE LINGUISTIQUE GENERALE 166 (Charles Bailly, Albert Sechehaye & Tullio de Mauro eds., 3d ed. 1995) (emphasis original).
²⁹⁶ CAPUTO, supra note 12, at 100-01.
²⁹⁷ Id. at 100.
²⁹⁸ SEIGEL, supra note 117, at 635.
²⁹⁹ Id.
³⁰⁰ Id.
irreducibility of the [o]ther with respect to the self.”

Indeed, “since what a being that seeks self-identity always finds is its own inner division, . . . it must erase itself in order to constitute the independence from otherness it seeks.” (Thus, the possibility of “autonomous” meaning is seen to connect, ultimately, with the idea of impossibility of meaning.)

In Derrida’s own words, “the play of differences indeed assumes syntheses and referrals that prohibit that at any moment, in any sense, a simple element be present in and of itself and refer only to itself. Whether it be in the order of the spoken discourse or the written discourse, no element can function as sign without referring to another element which itself is not simply present. This sequence means that each ‘element’ . . . constitutes itself from the trace in it of other elements of the sequence or system. This sequence, this fabric, is the text which produces itself only in the transformation of another text. Nothing, either in the elements or in the system, is anywhere or ever simply present or absent. There are only, through and through, differences and traces of traces.” Thus, “there is no ethics without the presence of the other but also and therefore without absence, dissimulation, detour, différance, writing.” Importantly for Derrida, despite the profound impact of the Saussurean influence, “différance is not restricted to language but leaves its ‘mark’ on everything—institutions, sexuality, the worldwide web, the body, whatever you need or want . . . [H]e is arguing that, like language, all these structures are marked by the play of differences.”

“[T]he whole thrust of . . . différance is to show that . . . we do not have access to over-arching, trans-historical, transcendent, ontological, universal structures. We are, if there is anything at all to différance, always stuck where we are, in the middle of the play of traces, in certain historical (and social, sexual, political, etc.) webs or networks.” “Différance” makes a cut in “something that pretends to be one and whole.” This last point is important. As Derrida emphasizes, “[différance] rules nothing, reigns over nothing and exercises no authority anywhere. . . . Not only is there no kingdom of différance but it foments the subversion of all kingdoms. This is what makes it obviously threatening and infallibly feared by everything within us that desires a kingdom, the past or future presence of a

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302 Id. at 187.
303 SEIGEL, supra note 117, at 636.
304 DERRIDA, POSITIONS, supra note 206, at 37-38 (emphasis original).
305 DERRIDA, GRAMMATOLOGIE, supra note 194, at 202 (emphasis original).
306 CAPUTO, supra note 12, at 104 (emphasis original).
307 Id. at 175-76, referring to DERRIDA, GRAMMATOLOGIE, supra note 194, at 233.
308 CAPUTO, supra note 12, at 194.
It is precisely because of the way in which it purports to subvert all kingdoms that the law of difference can be said to be "cruel" (meaning here, after Artaud, "necessary").

Whether Derrida is arguing against univocity or against clear and distinct oppositions, he is contesting the legacy of Cartesian metaphysics by showing that these "limits" are not externally imposed, but rather are endemic to the endeavor of understanding itself. As he opposes the ideas of unfolding meaning, of continuing meaning, of stable meaning, Derrida is marking a distance from Gadamerian hermeneutics, which he regards as too closely aligned with the metaphysical project. Derrida cannot accept the search for a deep truth in language, the idea of a Platonic-like quest for one ideal meaning that will eventually permit authentic understanding. Thus, Derrida can only disagree when Gadamer writes as follows: "One must look for the word that can reach another person. And it is possible for one to find it; one can even learn the language of the other person. One can cross over into the language of the other in order to reach the other. All this is possible for language as language." For Derrida, these ideas remain too close to the notion of a transcendental, meta-linguistic standpoint. Unlike Gadamer, Derrida cannot allow for meaning emerging in an event of mutual understanding: "I never cease to decapitate meta-language or rather to plunge its head back into the text." Indeed, the very idea of "dialogue"—which assumes that the two interlocutors are speaking the same language—makes Derrida uncomfortable and prompts him to assert that he prefers the idea of negotiation. This is not to deny the ideas that unite Derrida and Gadamer around an anti-positivist stance. And, of course, Derrida would agree with Gadamer that when it comes to language, the individual is not in charge and that, if anything, it is rather the other way around. Yet, ultimately, Gadamer impels one "to recognize one's own in the alien," while for Derrida "the same is the same only by being sensitive to the other."

3. "I am in search of the good metaphor for the operation that I am pursuing here. I would like to describe my motion, the posture of my
body behind this machine. . . . I am therefore looking for the good motion. . . . I see . . . a kind of dredging machine. From the cabin of a crane, hidden, small, closed, glassed-in, I handle levers and from afar, I saw it done in Saintes-Maries-de-la-Mer at Easter, I plunge a mouth of steel in the water. And I dredge the bottom, catch stones and algae that I bring to the surface in order to lay them on the ground while the water quickly falls back from the mouth. And I begin again to scrape, to rake, to dredge the bottom of the sea. . . . The toothed matrix gets out only what it can, algae, stones. Bits, since it bites. Loose. But the rest seeps through the teeth, the lips. One does not take the sea. It always closes itself again. It remains. There, equal, calm. Intact, impassive, always virginal."

Beyond phenomenology à la Husserl and structuralism à la Lévi-Strauss, Derrida’s “good metaphor” illustrates how he envisages the role of deconstruction—the post-phenomenological and post-structuralist philosophico-literary movement that he has come to embody. Although it is customary to refer to “deconstruction” generically, Derrida emphasizes that there is not “one” deconstruction but “many original configurations.” Moreover, deconstruction is not a method in the sense that it does not programmatically provide for a set of regulated and calculated procedures that would organize a priori every experience of reading or interpretation with a view to predictability or at least foreseeability. “Deconstruction is inventive or it is not.” (Indeed, deconstruction requires that the idea of “method” itself be deconstructed.) Rather, it allows for interpretations and transformations of the text that are so many events, that is, it generates new and surprising readings. Deconstruction is about an encounter with something, with something else in a way which, on every occasion, intimates an assumption of responsibility to the reader who must answer for his interpretation. This is one key sense in which a deconstructive interpretation is “affirmative.”

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319 DERRIDA, GLAS, supra note 286, at 228-29.
322 DERRIDA, DISSEMINATION, supra note 207, at 303.
323 JACQUES DERRIDA, PSYCHE 35 (2d ed. 1998) [hereinafter DERRIDA, PSYCHE 2d].
324 DERRIDA, EPERONS, supra note 188, at 28.
always mobilizes the openness of experience against the closure of conceptual reason."  

One is not concerned, of course, with “experience” as it would involve a completely self-sufficient or integral or unified or coherent subject harboring interior depth, a subject who would remain identical “beneath” his action, who would remain identical “behind” his quest for meaning. Indeed, Derrida gives short shrift to “experience” thus apprehended—the phenomenological idea that “experience” should be confined to encountering “meaning”—which he regards as a transcendental or metaphysical concept. He rejects “experience” (so understood, at least) as a “most troublesome” notion that entails a relationship with a necessary self-presence of mental states adverting to that which presents itself to the mind (an immediacy of the “self” to the “self” and an immediacy of the “self” to the “thing”). For Derrida, any idea of “experience” that would revert to an epistemic privileging of the inner life is unsustainable. Rather, “the relation to self can only be one . . . of différence, that is to say, of alterity or of trace.” In other words, “self-experience is above all the indication of the necessity of self-representation and its differential structure. There exists no interior self-consciousness without an exterior appearance of the subject in pronouncements, gestures, activities, and so on. The subject experiences its own self only by means of these expressions. . . . This is all to say that the subjective self must be understood as difference. ‘Difference’ refers to an irreconcilable opposition, an irresolvable tension, the unending postponement of any definitive decision. I am what I now am, and what I now am will only appear afterwards.” And there is also the fact that “the subject’s coherent selfhood is a perpetually deferred difference from the objects that are its others, . . . the world of fluid and unstable existence whose trace remains forever a part of its constitution.” In other words, “[I]ike every other sign, ‘I’ is an abstract term whose reference can never be limited to any particular object. It follows that no instance of ‘I’ ever succeeds in separating any distinct person from the sea of others who are not itself.”

