Goodman, Foucault, Derrida, Breyer, and Glendon

In his "Seven Strictures on Similarity", Nelson Goodman, the influential U.S. philosopher, percipiently remarks that "[s]imilarity, ever ready to solve philosophical problems and overcome obstacles, is a pretender, an impostor, a quack".[1] Indeed, there is nothing inherent about any form of semblance whatsoever. Rather, all equivalences or commonalities only exist as attributes that are affixed to some entity or other by an interpreter. It follows that the quality of "being like" is contingent, and it means that very much must depend upon an array of facts including the circumstances within which the interpreter finds himself. A reference to Michel Foucault may assist: "There is no resemblance without signature. The world of the similar can only be a marked world".[2] Foucault's contention is that it does not inherently pertain to any entity (say, to any law) to be like another entity (say, another law). Far from constituting an essential characteristic, equivalence or commonality is always attributed by an analyst or commentator. Hence, Foucault's argument that there is "no resemblance without signature", that every resemblance bears the signature of an analyst or commentator. This is the sense in which Foucault affirms that "the world of the similar can only be a marked world", that every resemblance carries the mark of an analyst or commentator. Jacques Derrida contributes an important deconstructive intuition on this issue. Seeking to probe the term "resemblance" with a view to generating a heightened understanding of it, he observes that "[t]he way in which resemblances constitute or stabilize themselves is relative, provisional, precarious".[3] Indeed, if equivalence or commonality is the product of an analyst's or commentator's interpretive input, one can expect this interpretation to depend on its interpreter (it is therefore relative to him), to be liable to amendment (for example, it may well be modified as the interpreter changes his mind over time), and to be fragile (not least in the way in which its success hinges on its reception by the interpreter's readers). Given the severely limited epistemic value of equivalence or commonality, Goodman is keen to draw attention to semblance's "insidious" character.[4] He concludes that upon close reflection all attempts at explanation by way of the idea of similarity are abysmally deficient. Equivalence or commonality, quite simply, "profess[es] powers it does not possess".[5] Unsurprisingly, Goodman chastises "our addiction to similarity".[6]

To maintain that entity A (say, U.S. judicial review or impeachment) is the same as entity B (say, the Mexican *amparo* or Brazilian "impeachment") or that it is similar to entity B or that

[1] Nelson Goodman, "Seven Strictures on Similarity", in *Problems and Projects* (Hackett, 1972), p. 437.
[2] Michel Foucault, *Les Mots et les choses* (Gallimard 1966) 41 ["Il n'y a pas de ressemblance sans signature. Le monde du similaire ne peut être qu'un monde marqué"].
[3] Jacques Derrida, *Politique et amitié* (Michael Sprinker ed., Galilée 2011 [1993]), p. 112 ["'La manière dont se constituent ou se stabilisent les ressemblances est relative, provisoire, précaire"].
[4] Goodman, *supra*, note 1, p. 437.
[5] *Ibid*.
[6] *Id*., p. 438.

it resembles entity B or that it is like entity B — in sum, that it features an equivalence or a commonality with entity B — must mean, on every occasion, that entity A effectively differs from entity B, that it is singular vis-à-vis entity B. Again, *this is what is the case*. Only if entity A were identical to entity B would it not distinguish itself from entity B. But the only way in which entity A could be identical to entity B would be for entity A to be entity B.[7] Now, if entity A were entity B, the very idea of a comparative study featuring entities A and B would become nonsensical. I insist that this logical demonstration is decisive for comparative law and that it is not dismissable as sophistry. Again, consider Derrida: "[T]o compare[:] [t]here has to be a difference permitting it".[8] To compare, there has to be more than one entity in co-presence. It follows that the assignment of a "compare and contrast" essay is, in fact, the setting of "compare and compare" work or, if you prefer, of a "contrast and contrast" task. The fact of the matter is that if a law is said to be the same as another or similar to another, if it is regarded as equivalent or common to another, there must be more than one law being addressed, which means, in line with Leibniz's cardinal insight, that there has to be difference across these laws. In Goodman's words, "[t]he flaw here went unnoticed for a long time, simply for lack of logical scrutiny".[9] I hasten to add that the contention concerning the necessary differend between entities A and B, the claim that all endeavours at "equivalentization" or "commonalization" must ultimately stand as so many restatements of differentiation, does not prohibit connections or even generalizations across the comparative compass.

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"Judges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances". There are "cross-country results that resemble each other more and more" so that there can be discerned "growing institutional and substantive similarities" across constitutional laws.

Stephen Breyer, "Keynote Address", 97 Am. Society Int'l L. Proceedings 265 (2003), pp. 266, 267, and 267.

"In the light of so many factors affecting comparability", such "casual" assumptions are "disquieting".

Mary Ann Glendon, "Comparative Law in the Age of Globalization", 52 Duquesne L.R. 1 (2014), p. 16.

[7] "[N]o two things have all their properties in common": *Id.*, p. 443. Goodman adds that similarity is thus "an empty and hence useless relation": *Ibid*.
[8] Jacques Derrida, *La Vérité en peinture* (Flammarion, 1978), p. 429 ["*comparer*(:) (...) (il faut) qu'une différence le permette".
[9] Goodman, *supra*, note 1, p. 442.