Revista de Investigações Constitucionais
ISSN 2359-5639
DOI: 10.5380/rinc.v10i1.88557

Negative Comparative Law: The Sanitization Enterprise

Direito Comparado Negativo: o empreendimento sanitização

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Recibido/Received: 20.09.2022 / 20 September 2022
Aprovado/Approved: 13.12.2022 / 13 December 2022

Abstract

This article challenges four basic and intertwining assumptions informing orthodox comparative law: that a comparatist can exactly represent foreign law; that he can write about foreign law objectively; that he can state the truth regarding foreign law; and that he enjoys the subjective agency to overcome the obstacles on the way to the achievement of these goals. Comparatists-at-law being oblivious to their structural cognitive weakness, which makes the pursuit of these realizations irredeemably preposterous, a strong contrarian programme is necessary so as to bring comparative law to its epistemological senses and, in the process, to heighten the scholarly integrity and reliability of comparative interventions. This article succinctly formulates such an oppositional stance.

Keywords: comparative law; foreign law; critical theory; epistemology; interpretation.

Resumo

Este artigo desafia quatro pressupostos básicos e entrelaçados que informam o Direito Comparado ortodoxo: que um comparatista pode representar exatamente o Direito estrangeiro; que ele pode escrever sobre Direito estrangeiro objetivamente; que ele pode declarar a verdade sobre o Direito estrangeiro; e que ele desfruta do arbítrio subjetivo para superar os obstáculos no caminho para a realização desses objetivos. Sendo os comparatistas do Direito alheios à sua fraqueza cognitiva estrutural, que torna a busca dessas realizações irremediavelmente absurda, um forte programa contrário é necessário para trazer o Direito Comparado a seus sentidos epistemológicos e, no processo, aumentar a integridade acadêmica e confiabilidade de intervenções comparativas. Este artigo formula sucintamente tal postura de oposição.

Palavras-chave: *Direito Comparado; Direito estrangeiro; teoria crítica; epistemologia; interpretação.*

Como citar esse artigo/*How to cite this article*: LEGRAND, Pierre. Negative Comparative Law: The Sanitization Enterprise. **Revista de Investigações Constitucionais/Journal of Constitutional Research**, Curitiba, vol. 10, n. 1, p. 13-76, Jan./Apr. 2023. DOI: 10.5380/rinc.v10i1

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"To suffer less he had wagered on foreignness".
–Beckett[1]

In this article, valorously keeping to the thither side of 30,000 words inclusive of notes and bibliography, I offer a challenge to four basic and intertwining assumptions informing orthodox comparative law, the influential brand of comparatism that gives itself the task of *Ordnung* as task. The endarkening postulates to which I react negatively are as follows: that a comparatist can exactly represent foreign law; that he can write about foreign law objectively; that he can state the truth regarding foreign law; and that he enjoys the subjective agency to overcome the obstacles on the way to the achievement of these goals, all ultimately destined to assuage an abiding craving for certitude (and a correlative loathing for interpretive play). Comparatists-at-law being oblivious to their structural cognitive weakness, which makes the pursuit of these re alizations irredeemably preposterous, a strong contrarian programme is necessary so as to bring comparative law to its epistemological senses and, in the process, to heighten the scholarly integrity and reliability of comparative interventions. This article succinctly formulates such an oppositional stance.

PREMISSES

Foreign law is what always-already presents itself for interpretation, what offers itself to understanding.[2] Foreign law is something that is there before me, that I encounter. It is an entity that concerns me as comparatist, because I defend the normative relevance of foreign law locally in the fabrication of statutory determinations, judicial opinions, or academic reflections. Foreign law is that out of which and on the basis of which I experience my comparative life-in-the-law. I am therefore interested in the engaging, accessing, and interpreting of foreign law; I am preoccupied with how it is

[1] BECKETT, S. **Impromptu d'Ohio.** S. Beckett (transl.). In: **Catastrophe et autres dramaticules.** Paris: Editions de Minuit, 1986 [1982]. p. 61 ["Pour moins souffrir il avait misé sur l'étrangeté"]. In May 1980, literary critic Samuel Gontarski, who had enjoyed a working relationship with Beckett for seven years and would be organizing a conference within months at Ohio State University to celebrate the playwright's seventy-fifth anniversary, instigated the writing of a new play expressly for the occasion. Initially styled the "Ohio project", *Ohio Impromptu*, first staged in Columbus, Ohio, on 9 May 1981, is a rare example of Beckett agreeing to write on request and the only work in Beckett's oeuvre with a geographical reference. In the event, Beckett wrestled for nine months before producing a play lasting ten minutes or so. In 1981, he translated the text into French as *Impromptu d'Ohio*. For Beckett as self-translator, the French version consists, in effect, of a rewriting – not in the least a surprising fact when one reminds oneself that "[w]hat one 'translates' is the untranslatability of language, the untranslatability of idiom": Spivak, G. C. The Politics of the Production of Knowledge. In CULLER, J.; LAMB, K. (eds.). **Just Being Difficult?** Palo Alto: Stanford University Press, 2003. p. 192. Spoken in the context of an interview with S. J. Murray, the transcribed words are Spivak's.