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325 Jay, supra note 131, at 366.
326 Derrida expressly disclaims this understanding. See Derrida, Positions, supra note 206, at 42.
327 Derrida, Grammatologie, supra note 194, at 89.
328 Derrida, Points, supra note 218, at 27; see also Derrida, Marges, supra note 58, at 16.
329 Rudolf Bernet, The Other in Myself, in Deconstructive Subjectivities 178-79 (Simon Critchley & Peter Dews eds., 1996) (emphasis original).
330 Seigel, supra note 117, at 637.
331 Id. at 638.
Thus, it is “presence” or “presence of being” (of the “object” to the “subject” and of the “subject” to itself) that is questioned by the thought of différance. And the idea that the “first person” could act as the ground of culture or as the out-of-the-world framework within which the world can be thought is, then, utopian. Rather, “experience” is a (discursive) consequence or effect of the ways in which culture (thus, language) has constituted and transformed individuals into thinking subjects of a particular kind. In Paul de Man’s words: “instead of containing or reflecting experience, language constitutes it.”332 The deflation of the epistemic primacy of the “I” is key if only because “signifying items are characterized by relationships and structures that deprive them of the stability, or ‘self-identity’, that would enable them to be grasped by a reflecting subject.”333

But there can be an “experience” that resists location in the fully integrated self, an “experience” that arises from a de-centering of the self, that is, an “experience” that allows for the insight that the other inhabits (or at least haunts) the self—in other words, an “experience” that is not so much “lived” as “endured,” what Derrida refers to as an “experience” that is “adventurous, perilous, enigmatic, nocturnal and pathetic,”334 what has been called by a literary critic an “experience of the limits,”335 what Derrida himself has termed “an experience of the impossible.”336 The “impossibility” at issue is, at the very least, that which relates to the unrepresentability and unrepresentability of meaning,337 for “the thing itself always slips away.”338 “‘Representation’ . . . , the making present of an object to the mind, is always ‘re-presentation’ . . . , the bringing back into presence of a sign that has been employed in some other relation before. Try as we may, therefore, we can never achieve the full presence of an object to consciousness . . . . No sign can refer to something in the present save by making a detour into the past. As this past recedes from us, so has it always receded from our discursive predecessors; objects can never be represented in the sense of being ‘brought to presence’ without being represented, referred to some prior state that remains forever un(re)presentable as such . . . . [W]e can never establish the reality of any object we represent to consciousness, since it can appear to us only

334 DERRIDA, ÉCRITURE, supra note 179, at 55.
335 PHILIPPE SOLLERS, L'ÉCRITURE ET L'EXPERIENCE DES LIMITES (1968).
336 DERRIDA, FORCE DE LOI, supra note 287, at 35.
337 See CAPUTO, supra note 12, at 32-33 (emphasis original).
338 DERRIDA, VOIX, supra note 196, at 117.
as the return of something else.” In Derrida’s own words, any attempted restitution of meaning is doomed to failure: “One must not reconstitute anything.”

There is, then, another way to speak of “experience,” which allows Derrida (revealing an “ambivalent relationship to the vocabulary of existential phenomenology”) to concede that it remains possible to refer to the subject albeit through a “restructured discourse.” Philippe Lacoue-Labarthe, in his moving book on Celan, defends “experience” not as pointing to something “lived” or something in the nature of an “anecdote,” but as implying—which it does etymologically—“getting across danger”—an “épreuve.” As he puts it: “Erfahrung” rather than “Erlebnis”. Derrida does likewise when he resorts to an idea of “experience” that is meant to overwhelm the centered subject. “Experience” becomes self-difference. In other words, “experience” serves to undermine the idea (and, within the Husserlian tradition, the ideal) of a fully self-sufficient subject. “Experience” thus becomes a “correlate” of the notion of “dispersal of authorial power.” Deconstruction, then, is “nothing other than experience regained.” It is “the experience of experience.”

To claim that deconstruction is about experience as “épreuve” and to argue that it does not constitute a method is not to say, however, that there are not “certain directions for use.” Perhaps the most basic such “guideline” is to appreciate that deconstruction is not a transcendental gesture: “différance,” for Derrida, “bars any relation to the theological.” It is emphatically not a thought “from above” in that it does not purport to intervene within the text it considers from an “elsewhere” that would be located outside the text. Rather, the deconstructive streak is inscribed within the text itself (perhaps it may help to think of a computer virus—indeed, Derrida writes that “the virus will have been the only object of [his] work”). It is the text itself, the words themselves that are always inherently concealing their inherent

339 SEIGEL, supra note 117, at 636-37.
340 DERRIDA, VERITE, supra note 256, at 436.
341 RAJAN, supra note 204, at 103.
342 See DERRIDA, POINTS, supra note 218, at 288-89.
343 PHILIPPE LACOUE-LABARTHE, LA POESIE COMME EXPERIENCE 30 (1986). For Heidegger, “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 us, jostle us, and transform us.” MARTIN HEIDEGGER, UNTERWEGS ZUR SPRACHE 159 (1959).
344 Id.
345 JAY, supra note 131, at 366
347 Id.
348 DERRIDA, DISSEMINATION, supra note 207, at 303.
349 DERRIDA, POSITIONS, supra note 206, at 54-55.
350 BENNINGTON & DERRIDA, supra note 228, at 89. The words are Derrida’s and belong to Circonfession, a text authored by him which appears on the lower third of each page of the book.
liability. In Derrida’s own formulation, “in as much as what one calls ‘meaning’ (to ‘express’) is already, through and through, constituted of a fabric of differences, in as much as there is already a text, a network of textual references to other texts, a textual transformation in which each ‘term’ allegedly ‘simple’ is marked by the trace of another, the presumed interiority of meaning is already haunted by its own outside.”351 The goal, then, is to undermine any claim to the absolute mastery of anything that would be presented as a clear and distinct meaning. Deconstruction is a counter-motion in as much as it opposes everything resonant of a mastery of meaning that would lead to safe, assured, uncontrovertible knowledge. “A task is thus prescribed: to study the philosophical text in its formal structure, in its rhetorical organization, in the specificity and diversity of its textual types, in its models of exposition and production . . . , in the space also of its staging and in a syntax that is not only the articulation of its signifieds, of its references to being or to truth, but the arrangement of its procedures and everything that is invested in it.”352

It is, then, “beyond positivism or scientism,” against “formalism and mathematism,” away from reduction and simplification, that deconstruction positions itself.353 The move is as expressed by Levinas, one of Derrida’s leading references: “It is . . . towards a pluralism that does not merge into a unity that I would want to head for.”354 On the one occasion when he volunteered to provide a definition of deconstruction, Derrida stated a formulation that he termed “brief, elliptical, economical”: “more than one language.”355 One compelling implication, on which I will focus for present purposes, is what Derrida calls, literally, the “breaking-and-entering of the commentary.”356 Reading, for Derrida, must “produce” a “signifying structure,” that is, “[it] must always aim towards a certain relation, overlooked by the writer, between what he masters and what he does not master of the schemes of the language he is using.”357 What, then does the idea of “production” convey?

In fact, Derrida begins to answer this question by telling his readership what the production of a signifying structure does not, cannot entail: “[it] can obviously not consist in reproducing, through the discreet and respectful duplication of the commentary, the conscious, deliberate, intentional relation that the writer institutes in his exchanges with the history to which he belongs thanks to the element of

351 Id. at 45-6 (emphasis original).
352 DERRIDA, MARGES, supra note 58, at 348-49.
353 DERRIDA, POSITIONS, supra note 206, at 48, 47 (respectively).
355 DERRIDA, MEMOIRES, supra note 321, at 38 (emphasis original).
356 DERRIDA, ECRITURE, supra note 179, at 290, n.1.
357 DERRIDA, GRAMMATOLOGIE, supra note 194, at 227 (emphasis original).
language."\(^{358}\) Of course, Derrida concedes that the duplicating commentary has a place within critical reading. Indeed, he refers to the need for the commentator to be faithful to the text in as much as there is something like "the law of the other text, its injunction, its signature."\(^{359}\) The other text is this "other event" that has happened before us and of which we must answer "as heirs."\(^{360}\) If the commentator does not subscribe to the law of the other text, there is no longer any relation with the other text as such. In this case, "the critical production would run the risk of going in every direction and of allowing itself to say almost anything."\(^{361}\) Derrida is emphatic: the one who felt authorized to add whatever he wanted "would have understood nothing."\(^{362}\) Jonathan Culler offers a helpful example: "Discussing a sentence that appears in quotation marks in Nietzsche's Nachlass, 'I have forgotten my umbrella,' Derrida writes, 'a thousand possibilities will always remain open'. They remain open not because the reader can make the sentence mean anything whatever but because other specifications of context or interpretations of the 'general text' are always possible."\(^{363}\) (A related difficulty is the danger not of saying anything one likes, but of saying nothing at all, of suspending or suppressing meaning and reference.)\(^{364}\) Derrida talks of a fidelity that is "almost sacred."\(^{365}\) But as "indispensable" as this "guardrail" is, the fact remains that it has only ever "protected" a text and has never "opened" a reading.\(^{366}\) "[I]f such guardrails are enforced absolutely, they will grind the 'tradition' to a halt... so that the tradition of reading Plato and Aristotle [for example] will become a matter of handing on ready-made results, passing along finished formulas for mechanical repetition and recitation. Then the traditional criticism will not protect at all, unless you regard embalming as a form of protection. So, the only way to be really loyal to a tradition, that is, to keep it alive, is not to be too loyal, too reproductive; the only way to conserve a tradition is not to be a conservative."\(^{367}\)

\(^{358}\) Id.


\(^{360}\) Id.

\(^{361}\) DERRIDA, GRAMMATOLOGIE, supra note 194, at 227.

\(^{362}\) DERRIDA, DISSEMINATION, supra note 207, at 72.

\(^{363}\) CULLER, supra note 280, at 131. The reference to Derrida is to DERRIDA, LIMITED, supra note 192, at 122. The reference to Nietzsche is to the Nachgelassene Fragmente following upon FRIEDRICH NIETZSCHE, DIE FROHLICHE WISSENSCHAFT, in V/2 NIETZSCHES WERKE 485 (Giorgio Colli & Mazzino Montinari eds., 1973).

\(^{364}\) See DERRIDA, POSITIONS, supra note 206, at 90.

\(^{365}\) Derrida, *Fidélité*, supra note 359, at 263.

\(^{366}\) DERRIDA, GRAMMATOLOGIE, supra note 194, at 227 (emphasis original).

\(^{367}\) CAPUTO, supra note 12, at 79. In an early text, Derrida notes that "absolute univocity would itself have no other consequence than to sterilize or paralyze history into the poverty of an infinite repetition." DERRIDA, ORIGINE, supra note 196, at 104.
In an unmistakable tension between the law of heteronomy (the priority of the text that is there, before me, and that I am ultimately not entitled to touch in the sense of changing it from what it is) and the law of autonomy (the priority of my critical vocation which impels me to derail the text) that is at work in every commentary, that is the commentary itself, deconstruction emerges as "a kind of filial lack of piety" towards the tradition, which is another way of saying that for deconstruction there cannot be "the" tradition in all its oneness. The deconstructive strategy, as explained in some detail by Derrida, is two-fold: "to practice an upheaval of the classical opposition and a general displacement of the system." (It is important to note at the outset that these two gestures are not to be apprehended as phases in the chronological sense. Although different, the two moves—"the reverse and displace technique"—are unified.)

First, one must recognize that within a text there is a structure whereby one term hides, represses, or prohibits another. It is key to observe that there is no equal, peaceful coexistence as between the two terms. Rather, there intervenes "a violent hierarchy," whereby one term, whether axiologically or logically or in whatever manner, subordinates the other. "To deconstruct this opposition is initially, at some point, to overthrow this hierarchy." Of course, one cannot stop here for to do so would be, ultimately, to continue to operate within the deconstructed system—to "reside" within it—in as much as it would mean acknowledging the system's discursive framework (or confirming the terms within which it claims the argument must be set).

Second, then, it is crucial to move beyond mere inversion and, through a writing that would be "displaced and displacing," generate the "eruptive emergence" of that which has never been comprehended within the anterior regime thus invading the field and disorganizing all of the received order. This motion pushes away from simplification and (binary) reduction towards complexification and expansion in the sense that one moves beyond dualism towards something that is neither A nor B and that is not a third term (such as C) that would provide a resolution of the A-B antagonism. This motion is a transgression (in the

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368 Derrida, Fidélité, supra note 359, at 263. For a beautiful exposition of the conflict vis-à-vis "the singular [text]" between what Derrida terms the "clinical" and the "critical", see DERRIDA, ECRIPTION, supra note 179, at 259-60.
369 DERRIDA, POINTS, supra note 218, at 139.
371 DERRIDA, LIMITED, supra note 192, at 50 (emphasis original).
373 DERRIDA, POSITIONS, supra note 206, at 56-57.
374 Id. at 57.
375 Id. at 56 (emphasis original).
376 Id. at 57.
377 Id.
sense that "[t]he deconstructive reading is ‘transgressive’ of the protection that the traditional reading affords’);\textsuperscript{378} it wants to disjoin what has been gathered into a unity under the aegis of “meaning”;\textsuperscript{379} it wants to resist the classical opposition, to disorganize it, but it also wants to subvert any dialectical reappropriation that would claim a resolution of the opposition à la Hegel, that would appropriate difference through an idealizing interiorization ultimately resolving itself into the peace, security, and mastery associated with an oikos, a domestic economy (the kind of economy that appropriates—etymologically, that makes one’s own—that assimilates, that consumes) and that would, on account of this mediation, prompt the forgetting of difference in the mediation, through the mediation.\textsuperscript{380} Hence, the idea of “dissemination,” whose irreducible disruptive and generative force avoids the reification of synthesis and any eventual resumption of unitary meaning, any reconciliation, any (teleological) totalization, any truth-in-meaning. Yet, as Derrida himself underlines, “the reading . . . cannot legitimately transgress the text towards something else than itself.”\textsuperscript{381} Because deconstruction denies the “exhaustive and enclosing formalization” of the text,\textsuperscript{382} it is also, thereby, an affirmation not of the present, but of what is to come: “What is really going on in things [texts, institutions, traditions, societies, beliefs, and practices of whatever size and sort you need], what is really happening, is always to come.”\textsuperscript{383}

In one of his early works, Derrida presented the basic choice in terms that continue to prove relevant. The first option could be associated with Husserl who aimed to “reduce” language to the point where its univocal elements would appear transparent and translatable. He wanted a “scientific, mathematical, pure language.”\textsuperscript{384} The second possibility could be linked to James Joyce: to assume equivocality, resolutely to situate oneself within the labyrinthine field of culture by calling on the widest array of its forms (“mythology, religion, sciences, arts, literature, politics, philosophy, etc.”), to circulate within all these languages (rather than translate one into the other on the basis of allegedly common kernels of meaning), to actualize their most secret resonances, to cultivate associative syntheses rather than run away from this accumulation of energies, than reduce it, than rule it out-of-

\textsuperscript{378} CAPUTO, supra note 12, at 79.
\textsuperscript{379} Id. at 31-32.
\textsuperscript{380} DERRIDA, POSITIONS, supra note 206, at 59. In DERRIDA, ECRITURE, supra note 179, at 190, Derrida insists that the Hegelian process of “Aufhebung” is not one of suppression of difference as such but of “appeasement” or “summarization.”
\textsuperscript{381} DERRIDA, GRAMMATOLOGIE, supra note 194, at 227.
\textsuperscript{382} DERRIDA, POSITIONS, supra note 206, at 62.
\textsuperscript{383} CAPUTO, supra note 12, at 31.
\textsuperscript{384} Id. at 26. The words, being the transcript of an interview, are Derrida’s.
bounds. Against this (no doubt schematic) delineation, Derrida earnestly condemns the “metaphysical pathos,” that is, “the plan to go back ‘strategically’, ideally, to an origin or ‘priority’ that would be simple, intact, normal, pure, proper, in order thereafter to think about derivation, complication, degradation, accident, etc. All metaphysicians have proceeded in this way, from Plato to Rousseau, from Descartes to Husserl: good before evil, the positive before the negative, the pure before the impure, the simple before the complicated, the essential before the accidental, the imitated before the imitating, etc.”