[2] Cf. KAFKA, F. **Die Zürauer Aphorismen.** R. Calasso (ed.). Frankfurt: Suhrkamp, 2006 [1931†]. § 109. p. 117: "The world will offer itself to you for unmasking" ["Anbieten wird sich Dir die Welt zur Entlarvung"].

brought into play. In this article, I maintain that from the standpoint of the comparatist, freedom from standpoint is a delusion. In effect, any allegation along the lines of exact representativeness of foreign law being achievable, any contention about an objective or true statement on foreign law being feasible, any submission to the effect that such integrally duplicative enunciations are within the epistemic grasp of the subjectively earnest and rigorous comparatist-at-law, is "nothing other that an explicit *appropriation of [a] point of view*" ("nicht anderes als ausdrückliche *Aneignung des Blickstandes*").[3] Since no perception exists out-of-culture, the comparatist's outlook can only be thoroughly cultural and therefore necessarily perspectival or slanted. Moreover, *ex comparatione hypothesi*, the comparatist's stance must pertain to a culture other than that within which foreign law dwells and, there being more than one culture in co-presence, must differ from foreign law's approach.[4] *Narration of foreign law is not foreign law*. *Narration of foreign law cannot be foreign law*. *And narration of foreign law ought not to want to be foreign law.* ("Ceci n'est pas le droit étranger", as Magritte might have framed the matter considering the comparatist's text.)

To reject the idea that the narration of foreign law could exist as an invariant vis-à-vis foreign law even as it is other than it and subsequent to it, to foreground this necessary distinction, is not to contend, however, that foreign law would be completely absented from the narration. Rather, foreign law persistently haunts the narration, the narration being *of* it. Yet, the inevitable dissonance that I address entails crucial epistemic consequences, the principal implication arguably being that *description of foreign law is impossible*. Because narration constructs and enacts its own interpretation of foreign law, since it performs and institutes its own understanding, it can only ever *approximate* description. Narration must fail to restitute foreign law. It follows that exactness, apodicticity, and finality must yield to justness, every narration being provisional and susceptible to improvement. Indeed, narrations are constantly re-narrativized, whether by their initial authors or by these authors' critics, there being no end to the process that consists in the attenuation of narrative misadjustment.

Its inscriptive role – narration *inscribes* foreign law – means that the comparatist's text silently determines the foreign law that it replaces. In particular, for the many readers who do not enjoy a fully fledged access to foreign law, the narration becomes an authoritative source of information. The structural contingency informing every

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[3] HEIDEGGER, M. **Ontologie (Hermeneutik der Faktizität).** In: **Gesamtausgabe.** vol. 63. K. Bröcker-Oltmanns (ed.). Frankfurt: Klostermann, 1982 [1923]. p. 83.

[4] If there is more than one culture, there must be difference across those cultures – or so asseverates Leibniz's Law, which reads thus: "[B]y virtue of imperceptible variations, two individual things […] must always differ": LEIBNIZ, G. W. **Nouveaux essais sur l'entendement.** In: **Die philosophischen Schriften von Gottfried Wilhelm Leibniz.** vol. 5. C.I. Gerhardt (ed.). Hildesheim: Olms, 1965 [1764†]. p. 49. This text was written in 1704 and appeared posthumously.

narration of foreign law and making it inherently transformative of foreign law therefore deserves to detain the comparatist-at-law. It is accordingly the focus of this article.

COMPARATIVE LAW, ITS PUTRESCENCE

In my seemingly ever expanding experience, I find that comparatists, as they commit to interventions embracing foreign law, as they respond to what is ultimately the age-old Platonic demand to *give an account* of foreignness (logon didonai; λόγον διδόναι), habitually aspire to the composition of reports exhibiting representativeness, objectivity, and truth. I maintain that such epistemic proclivities are indeed spontaneous. Moreover, comparatists characteristically insist that they can mobilize their subjectivity (say, in the form of a more extensive and more stringent assembling of information, of a more sensitive and more exigent reading of documentation, of a more responsive and more attendent crafting of rendition) so as to attain their epistemic ambitions. I observe such a reflexively confident inclination in the affirmation of representativeness (r), objectivity (o), truth (t), and subjectivity (s) – what I style "rots" – to be animating seasoned and emerging comparatists alike, not least in continental Europe and its colonies (formerly political, lately intellectual), all committed to the victorious enunciation of an *adæquatio rei et intellectus* that they believe to be attainable for the better (and for the good of comparative law). There is compelling evidence to suggest that this propensity is heavily influenced by the German mindset long dominant within orthodox comparative law, albeit not exclusively so.