In the words of Richard Rorty, “Derrida is interested not in the ‘splendor of the simple’ but, rather, in the lubriciousness of the tangled.” This textual work indeed affords him “great pleasure.”

To suggest that Derrida, through a commitment to something like “un-reason” somehow repudiates the unfinished project of Enlightenment is, on the basis of a close examination of his texts, unconvincing. Indeed, the answer is Derrida’s own: deconstruction is “a new, very new Aufklärung.” This claim allows me to return to one important point as regards Derrida’s thought. I have mentioned that deconstruction for Derrida is affirmative. As I close on my presentation of Derrida’s work, I must insist that it would be a serious mistake to overlook this argument and somehow to assume that deconstruction is roughly equivalent to annihilation. Rather, as it apprehends the reading and interpretation of texts, deconstruction operates through the logic of the structuring cut. One may think in terms of cutting through a fabric in order to make a dress. The process is emphatically one of construction. Such is the deconstructive motion as it engages in reading and writing. As it proceeds to challenge the “semantic or formal” aspects of discourse, as it questions its “extrinsic operational circumstances,” “the historical forms of its pedagogy,” and “the social, economic, and political structures of this pedagogical institution,” deconstruction proceeds ever so constructively by asserting the discontinuity of textuality, by affirming the hauntedness of

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385 DERRIDA, ORIGINE, supra note 196, at 104.
386 CAPUTO, supra note 12, at 26. The words, being the transcript of an interview, are Derrida’s.
387 DERRIDA, LIMITED, supra note 192, at 174.
388 RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 126 (1989).
389 DERRIDA, POSITIONS, supra note 206, at 15.
390 DERRIDA, LIMITED, supra note 192, at 261.
391 See supra text accompanying note 324.
392 DERRIDA, VERITE, supra note 256, at 23.
texts (such that they can never be said to be fully present), by asseverating the spectrality of (deferred) sense.

The myth of full knowledge through words, the brand of full knowledge that would allow access to Truth, is exposed. It is outplayed by forces of resistance that are silently at work to displace the alleged supremacy of the signifier, that exceed it, that remain beyond it, and that have a potentially (recursory) critical impact on it. The text or the signifier is not an all-governing master that would fully control meaning. As sign, it refers endlessly to other signs. Because there is always a space within the process of generation of meaning as one sign divides into another sign, because this space is irreducible, because this space is the locus of alterity, no text or signifier can subsume alterity. All there is on offer is something that is irreducible to a language in search of absolutism, something ungraspable, something unnamable, alterity, which comes as "a sort of non-sort," as a "terrifying monstrosity." 393 It is not that there was once a center (a transcendent perspective, for instance) which has since fallen into oblivion and that one can miss. It is that there never was a center. There is, then, nothing to miss. In this sense, Derrida's argument militates for a keen assumption of individual responsibility—an affirmative value—in the face of significance. The idea of a harmonious center might have proved reassuring. But it partakes of an illusion. One must, serenely, accept the fact of an inherent disorder, a derailing, a delirium. One must simultaneously accept the fact that no text or signifier can subsume alterity, in other words that alterity cannot be confined within a text. And one must further accept that nothing like another master can be substituted for the non-center.

Deconstruction is thus constructive in as much as the non-mastery over meaning that it asserts is a non-mastery that is inherently open to the encounter with an alterity that overflows it, "to the possibility for another tone or for the tone of another of coming at any moment to interrupt a familiar music." 394 The relation with the other apprehends the other through a relation of incomprehension (that is, through a relation that does not comprehend it in the sense both that it does not include it and that it does not understand it). This relation is also one of interruption. Not an interruption that would interrupt the relation with the other, but an interruption that opens that relation to the other-as-other as a possibility. It is certainly not a matter of ignorance of the other or of a withdrawal before intelligibility. The simple fact is that an interlocutor—the "thereness" of an interlocutor—means an interruption in the discourse of appropriation, of assimilation.

393 DERRIDA, ECRITURE, supra note 179, at 428.
394 DERRIDA, TON, supra note 193, at 67-68.
To summarize, Derrida does not negate the signified or its significance. Rather, he thematizes the possibility for any signified of its own cancellation and asserts this possibility as being constitutive of the signified as such. It becomes apparent, then, that Derrida’s work does not refer to the values of meaninglessness and indifference, but to what is possible. Derrida’s is a logic of possibility. Indeed, Derrida does not stop at a description of the possibility of the possible, the fact of the possible, and the role of the possible within the text. He asserts the necessity of the possible over against that of a teleological accomplishment, of a final achievement, of a finality. The non-simplicity of presence and absence does not mean their reduction to indifference, but asserts a contamination that is always possible and also the irreducible possibility of their contamination. It is in this assertive sense that writing, as the locus of inscription of the institution, means the always-possible destruction of the institution. The possible, the law of the possible, does not institute nihilism. It institutes reality, which is a domain of the possible, an effect of the possible. “Deconstruction is on the side of the yes, of the affirmation of life.”

Derrida, then, is operating the dredging machine. He is there, dredging, yet at a distance, somewhat isolated (in the “cabin of a crane,” a “closed” cabin). He sees the dredging, but does so through his “glassed-in” compartment. For him, the “plunge” of the machine in the water takes place “from afar.” The dredging is his, of course. But it is processed through an awkward machine, through “levers.” The dredging is known to be his, but he is out of sight (“hidden,” “small”). He collects “only what [he] can,” at a certain depth. No grand design at work, no predictable scheme being implemented. He “scrapes[s]” the “bottom.” He collects bits and pieces, un conceals them, some of this and some of that, a heterogeneity, reveals them, brings them “to the surface,” “loose.” Nothing particularly sizeable, it would appear: “bits.” Yet, genuine items: “stones,” “algae” that can be “là[rid] on the ground”—and that are. But, as he collects these “bits,” there is much that “seeps through the teeth” of the machine. There is all of that which escapes him, which falls back into the sea, what remains, inappropria ble within interpretation (and thus disavowing the idea of total interpretive coverage). And there is what one cannot take at all, what lies beyond taking: the sea.

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395 For an excellent interpretation of Derrida’s work along these lines, see SILVANO PETROSINO, JACQUES DERRIDA E LA LEGGE DEL POSSIBILE (1983).
396 See DERRIDA, CARTE POSTALE, supra note 17, at 427 (“What one calls reality is nothing outside [the] law of différence.”).
397 DERRIDA, APPRENDRE, supra note 186, at 54 (emphasis original).
398 See supra text accompanying note 319.
One thing at least seems clear and it is that one is very far from the *joyeuse pagaille* that ill-informed critics have often associated with deconstruction, which they have branded “a miscegenated monster: the Minotaur in the maze, waiting to entrap us by a total mixture of literary and philosophical, of verbalisms endlessly caught in the impasse of skeptical thought.” There is another point to be made. The idea that Derrida has somehow been promoting the annihilation of the self is belied by the fact that he, Derrida, consistently asserted an original and powerful self able to develop an idiosyncratic thought, a reflective vocabulary, and, generally speaking, a singularly critical consciousness. If anything, “Derrida views the fluidity of the self as an opening to liberation,” “an opening to another mode of being, where no limits hem it in.”

VII. DERRIDA FOR COMPARATISTS-AT-LAW

Through an appropriating gesture that does them an injustice, that formalizes and thus impoverishes them, but that also attests to an urgency—the urgency to critique Hein Kötz and pedigreed Kötzians who appear to regard *An Introduction to Comparative Law* as the omega (or further outpost) of what can be thought, the urgency to do it now and to do it here, the urgency to harness deconstruction to enable the epistemological makeover that must inform an altered politics of comparison—some of Derrida’s teachings on “experience as not-being-Cartesian,” as they are made to bear on comparative legal studies, can perhaps be (ampliatively) organized along the following lines.

*To Begin*

A question: “How does [the comparatist] live this unlivable discord between worlds, histories, memories, discourses, languages?”

*To Continue*

Parts of an answer: The dynamics of self and other is “one of the trickiest.” It is “as difficult to think through as a square circle.”

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400 *Seigel*, *supra* note 117, at 638.
401 *Id.* at 639.
404 DERRIDA, POSITIONS, supra note 206, at 90 (emphasis original).
405 DERRIDA, ALTERITES, supra note 283, at 86.
"And it is not because it is as difficult to think through as the square circle that [one] must renounce thinking it through."\textsuperscript{406} "Indeed, a square circle is an expression that one understands very well."\textsuperscript{407}

\textbf{Other parts of an answer:} An articulated theory governing comparative interventions and ascribing meaning to that which comparatists-at-law purport to compare—while accepting that "[t]he work of the word impedes the question of cross-cultural meanings" and that, yes, there is a "threatened 'loss' of the transparent assimilation of meaningfulness in cross-cultural interpretation"\textsuperscript{408}—is a necessity. Such a theory can be said to translate law-being-compared into cognition in the same way, say, as a theory of art translates art into cognition. Referring to Andy Warhol's exhibit of "Brillo" cartons, art critic Arthur Danto memorably accounted for the value of art theory: "What in the end makes the difference between a Brillo box and a work of art consisting of a Brillo Box is a certain theory of art. It is the theory that takes it up into the world of art, and keeps it from collapsing into the real object which it is (in a sense of is other than that of artistic identification). Of course, without the theory, one is unlikely to see it as art, and in order to see it as part of the art world, one must have mastered a good deal of artistic theory as well as a considerable amount of the history of recent New York painting. It could not have been art fifty years ago. But then there could not have been, everything being equal, flight insurance in the Middle Ages, or Etruscan typewriter erasers. The world has to be ready for certain things, the art world no less than the real one. It is the role of artistic theories, these days as always, to make the art world, and art, possible. It would, I should think, never have occurred to the painters of Lascaux that they were producing art on those walls. Not unless they were neolithic aestheticians."\textsuperscript{409}

\textbf{A focus:} Technocracy, like all classifications and tabulations in search of a gapless system—even Hein Kötz's brand of comparativism—is not without its power or its effectiveness. As Kötz promotes the organization of the legal along the lines of a periodic table—some sort of basic chart of rationality that would bring order to the chaos amongst laws (and, thus, restore order to an anarchic world)—the approaches and models that he advocates prove to be eminently constitutive. For example, Kötz's commitment to a conception of legal justification purportedly eschewing ideological dimensions in favor of a rigorously impersonal method of analysis, his predilection for institutionalized materials, and his assumption that these materials

\textsuperscript{406} \textit{Ibid.}

\textsuperscript{407} \textit{Ibid.}

\textsuperscript{408} Homi K. Bhabha, \textit{The Location of Culture} 125-26 (1994).

\textsuperscript{409} Arthur Danto, \textit{The Artworld}, 61 J. Phil. 571, 581 (1964) (emphasis original).
display an intelligible legal order fashion comparatists-at-law in making them apprehend the matter of comparison as having as its object ordered synthesis rather than transformative effort and in making them envisage themselves as cartographers rather than hermeneuts. In important respects, Kötz’s words thus stultify comparative thought. When Kötz writes that “the critic is forced to conclude” this or that, when he says that subjectivity on the part of the comparatist will be collegially corrected, he is in effect endorsing a soft, ironic view of comparative legal studies that harks back to a time when there were unicorns perhaps, but certainly nothing in the nature of significant disagreements across laws or amongst comparatists—possibly the year 1900. Even as to detail, Kötz’s goal is to avoid conflict (consider the praesumptio similitudinis, for instance). But this process of euphemization entails a deficit. Ultimately, it leads comparative thought astray. It does violence to comparative thought. Not surprisingly, Kötz’s reordering is seen to be proposed in the name of a deeply entrenched conservativism. Kötz is an unabashed protagonist of the classical nineteenth-century apodictic order. Indeed, Kötz’s ecumenical impulse to prioritize uniformity is revealed to be for order more than for alterity.

Then, a (philosophical) critique: Moved by a romantic impulse, animated by a an inclination to see the laws “click” into place, longing for some sense of perfect rightness, aspiring to a world that is whole and continuous, prompted (at some “level” at least) by an aesthetic impulse, thus chasing a glimpse of some confirming, self-ratifying idea of beauty, a law to transcend all laws, comparative legal studies as practiced by Hein Kötz stands for the myth of an absolute appropriation of the other, of a presence of otherness that is fully present to a self-absolved self acting as appropriating center. It pretends to be obeying to the law itself. It wants to do nothing but show what it invokes as its referent on the assumption that it can reliably refer to laws “out there.” It claims to get a firm grip on the world through precision and rigor. Behind Kötz’s purported transparency, there is in fact opacity for his gaze does not go deeper than surfaces. There are no insides. There are no secrets. Through a notion like “objectivity,” Kötz’s comparative argument reveals itself to be an instrumental dissolution of specific cultural forms into generic strategic effects, an enterprise of totalization, a “theological” project. Kötz, “imprisoned inside the structures of... longing for wholeness,” proceeds to an invagination of the diverse and the homogeneous.

410 See supra text accompanying note 143.
411 ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 47; ZWEIGERT & KÖTZ, EINFÜHRUNG, supra note 3, at 47.
412 See Hill, supra note 11, at 106.
413 SEIGEL, supra note 117, at 640.
In other words: Hein Kötz fails to recognize his legislative and executive force and to acknowledge that the field of comparative legal studies, including its frontiers, is the result of decisions and not the representation of a preceding "real." No claim (conscious or otherwise) to something like "naturality" can hide the fact that all the while Kötz is determining violently the space of what is but a pseudo-naturality. No formalist argument can conceal the fact that Kötz's metaphysical logic (the one that calls for "objectivity" and so forth) is meant as a procedure of truth predicated on a disavowal of empiricity, facticity, or embeddedness of legal discourse—a procedure which in the name of its ideals promotes misrecognition of singularity. Whether one is talking about the comparandum or the comparans, one must accept variations and contingencies, let us say, a spatio-temporal inscription. Kötz denies the imprint of the world on comparandum and comparans alike, disclaims the trace that the world leaves on comparandum or comparans. The suppression of this imprint or trace and the substitution for it of a "meta" gesture that wishes to appear "as such" is an act of institutional violence in the sense that it does violence to the experience of time and space that constitutes the human condition (even for comparatists-at-law!) in the face of the inescapability or ineliminability of inscription. (Indeed, this violence emerges just as comparison-at-law wishes to put an end to the violence that it apprehends as arising from the diversity of laws.) Ultimately, this articulation of what would be "just" or "right" through the decision to make time and space irrelevant to (comparative) logic is an ethico-theoretical decision to suppress difference (showing that the more ethical the comparatist-at-law wishes to be in defense of universalism or oneness the more unethical he becomes). Such determination is eminently political.

One unacceptable implication: "Once you grant some privilege to gathering and not to dissociating, then you leave no room for the other, . . . for the radical singularity of the other."414 You are annulling the other (and the other-in-the-law and the other's law) in its own right.