By way of illustration of the investment in rots, and of the tropism towards the search for epistemic *guarantees* that this dedication belies, recall how Konrad Zweigert and Hein Kötz enjoin texts on foreign law to feature "scientific exactitude and objectivity",[5] how they adjure the writing of a record decidedly "objective, that is, free from any critical evaluation".[6] And these prominent comparatists also profess that comparative law is an "école de vérité",[7] the comparison of laws harboring "the ultimate goal of discovering the truth".[8] For his part, Uwe Kischel, who explicitly adopts the gist of Zweigert and Kötz's model "without reservation" ("uneingeschränkt"),[9] also demands that the comparatist should "acquir[e] an objective understanding" of foreign law.[10] Specifically,

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5 ZWEIGERT, K.; KÖTZ, H. **Introduction to Comparative Law.** 3rd edn. T. Weir (transl.) Oxford: Oxford University Press, 1998. p. 45.

6 *id*, p. 43.

7 *id*, p. 15.

8 *id,* p. 3.

9 KISCHEL, U. **Comparative Law.** A. Hammel (transl.). Oxford: Oxford University Press, 2019. p. 173 [hereinafter **Comparative Law**]; KISCHEL, U. **Rechtsvergleichung.** Munich: Beck, 2015. p. 187.

10 Kischel, **Comparative Law** (note 9), p. 156.

he rejects the idea that "[c]omparative law is not about truth".[11] The position that "[a] proper description has to be objective" having become something of a mantra within orthodox comparative law,[12] the further view that neutrality is "not only desirable, but also constructible" having established itself as a kind of leitmotiv[13] – the underlying supposition presumably being that "legal theory can lead to objective knowledge"[14] – no intellectual contortion seems too strained: comparatists-at-law quixotically pursue "objectivity through mutual critique and intercultural division of labour",[15] fancifully "formulate a neutral reference system in the form of concepts",[16] and astonishingly seek to "eradicate the preconceptions of [their] native legal system",[17] that is, to "cut themselves loose from their own doctrinal and juridical preconceptions and liberate themselves from their own cultural context".[18] Indeed, the focus of comparative analysis on "the obtaining of correct information about the rules to be compared",[19] not to mention the basic allegiance to the idea that "[an objective, neutral theory of law] […] remains important",[20] indicate how "the comparati[st] […] has no faith in any criterion that is not objective".[21] If you will, comparative law's credo is that *this* statement about foreign law must, and can, correspond tautologically with *that* foreign law, both duly (and safely) disciplinarily and legally bounded, the "here" perfectly *ad idem* with the "there".

Yet, the idea of repetition *tout court* must be seen to be "fantasmati[c]", "ideolog[ical]", and "metaphysica[l]", any pretended repetition or recurrence indeed structurally taking the form of a (Leibnizian) difference or iteration,[22] which is why I resolutely approach rots as epistemic detritus – pseudo-transcendental dross – that has long been cluttering comparative law's theory and practice to the point where this accumulating

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11 *id*, p. 101.

12 BRAND, O. Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies. **Brooklyn Journal of International Law**, New York, vol. 32, n. 2, p. 405-466, 2007. p. 453.

13 *id*, p. 436.

14 HAGE, J. Can Legal Theory Be Objective? In HUSA, J.; VAN HOECKE, M. (eds.). **Objectivity in Law and Legal Reasoning**. Oxford: Hart, 2013. p. 40.

15 PETERS, A.; SCHWENKE, H. Comparative Law Beyond Post-Modernism. **International & Comparative Law Quarterly**, London, vol. 49, n. 4, p. 800-834, 2000. p. 830.

16 Brand (note 12), p. 436.

17 Zweigert and Kötz (note 5), p. 35.

18 *id*, p. 10.

19 BOGDAN, M. On the Value and Method of Rule-Comparison in Comparative Law. In MANSEL, H.-P. *et al* (eds.). **Festschrift für Erik Jayme.** Munich: Sellier, 2004. p. 1237.