Another unacceptable implication: To the extent that it is incapable of respecting the other, the other-in-the-law, and the other's law in their being and in their meaning (none of these terms purporting to refer to a monolithic totality), comparative legal studies, because of the totalitarianism and the oppression inherent to a strategy of sameness and assimilation, is a practice of violence, an example of "the old

414 CAPUTO, supra note 12, at 14. The words, being the transcript of an interview, are Derrida's. For two excellent studies of "singularity" with specific reference to Derrida's thought, see DEREK ATTRIDGE, THE SINGULARITY OF LITERATURE (2004); TIMOTHY CLARK, THE POETICS OF SINGULARITY (2005).
hidden friendship between light and power, the old complicity between theoretical objectivity and technico-political possession.”

Also: Comparative analysis as practiced by Kötz is a discourse that claims “the neutrality or at least the imperturbable serenity that must accompany the relation to the truth and to the universal, . . . that must guarantee them also by what one calls the neutrality of tone.” Moreover, it is a discourse that, in the end, seeks to bring discourse to an end by depriving itself of interlocutors through the drive to oneness and the absorption of all discourses into the discourse of the same.

To Change (Dis)course

A retort (and a rough agenda for comparatists-at-law): At a time when Europe is once again experiencing a “comparative moment,” it is an urgent task to deconstruct comparative metaphysics, to interrupt or cut through the self-enclosing circle of the same, and to do so with irrepressible energy. Comparative legal studies wants to outplay the mastery of the same, which claims to be able to account for the other by positing it and by inserting it within a totality over which comparativism will govern. Because every law is traditionalized and enculturated and because every comparatist-at-law is traditionalized and enculturated, comparative legal studies wants to write itself according to another logic, according to a logic of the other. What is required in an age of globalization is not so much yet more technical knowledge about what a foreign law says on any given point at any given time, for one can relatively easily consult an encyclopedia or enlist the help of a foreign lawyer to ascertain such rudimentary data. Rather, there is an urgent need to understand how foreign legal communities think about the law, why they think about the law as they do, why they would find it difficult to think about the law in any other way, and how their thought differs from ours. It is this kind of fundamental information about alterity-in-the-law that comparatists are uniquely suited to provide and that they should be seeking to disseminate, leaving the technical updates to practitioners specializing in a given foreign law.

A cautionary note: Any attempt at globalization ultimately resolves itself as an original experience of “glocalization.” The similarities that require to be postulated if the “convergence” thesis is to prove creditable are simply unrealistic. In fact, the “convergence” thesis can only hold if its proponents are prepared to pretend that the

415 DERRIDA, ECRIPTION, supra note 179, at 136.
416 DERRIDA, TON, supra note 193, at 18.
417 FRIEDRICH NIETZSCHE, MENSCHLICHES, ALLZUMENSCHLICHES, in IV/2 NIETZSCHE WERKE 40-1 (Giorgio Colli & Mazzino Montinari eds., 1978) (1967).
problems that the law addresses and the solutions that the law provides to these problems are somehow unconnected to the cultural environment from which the problems and solutions arise. In other words, the “convergence” thesis compels one to regard social problems and their legal treatment as occurring in a cultural vacuum. Only if one is willing to ignore the cultural dimension of the law can one say that the problem of “relief against public officials” or whatever and its treatment by the law can be considered irrespective of geography. What is unclear is whether the defenders of “convergence” take the view that unlike art or literature, law is somehow completely disconnected from the society by which it is produced or whether they accept that law necessarily partakes in the culture from which it emanates but prefer to close their eyes to this fact leaving the matter to sociologists or other such “marginal” figures to consider. In either case, the “convergence” approach perpetuates a brand of “rightwing Hegelianism [which] conceals a stark downgrading of historical contingency and human freedom.”419 Observe that the presence of legal phenomena operating on the global level in relative insulation from the state does not mean a fundamental de-traditionalization of law: there is still cultural cohesion locally. And, although global legal processes may indicate a weakening of the state as a source of identity, that is, a measure of de-territorialization, it is hard to see how a transnational corporation, the WTO, or the IMF, for instance, can offer a competing source of “cultural resonance” to the national bond and its history and mythology. While the specialized and technical global legal discourse cannot usually be regarded as the expression of one society or one culture in particular, it remains that manifestations of the global can be traced to local, “cultural” ties. The idea of an acultural law, whether global or not, cannot be envisaged. Even global phenomena are not above or beyond culture for they arise from a cultural diversity which is already there; they are the outcome of cultural flow. In this sense, a meta-culture must never be taken to suggest a tabula rasa. Unsurprisingly, therefore, Gunther Teubner shows that even as the legal notion of “good faith” is being “globalized,” cultural embeddedness continues to be strong such that the German model cannot be transferred to Great Britain because it is linked to a specific production regime—what the author calls “Rhineland capitalism.”420

Concretely: One can no longer accept a treatment of such an “ontologically” (and non-phenomenologically) doxic topic as “offer and acceptance” that would doxically limit itself strictly to doxic “legal” materials like statutes, appellate judicial decisions, and expository commentary doxically deemed doxically “authoritative,” that would

420 See Teubner, supra note 161.
doxically embrace the law of nine jurisdictions over seven pages, that would doxically limit the range of its references to each law to (at the very best) a sprinkle of epigrammatic statements seemingly reflecting the holdings in the local law library more than the actual state of play within the law under consideration, that would doxically follow upon this “analysis” with a one-and-a-half-page conclusion on what is doxically apprehended as the “better” law and three paragraphs on how an international convention failed to apply said “better” law.\textsuperscript{421} One can no longer accept that comparatists-at-law should be able to stay within the small range of experience of their law school days when “the (posited) law” looked so great and important, but philosophy or anthropology was something discussed in lesser faculties by dabblers on some quixotic quest.

A \textbf{manifesto in three parts} ("[t]he aim . . . [being] to overlay, to ruffle, to sting, to unsettle, and to trouble so that exciting and interesting things might result, so that imposed burdens can be rearranged and simplifications, those dangers to life and mind, can be set aside")\textsuperscript{422}:

In the name “of vigilance, of lucid vigil, of elucidation,”\textsuperscript{423} the privilege granted to homogenized wholes, unity, oneness can be challenged: “totalization or gathering up” is a “lure” and must be “denounce[d].”\textsuperscript{424} The relentless scansion of totality must be disrupted.

The comparatist-at-law must accept that just as there cannot be unmediated visibility of law there cannot be the non-derivability of comparison, which is always an idiom: “situation” dissolves “objectivity” (no view from nowhere is envisageable). But “situation” also explodes “subjectivity”: the self is sited in language, culture, and tradition beyond control and beyond understanding even—thus, “\textit{Je est un autre}.”\textsuperscript{425}

Comparative legal studies must involve a protocol of action foregrounding an interpellative and interlocutionary ethics—or a politics of ethical singularity—upon which all other structures organizing the relation between self and other—and between self-in-the-law and other-in-the-law—must rest.\textsuperscript{426}

\textsuperscript{421} I refer to ZWEIGERT & KÖTZ, INTRODUCTION, supra note 3, at 356-64.
\textsuperscript{422} Paul Bové, Continuing the Conversation, in EDWARD SAID: CONTINUING THE CONVERSATION 42 (Homi Bhabha & W.J.T. Mitchell eds., 2005).
\textsuperscript{423} DERRIDA, TON, supra note 193, at 64.
\textsuperscript{424} JACQUES DERRIDA, ACTS OF LITERATURE 34 (Derek Attridge ed., 1992).
\textsuperscript{426} In this usage, “ethics” cannot be understood as referring “to the domain of ethics, to the domain conventionally and traditionally determined of ethics”, to what has been constituted as a region within philosophy. DERRIDA, ALTERITES, supra note 283, at 71. But this is not to say that the relation to the other is anethical or unethical \textit{tout court}. 