20 MICHAELS, R. The True Lex Mercatoria: Law Beyond the State. **Indiana Journal of Global Legal Studies**, Bloomington, vol. 14, n. 2, p. 447-468. p. 460. The author applies the relevant excerpt to state law, the historical hallmark of comparative law.

21 SACCO, R. Legal Formants: A Dynamic Approach to Comparative Law (J. R. Gordley ed.). **American Journal of Comparative Law**, Berkeley, vol. 39, n. 1, p. 1-34, 1991. p. 25 fn. 27.

22 DERRIDA, J. **La Bête et le souverain.** vol. 2. M. Lisse; M.-L. Mallet; G. Michaud (eds.). Paris: Galilée, 2010 [2003]. p. 120.

flotsam and jetsam has effectively stunted the understanding of what it means to understand foreign law, thereby intransigently stultifying worthy comparison.[23] Not unlike a purging of the drains, I purport a cleansing of comparative law to eliminate its cloggy epistemic decay, its viscous epistemic waste, its sticky epistemic *Schleim*.[24] I therefore uncompromisingly reject rots as a regulative epistemic ideal, because it discloses unwarranted (and unwarrantable) confidence in the comparatist-at-law's power of thought. Quite simply, the appreciation of foreignness informing comparative law cannot be grounded on rots, which is structurally unable to supply the epistemic foundations being craved. I hasten to add that I do not reject the idea of striving towards an ameliorated discernment of foreignness and of comparison (in fact, I have long been campaigning in favour of such clarification).[25] But I firmly contest the assumption that through dint of sheer hard work, by way of a more stringent mobilization of his subjective agency, the comparatist can bring the declension of foreign law to reach facsimilization, neutralization, and veridiction – *mêmeté* or *mesmidade*. In fact, comparative thought is too weak even to contemplate what such epistemic achievements would mean.

Strictly speaking, a comparing mind cannot make sense of epistemic configurations like "objectivity" or "truth", because any objective or true enactment about foreign law must be devoid, by definition, of personal mindful input – since it is precisely one's personal mindful input that thwarts objectiveness or truthfulness. Now, a mind simply cannot configure an unmindful, an out-of-mind, enactment. And how could an enactment, a comparative enactment – someone's comparative enactment – be devoid of personal mindful input, in any event? I allege that personal mindfulness intrinsically pertains to *every* comparative enactment. It follows, *ipso facto*, that no enactment can be either objective or true. Accordingly, I argue the case for *irrelation*, which must be understood as an irreduction. Specifically, I claim the impossibility for the comparing mind to connect with foreignness-in-the-law in a way that would permit a rescriptive,

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[23] In the end, even the most enthusiastic attempt at transcendentalism remains mired in human finitude. It must therefore consist, at best, of *imagined* transcendentalism. See HEIDEGGER, M. In: Davoser Disputation zwischen Ernst Cassirer und Martin Heidegger. O. F. Bollnow; J. Ritter (eds.). In: HEIDEGGER, M. **Kant und das Problem der Metaphysik.** Frankfurt: Klostermann, 2010 [1929]. p. 279.

[24] For a manifesto refuting cacodorous comparative law, see LEGRAND, P. **Negative Comparative Law: A Strong Programme for Weak Thought.** Cambridge: Cambridge University Press, 2022 [hereinafter ***NCL***]. It must be clear, *mais cela va peut-être mieux en le disant*, that my undertaking has nothing whatsoever to do with the Kelsenian quest for the purity of legal doctrine. His scrubbing and mine are washing strategies that harbour diametrically opposite ambitions. Indeed, the Kelsenian meracity concerns precisely the implementation of theoretical undertakings that I wholeheartedly reject such as analytical depersonalization and legal autarky. Unlike Kelsen, I am emphatically not mysophobic.

[25] See eg LEGRAND, P. What Is That, to Read Foreign Law? **Journal of Comparative Law**, London, v. 14, n. 2, p. 294-310, 2019 [hereinafter What Is That?]; LEGRAND, P. Foreign Law: Understanding Understanding. **Journal of Comparative Law**, London, vol. 6, n. 2, p. 67-177, 2011; LEGRAND, P. The Same and the Different. In LEGRAND, P.; MUNDAY, R. (eds.). **Comparative Legal Studies: Traditions and Transitions.** Cambridge: Cambridge University Press, 2003. p. 240-311.

objective, or veridictive recitation of the foreign. Moreover, I maintain that this impossibility cannot be surpassed through the application of subjective agency, because it stands as a structural feature of the workings of the mind claiming to give an account of the world, of the comparing mind seeking to report on foreign law. It is not that there is no foreign law and only (encumbered) interpretations; rather, it is that there is only foreign law through (encumbered) interpretations. The excellence of any given comparative endeavour is beside the point: interpretive encumberment holds.