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In other words: Law inscribes cultural difference. One of the goals for comparatists-at-law must then be to "re-inscribe" (or "deconstruct") the locality of law in order to make it amenable to cross-legal/cross-cultural/cross-traditional negotiation. (There is no question, therefore, of leaving local laws to stand in juxtaposition as windowless monads.) Quite apart from partaking in an inexhaustible quest which is marked by the comparatist's exhaustion (or the editor's final deadline), this process of "re-inscription" is, of course, an act of violence. But it is a "lesser" violence than that wrought on "the legal" by the metaphysician masquerading as comparatist-at-law and wielding the sticks of deracination and transcendentalization (or is it panoptic control?).

New Roads

A fact: Within law, comparative legal studies is constitutively hospitable to other kinds of knowledge (that exist beyond the study of national posited law per se).

Another fact: Comparison takes place.\textsuperscript{427} It cannot be reduced to a technology or a set of rules or procedures or a method. It cannot be instrumentalized. It is an event. Comparative legal studies must thus be \textit{eventalized} (and de-methodologized).\textsuperscript{428} Comparatists-at-law must think of the so-called "data" not as the given, but as the giving: that information which permits the comparatist to engage in the act of giving meaning to the law and thus of \textit{giving} an entry into the "thickness" of law's significance or, if you like, into law's spectrality (into that which, although unexpressed, haunts the law).

An opinion: Lest it acknowledge the role of experience in the fashioning of comparative knowledge, comparative legal studies has no solid ground from which to dispute the institutional supremacy of legal positivism. Thus, the idea of "the comparatist's self" (or of a "comparative self") must be redirected away from any transcendental conceptualization (such as is typically and unreflexively enshrined in words like "author" and "authorship") towards a transformative notion of \textit{épreuve}.

An argument: Let us refer to the Heideggerian "as-structure" of perception (the idea that knowledge is acquired through analogical extensions from one's pre-understanding) as the "condition of possibility" of comparison, the ineliminable sensibility that demarcates the epistemological space within which it becomes possible to study other laws. But this point must not be understood to mean that

\textsuperscript{427} \textit{Cf.} DERRIDA, PSYCHÉ 2d, \textit{supra} note 323, at 391 ("Deconstruction takes place.").

\textsuperscript{428} For a fascinating philosophical reflection around the idea of "event", see JACQUES DERRIDA (with GAD SOUSSANA & ALEXIS NOUSS), \textit{DIRE L'EVENEMENT, EST-CE POSSIBLE?} (2001).
comparatists-at-law can then legitimately effectuate an approximation of alterity to sameness, that they can then engage in a silencing or obliteration of alterity, that they can then repress alterity by dismissing it as insignificant or that they can, in whatever manner, reduce alterity to the benefit of a conceptual understanding placed under the sign of the same.

_Ditto_: Any comparison purporting to articulate the particular as universal is a gesture that fabricates a so-called “universal” that is haunted by the particular which, ultimately, escapes universalization because of the irreducibility of time and space.

_Ditto_: “Absolute impossibility of a meta-language,” “impossibility of an absolute meta-language”: any purported meta-language exists “in” a language. There is “[n]o historical meta-language [that can] bear witness in the transparent element of some absolute knowledge.”

_Ditto_: “Tradition,” “culture,” and so forth cannot unproblematically be said to lie outside the law and cannot unproblematically be said to lie outside comparative legal studies for “everything depends upon contexts which are always open, non saturable.”

_Ditto_: Nothing is identical to itself. (A “culture,” for example, entails difference within identity. When I say “my” culture, I mean my neighbor’s culture also. In this sense, “my” culture is, literally, different from “my culture.”)

_Ditto_: There is no “true” German, French, or English law or no “true” account of German, French, or English law: “también la verdad se inventa.” The interest is not that the comparison be true, but that it be plausible.

_Ditto_: What English law means is not only a matter of what it wants to say.

_Ditto_: No law, irrespective of how globalized it finds itself to be, is so internally differentiated as to lose its self-identity.

_Ditto_: Even the national jurist is a foreigner within his own law: law is always somewhat beyond one, that is, not entirely masterable such that one, despite being institutionalized into the law, feels apart from it. Consider what Derrida says of language: “Yes, I have but one language, yet it is not mine.”

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429 JACQUES DERRIDA, LE MONOLINGUISME DE L’AUTRE 43 (1996) [hereinafter DERRIDA, MONOLINGUISME].
430 JACQUES DERRIDA, FICHUS 57 (2002).
431 DERRIDA, MEMOIRES, supra note 321, at 115.
434 DERRIDA, MONOLINGUISME, supra note 429, at 15.
Ditto: The comparatist is a subjectile.435 "[This word] not only names the subject and subjectivity, but subjection and projection."436 The idea of "projection"—a variation on the Heideggerian theme of Geworfenheit and the notion that agency is in significant measure exorbitant to the self and in this sense calling on one to live according to a "beyond-the-self" that one has not chosen—437—is captured by the French (and English) word "projectile," which is immediately present to a French (or English) ear. Less obviously, "subjectile" also connotes a de-centered subject as subjected subject, a "subject-il" (in French) or a "he-subject" (in English), that is, a subject governed by a "thereness"—which, even though the comparatist-at-law remains an "idiomatic witness," once again calls into question the unexamined ideas of "author" and "authorship."438

One more argument (in the form of a contrast): While Kötz takes mimesis for granted and imagines that he can write of or about another law, comparative legal studies requires to resist specular (and metaphysical) protocols by developing a critical thought that is non-representational and non-referential, that is metaleptic. Just as Gayatri Spivak begins a text on Virginia Woolf's To the Lighthouse by saying that "[t]his essay is not necessarily an attempt to illuminate To the Lighthouse and lead us to a correct reading,"439 we need comparatists-at-law who will promote an alternative textuality to that looking for the security of fixed referentiality and introduce their paper with such words as these: "This essay about the English law of secured transactions is not necessarily an attempt to illuminate the English law of secured transactions and lead us to a correct reading." (Why should comparative research always generate ieric or "happy" endings? Any comparison that is made without considerable strife will have highly underwhelming results. Let comparison-at-law make noise. Let it be vehement. Far away from scientific pretensions, let there be comparative legal studies "not as harmony and resolution, but as intransigence, difficulty and contradiction."440)

435 The word is Artaud's. See Jacques Derrida, Forcener le subjectile, in PAULE THÉVENIN & JACQUES DERRIDA, ANTONIN ARTAUD 55-108 (1986).
436 RAPAPORT, supra note 372, at 122.
437 For Heidegger's idea of "Geworfenheit" or "thrownness", which suffuses SEIN UND ZEIT, supra note 167, see, e.g., HUBERT L. DREYFUS, BEING-IN-THE-WORLD 242-44 (1991); STEPHEN MULHALL, INHERITANCE AND ORIGINALITY 248-52 (2001).
438 DERRIDA, MONOLINGUISEME, supra note 429, at 116.
439 GAYATRI CHAKRAVORTY SPIVAK, IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS 30 (1987).
440 Edward Said, Thoughts on Late Style, LONDON REVIEW OF BOOKS 3, August 5, 2004. For stimulating reflections on "difficulty", see GEORGE STEINER, ON DIFFICULTY AND OTHER ESSAYS 18-47 (1978); JUST BEING DIFFICULT (Jonathan Culler & Kevin Lamb eds., 2003).
On the Way

A governing idea: At bottom, the argument for comparative legal studies otherwise and other-wise—for a different, post-Kötzman comparative consciousness which brings comparative questions into a singular constellation opening a powerful thinking of the relation between logic, institution, alterity, history, and violence—is about nothing less than “other articulations of human togetherness, as they are related to cultural difference and discrimination.” It concerns the radicalization of democratic thinking on the relation between law (including the comparatist’s law) and individuality.

Advice: “If you want a good rule-of-thumb generalization from anthropology, I would suggest the following: Any sentence that begins, ‘All societies have...’ is either baseless or banal.” For “societies,” comparatists-at-law can substitute “laws.”