That orthodox comparatists would recoil in the face of the epistemic protestations I adduce is easily fathomable. Having been mired for so long in rots, comparatists can be expected to wonder how comparative law can at all expect to intimate the slightest consideration if its executants openly recognize the impossibility for them of offering a representation of foreign law that would be exact, of writing objectively and truthfully about foreignness – if they admit that epistemic failure is inescapable, that there is ultimately nothing they can do to circumvent it, no matter how strong-willed their subjective agency proves itself to be. Whither comparative law *sans* rots, then? For my part, I can only see intellectual promise in this outcome, which is why I urge an alternative, a negative line of reasoning. I contend that by propounding rots, comparative law has effectively been inviting epistemic discredit, the kind of disparagement that besmirches intellectual creditability and prompts institutional marginalization. In effect, it is only once comparative law rids itself of rots that it will be able to aspire to meaningful recognition and respect, that it will find itself in a position to operate as a deserving disciplinary undertaking (and to be appreciated as such). As comparative law accepts that it can do no more than generate the production of just interpretations of foreignness – that it can just produce just interpretations – and as it learns to be satisfied with accounts or reports trying, responsibly but necessarily interpretively, to be just towards the foreign, to do justice to foreignness (there can be no justice without justness), the field can at long last acknowledge that, far from being detached from their comparative interventions, comparatists haunt them: they are a spectral presence within each and every one of their comparisons. With rots out of the epistemic way, comparative law can finally mature into scholarly integrity, apply itself to hauntology, and admit that *the comparatist is in the comparison* (according to the all-encompassing way in which someone is in love or in mourning rather than in the separable manner in which coffee is in the cup). It ought to go without saying that post-rots comparative law cannot entail that any interpretation will now be as good as any other, that everything interpretive will henceforth partake of arbitrariness. Who could seriously believe in such equipoising, in any event? Who could accept that anyone can say anything whatsoever about *King Lear*, that all interpretive yields of the play are equally insightful – Shakespeare's

tragedy incidentally showing how the requirement for certainty in human affairs (and by extension, in the humanities broadly understood) can lead to calamity?[26]

APPLYING PHILOSOPHICAL DETERGENT

I observe that the epistemic considerations I raise are not specific to comparative law or indeed to law in general. Anthropologists, too, must face the quartet of issues I address. Such is the case also for sociologists, historians, or translators, who must likewise forsake representativeness, objectivity, or truth – and renounce the idea that the individual could labour hard enough so as agentially to generate any of these epistemic results. In other words, comparative law's epistemic quandary crosses disciplinary boundaries and thus solicits discussion from a pan-disciplinary perspective, hence my turn to philosophical discourse. As I deploy my argument for the scouring of pseudo-transcendence from comparative law, for the disinfection of the comparative enterprise, for the outright flushing of rots, I derive compelling assistance in particular from Hans-Georg Gadamer (1900–2002). I hasten to add that I do not assume any argument of mine to be settled by the lemma "Gadamer says so". The postulate that Gadamer's views are justified because they happen to be Gadamer's – along the lines of "Gadamer dixit, ergo…" – is evidently inadequate. What I contend, though, is that over many decades of painstaking and extensive reflection on the interpretation of texts, Gadamer has produced conclusions that are widely regarded as proving particularly incisive and as featuring a more compelling theoretical and practical dividend than the other models on offer – which is no doubt why so many books and authors, corroborating the force of his discernment, have regarded his work as warranting critical address.[27] Although Gadamer easily deserves to be recognized as one of the modern era's most noteworthy philosophers, it is not, of course, that his template is flawless.[28] Personally, I find

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[26] Cf. CAVELL, S. The Avoidance of Love: A Reading of *King Lear*. In **Must We Mean What We Say?** 2nd edn. Cambridge: Harvard University Press, 2015 [1969]. p. 246-325.