More advice (for comparative legal studies als Beruf): “A genuinely critical comparison could be at once commendable and fruitful, of course, as long as it does not set itself the goal of chasing after ‘analogies’ and ‘parallels’ in the manner of currently fashionable constructions of general schemes of development, but when, doing precisely the opposite, its aim is to highlight the specificity of each of the developments as they are ultimately so different and thus to point towards the ascription of this course of differentiation to a cause.”

A thought: Dissociation, separation, singularity must be promoted as a necessary condition of allowing for the radical otherness of the other, for a relation with the other (which is, ultimately, a relation that is also a non-relation since the other can never be reached). There is more to difference than “contrivances, masks, appearances, or shams.” “[Difference] must be seen as comprising [similarity]: locating it, concretizing it, giving it form.”

An attitude: There is an “already there” that compels the comparatist-at-law to reticence in the face of the “there is” of other laws, to be addressed more as “active cultural media” than as objects of study, to be approached as “enactive, enunciatory site[s].”

A sensibility: “[W]e are faced with the challenge of reading, into the present of a specific cultural performance, the traces of all those

441 Bhabha, supra note 408, at 191.
444 Derrida, Ton, supra note 193, at 67.
445 Geertz, supra note 442, at 226-27.
446 Gayatri Chakravorty Spivak, Death of a Discipline 9 (2003).
447 Bhabha, supra note 408, at 178.
diverse disciplinary discourses and institutions of knowledge that constitute the condition and contexts of culture."^{448}

A realization: Even "the totality 'effect' does not withdraw the word from difference and from the supplement; [totality] does not exempt it from the law of bias so as to give it to us full-face, its very own, its only one."^{449}

A motto: "The other is the other only if its otherness is absolutely irreducible."^{450}

(An explanation: For the other of ontology to be recognized as other, it must be unrecognizable by the self. The moment the other is recognized, it is no longer the other for recognition must assume apprehension in terms of the self's pre-understanding, that is, the self's traditionally and culturally pre-oriented understanding-enabling background from which he builds a perceptual or cognitive bridge allowing for the apprehension of something as something that can be compared with something else—in the words of Master Eckhart, "resemblance is a prerequisite" to knowledge.^{451} Thus, the logic of recognition can only restrict itself to an economy of misrecognitions: "[r]ecognition must be impossible, for recognition to have a chance."^{452} This aporia is insurmountable. Yet, it is the source of all comparisons.)

(An implication: The comparatist-at-law will fail—I repeat—on account of "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."^{453} My claim is that he should fail (much) better than positivists have allowed.}\^{454}

A warning: To be sure, in the language of the self, "in the language of the same," thus in the language of the doxa, an "otherwise-said"—including the argument defended in this paper—may be "badly received."^{455} It may be thought inadmissible within a certain logic to which reference is silently being made. What logic? To what logic is reference being made? Who says what the governing logic is? What is the code? There is at work a formidable authority to posit distrust towards this discourse on the other. But one is entitled to call this formidable authority to account. Where does this authority come from? It asks: what is this discourse on the other worth? I ask: what is your "what is it worth?" worth?
Comparison/Deconstruction

Deconstruction is "the very movement of attention to the other" (its restlessness gesturing towards empathic understanding, then, rather than suggesting absolute free-play).\textsuperscript{456} Contrast Hein Kötz’s program of assimilation of otherness into oneness. The ethnocentric fissure lies within Kötz’s theoretical framework for comparative legal studies and is inherent to it.

Law is deconstructible.\textsuperscript{457} Commentaries on the law are too.

Deconstruction dooms every attempt to resemble laws: "the essential link of thought to language, or in any event to the trace, will never dispense with idioms."\textsuperscript{458}

There is the injustice of universality in as much as the logic of universalization purports to abolish the very thing to be universalized as it claims to be universalizing it. "[J]ustice . . . implie[s] non-gathering, dissociation, heterogeneity."\textsuperscript{459}

Deconstruction dooms every attempt to say the law. (When Blanchot’s character, upon being asked to say how things happened "precisely" ("au juste"), confesses that he is unable to do so, he is telling us that all narration—including narration of laws—is unsayable as such.\textsuperscript{460})

"Things are never as conceivable and sayable as one would most often have us believe."\textsuperscript{461} Why would law and the texts of law be exempt?

Deconstruction does not solicit adhesion to a doxa and allows for libidinal investment within comparative legal studies.

(To what extent can the comparatist-at-law be guided by curiosity—"not that which seeks to appropriate to itself what needs to be known, but that which allows one to cast off one’s own self"?\textsuperscript{462})

Not to Forget

Kötz circumvents the matter of translation.\textsuperscript{463} Contrariwise, Derrida is keenly attuned to the infinitely problematic nature of transmigration of language. Thus, in his own words: "I do not believe

\textsuperscript{457} DERRIDA, FORCE DE LOI, supra note 287, at 35.
\textsuperscript{458} JACQUES DERRIDA, J’DONNER LE TEMPS 76 (1991).
\textsuperscript{459} CAPUTO, supra note 12, at 17. The words, being the transcript of an interview, are Derrida's.
\textsuperscript{460} MAURICE BLANCHOT, LA FOLIE DU JOUR 36-37 (1973).
\textsuperscript{461} Letter from Rainer Maria Rilke to Franz Kappus (Feb. 17, 1903), in IV WERKE 514 (Horst Nalewski ed., 1996).
\textsuperscript{462} MICHEL FOUCAULT, L’USAGE DES PLAISIRS 14 (1984).
\textsuperscript{463} See supra text accompanying notes 52-53.
translation to be a secondary or derivative event as regards an original language or text." The fact is that the translator always decides for a certain meaning in the language being translated and further decides for a certain word in the language of the translation. This is Derrida’s argument: “For the notion of translation, one will have to substitute a notion of transformation: the regulated transformation of a language by another, of a text by another.” He adds: “We will never have been involved and never have been involved in fact in the ‘transportation’ of pure signifieds which the signifying instrument—or the ‘vehicle’—would leave intact and untouched, from one language to another.”

“What guides me,” observes Derrida, “is always untranslatability.”

Pace Hein Kötz, “Pierre” is not “Peter.” Yet, “[one] must translate, transfer, transport (übertragen) the untranslatable . . . where, though translated, it remains untranslatable.” An adaptation of the final words of The Unnamable well captures the aporia: “I don’t know, I’ll never know, in the silence you don’t know, you must [translate], I can’t [translate], I’ll [translate].” The basic point remains that translation is a supplement purporting to (re)produce the original text including that aspect of it that will resist translation. As such, it cannot be subservient to it and does not, therefore, pursue slavish adequacy. Translation is transumption. Still, it must treat the original as somehow intangible. To translate, then, is to place oneself in a space where the language that one is talking about as translator and what one is saying about it coexist without canceling each other. Unlike Kötz, comparatists-at-law must attend to the transferential process within which (deconstructed) language and law are immingled.

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If I were to write that “comparative legal studies is deconstruction,” I would not be promoting the essentialism to which the verb “is” might be thought to lend itself. Rather, I would be making at least two (underlying) assertions in favor of a meaning-centered, non-reductive approach to the comparison of laws. First, I would be

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464 DERRIDA, PSYCHE, supra, note 320, at 392.
465 DERRIDA, POSITIONS, supra note 206, at 31.
466 Id.
468 DERRIDA, PSYCHE 2d, supra note 323, at 209.
defending the claim that the question of comparative legal studies is best illuminated by the workings of deconstruction. In this regard, I would be saying that comparison-at-law is not to be apprehended restrictedly in terms of comparing laws (narrowly understood), but also that it must be envisaged as a practice of respect in which “the object of our interest escapes the gaze in which we typically contain it.”472 (I would also be observing that the laws of which comparative legal studies speaks are themselves deconstructible.)473 Second, I would be arguing that deconstruction can be better understood in the light of comparative legal studies.

Comparative legal studies is deconstruction.

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472 WOOD, supra note 346, at 193, n.16. Beyond the quotation, this passage follows Wood closely.

473 For the deconstructible character of law, see DERRIDA, FORCE DE LOI, supra note 287, at 34-36.