[27] See eg GEORGE, T.; VAN DER HEIDEN, G.-J. (eds.). **The Gadamerian Mind.** London: Routledge, 2022; DOSTAL, R. J. (ed.). **The Cambridge Companion to Gadamer.** 2nd edn. Cambridge: Cambridge University Press, 2021; WARNKE, G. (ed.). **Inheriting Gadamer.** Edinburgh: Edinburgh University Press, 2016; MALPAS, J.; ZABALA, S. (eds.). **Consequences of Hermeneutics: Fifty Years After Gadamer's *Truth and Method*.** Evanston: Northwestern University Press, 2010; KRAWJESKI, B. (ed.). **Gadamer's Repercussions.** Berkeley: University of California Press, 2004; MALPAS, J.; ARNSWALD, U.; KERTSCHER, J. (eds.). **Gadamer's Century.** Cambridge: MIT Press, 2002; HAHN, L. E. (ed.). **The Philosophy of Hans-Georg Gadamer.** Chicago: Open Court, 1996; SILVERMAN, H. J. (ed.). **Gadamer and Hermeneutics.** London: Routledge, 1991; WRIGHT, K. (ed.). **Festivals of Interpretation: Essays on Hans-Georg Gadamer's Work.** Albany: State University of New York Press, 1990. Out of a plethoric bibliography, I limit this list to noteworthy collections of essays in English.

[28] Beyond the internal tensions and occasional aporias in Gadamer's theory, there is a disturbing mystical streak traversing the work. It simply cannot do, for example, to refer to the "miracle of understanding" ("Wunder des Verstehens") as Gadamer does repeatedly: GADAMER, H.-G. **Truth and Method.** 2nd Engl. edn. J. Weinsheimer; D. Marshall (eds. and transl.). New York: Continuum, 2004 [1960]. p. 292, 309, and 337 [hereinafter **T&M**]; GADAMER, H.-G. **Wahrheit und Methode.** 5th edn. In: **Gesammelte Werke.** vol. 1. Tübingen: Mohr Siebeck, 2010 [1986]. p. 297, 316, and 347 [hereinafter **W&M**]. Elsewhere in his book, Gadamer also mentions

Jacques Derrida's conjectures as regards a number of contentious interpretive issues to be more astute and congenial.[29] But these antagonistic questions are not detaining me with specific reference to the thesis that I defend in this article. Indeed, with respect to the topics under present consideration, I do not hesitate to hold that Derrida finds himself wholeheartedly concurring with Gadamer. Why, then, refer to Gadamer instead of Derrida, whose thought has arguably radiated even more widely than Gadamer's?[30] Why one foray into intertextuality rather than the other?

My answer lies in the fact that I find it helpful to marshal a thinker readily appraised as conservative rather than someone willingly envisaged (if unfairly) as a nihilist, no-epistemic-holds-barred firebrand. For instance, John Caputo, a leading philosophical commentator on interpretation, repeatedly labels Gadamer's work "conservative".[31] Those who assume a comparative philosophical interest in Gadamer and Derrida indeed cast the two philosophers as illustrating two competing strands of post-Heideggerian thought. Richard Rorty thus remarks upon "Gadamer's right-wing and Derrida's left-wing Heideggerianism".[32] The reference evokes, of course, Martin Heidegger (1889–1976) and his salient anti-Cartesian philosophy.

Situating himself within a Counter-Enlightenment philosophical discourse that runs from Hegel through Kierkegaard and Nietzsche, Heidegger openly applies his thought to the "destruction" ("Destruktion") of Cartesianism through the dramatic staging of a confrontation between Descartes's "ego" and his own "Dasein".[33] In my

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the "miracle of art" (*id*, p. 51 [English] and 63 [German]) and the "miracle of language" (*id*, p. 419, 419, and 420 [English] and p. 423, 424, and 425 [German]). In my view, these three miracles are three miracles too many.

[29] For example, Derrida disputes Gadamer's "Theorie der Horizontverschmelzung", or "fusion of horizons theory", whereby interaction between the self and the other would ultimately generate a degree of consension, albeit at a certain level of generality and of completeness only. For an overview of Derrida's refutations of various Gadamerian assumptions, see LEGRAND, P. Derrida's Gadamer. In GLANERT, S.; GIRARD, F. (eds.). **Legal Hermeneutics: Other Investigations.** London: Routledge, 2017. p. 144-167. In that text, I address the debate that took place between the two philosophers, most notably on the occasion of their April 1981 encounter in Paris.

[30] Even confining myself to the English language, the books devoted to Derrida's thought are, *à la lettre*, innumerable. Suffice it to mention, then, DIREK, Z.; LAWLOR, L. (eds.). **A Companion to Derrida.** Oxford: Wiley-Blackwell, 2014.

[31] CAPUTO, J. D. **Radical Hermeneutics.** Bloomington: Indiana University Press, 1987. p. 95-97, 115, 118, and 217. See also WARNKE, G. **Gadamer.** Palo Alto: Stanford University Press, 1987. p. x, 91, and 106-107.

[32] RORTY, R. From Logic to Language to Play. **Proceedings and Addresses of the American Philosophical Association.** Newark, vol. 59, n. 5, p. 747-753, 1986. p. 751. See also Caputo (note 31), p. 95.

[33] For Heidegger's first use of the word "Destruktion" with specific reference to Cartesianism, see HEIDEGGER, M. **Grundprobleme der Phänomenologie.** (H.-H. Gander ed.). In **Gesamtausgabe.** vol. 58. Frankfurt: Klostermann, 1993. p. 139. This text is the transcript of Heidegger's lectures delivered in 1919–1920 (he began his teaching career in January 1919). For the thematization of the idea of "Destruktion" in Heidegger's lectures of the following year (1920–1921), see HEIDEGGER, M. **Phänomenologische Interpretationen zu Aristoteles: Einführung in die Phänomenologische Forschung.** (W. Bröcker and K. Bröcker-Oltmanns eds.). In: **Gesamtausgabe.** vol. 61. Frankfurt: Klostermann, 1994. p. 172-173 [hereinafter **Aristoteles**]. Heidegger's objection to Descartes always remained central to his philosophy. As late as the Zähringen seminar of 1973 (the very last workshop Heidegger conducted before his death in 1976), one thus finds a statement to the effect that "[i]n

simplifying words, the conflict is between subjectivity, agency, or autonomy, on one hand, and determination, enframement, or enculturation, on the other. Through the particle "da", which in German means "there", Heidegger's "Dasein" ("Sein" is "being") wants to emphasize not only the thereness of one's being – one's facticity or situatedness, one's *Standortgebundenheit* – but the fact that one will have been thrown into one's thereness. The idea is that one finds oneself mired into a pre-existing configuration – such as language – that is not of one's own choosing. (I return to thrownness momentarily.) Identifying Cartesianism as an "extreme counter-example" ("extreme[r] Gegenfall") vis-à-vis his own work,[34] Heidegger targets it throughout *Sein und Zeit* (*Being and Time*),[35] his *magnum opus*, which easily qualifies as the most important philosophical argument of the twentieth century.[36] Castigating Descartes, Heidegger frontally assails "the metaphysics of the I" ("Ich-Metaphysik").[37]

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the entirety of the thought of modernity emerging from Descartes, subjectivity forms […] the barrier to bringing the question of being on its way": HEIDEGGER, M. **Seminare.** (C. Ochwadt ed.). In **Gesamtausgabe.** vol. 15. Frankfurt: Klostermann, 2005 [1973]. p. 382 ["Im gesamten, aus Descartes hervorgegangenen Denken der Neuzeit bildet (...) die Subjektivität das Hindernis (...), die Frage nach dem Sein auf ihren Weg zu bringen"]. See generally VAN BUREN, J. **The Young Heidegger.** Bloomington: Indiana University Press, 1994. p. 167-168; KISIEL, T. **The Genesis of Heidegger's *Being and Time*.** Berkeley: University of California Press, 1993. p. 493-494.

34 HEIDEGGER, M. **Sein und Zeit.** Tübingen: Niemeyer, 2001 [1927]. p. 88. The word "Destruktion" is in *id*, p. 89.

35 See BARASH, J. A. **Martin Heidegger and the Problem of Historical Meaning.** 2nd edn. New York: Fordham University Press, 2003. p. 99, where the author designates "[t]his theme of destruction" as *Sein und Zeit*'s "keynote". For example, Heidegger draws a sharp contrast between "subject and object" ("Subjekt und Objekt"), on one hand, and "Dasein and world" ("Dasein und Welt"), on the other. See Heidegger (note 34), p. 60. In a marginal entry that he inscribed on the occasion of a personal post-publication rereading of his work, Heidegger insisted on the radically oppositional character of the distinction between the two conceptual pairs and maintained that they are emphatically not alike. "Certainly not!" ("Allerdings nicht!"), he wrote: *id*, p. 441.

36 For the established English translation, see HEIDEGGER, M. **Being and Time.** J. Macquarrie; E. Robinson (transl.). Oxford: Blackwell, 1962 [hereinafter **B&T**/1962]. A subsequent translation, arguably featuring enhanced justness, is HEIDEGGER, M. **Being and Time.** 2nd Engl. edn. J. Stambaugh (transl.). Albany: State University Press of New York, 2010 [hereinafter **B&T**].

37 Heidegger, **Aristoteles** (note 33), p. 172-173. Heidegger also targets Kant. For Kant, writes Heidegger, "[t]he being of the I is understood as the reality of the *res cogitans* […] without positing the 'I think' itself in its full essential content […]. […] [T]h[e] very phenomenon of the world also determines the constitution of being of the I […]. Saying-I means the being that I always am as 'I-am-in-a-world'. Kant did not see the phenomenon of world […]. […] [T]hus the I again was forced back to an *isolated* subject". I follow Heidegger, **B&T** (note 36), p. 306-307. For the German text, see Heidegger (note 34), p. 321. In my terms, one's being exists *as* culture. Importantly, it is not that one's being is contextually cultural, but that it is *inherently* cultural. While I categorically side with Heidegger's anti-metaphysics, I observe that his theoretical model is marred by the relics of his early allegiance to Catholicism. For example, Heidegger slips into occasional talk of transcendence. See eg Heidegger, **B&T** (note 36), p. 33-34 (English); Heidegger (note 34), p. 38 (German). The son of a provincial sexton, Heidegger studied for the Catholic priesthood in his teens and actually spent two weeks as a Jesuit novice in October 1909. When he moved to philosophy in 1911, he began his philosophical studies as a Catholic. While Heidegger claimed to have broken with Catholicism in 1918, he was buried in a Catholic cemetery after a Catholic service had been held. In his later life, he would have said, "I never left the church" ("Ich bin niemals aus der Kirche getretten"): SHEEHAN, T. Reading a Life: Heidegger and Hard Times. In GUIGNON, C. B. (ed.). **The Cambridge Companion to Heidegger.** 2nd edn. Cambridge: Cambridge University Press, 2006. p. 72. For an account of Heidegger's Catholicism, see generally BARING, E. **Converts to the Real.** Cambridge: Harvard University Press, 2019. p. 85-115.

My not-rots argument is bound to appear unacceptable to orthodox comparatists and their many disciples who continue to have faith, epistemic evidence notwithstanding, in the possibility of description and who find no need whatsoever to reach for discursive assistance so as to explain (comparative) legal analysis beyond what they regard as the proper sphere of legal discourse.[38] And predictably, these comparatists-at-law will look askance at the fact that I am seeking to undermine their (unexamined) investment in rots, that I am staging this specific issue as the focus of my epistemic discontent, that I am making this very topic into a problem at all. It therefore matters to me that someone like Caputo or Rorty should deem Gadamer a conservative thinker, because this qualification may help to save my claim – that the interpretive mind is unable merely to reproduce foreign law-texts representatively, objectively, and truthfully and that it is effectively doomed to be *producing* foreignness and to be doing so at an epistemic angle – from more or less instantaneous dismissal as radical postmodernism (the term usually deemed a slur), unless my contention were simply to get conveniently buried in deliberate indifference. In other words, if a conservative philosopher like Gadamer takes a vigorous stand against rots and indeed deprives rots of any defensible epistemic status, I reckon that it must become more difficult for comparatists-at-law to cancel such counter-signature than if opposition to their favoured epistemic model came from a *marked* scholar like Derrida.[39] In fairness, I must add that although I am making every effort to be just towards Gadamer, I implement my interpretation of Gadamer, *my* Gadamer. There is no other way as I have no other Gadamer to offer.

Famously, Gadamer expounds his pathbreaking theory of textual understanding in *Wahrheit und Methode*,[40] a publication that appeared in 1960 after nearly ten years of agonizing labour,[41] a book that saw a fifth and final edition in 1986.[42] There are two English translations of this work in existence as *Truth and Method*, the more recent, a revision of the earlier one, being extensively and effectively regarded as controlling.[43] Gada-

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[38] For a contention urging the closing of the legal mind, see eg MICHAELS, R. Two Paradigms of Jurisdiction. **Michigan Journal of International Law.** Ann Arbor, vol. 27, n. 4, p. 1003-1070, 2006. p. 1017: "[The explanation] must remain within the law […]. […] [It] must encompass the law as a whole, but nothing beyond the law".

[39] Such was Derrida's bravery – and overall persuasiveness – in the expression of his disturbing epistemic conclusions, and so significant was his scholarly output, that the intellectual establishment, seemingly mired into an endless cycle of obsessive-compulsive behaviour, widely and wildly vilified his work as either inaccessible or unacceptable, the vehemence of the critique often partaking of the neurotic. A 1992 letter to *The Times* in protest at Cambridge University's decision to award Derrida an honorary doctorate in philosophy supplies as good a piece of evidence as any. For a copy of this correspondence, see SMITH, B. *et al*. Letter to the Editor. **The Times.** 9 May 1992. <www.ontology.buffalo.edu/smith/derridaletter.htm> [on file].

[40] GADAMER, H.-G. **Wahrheit und Methode.** Tübingen: Mohr Siebeck, 1960.

[41] See GRONDIN, J. **Sources of Hermeneutics.** Albany: State University of New York Press, 1995. p. 85.

[42] Gadamer, **W&M** (note 28), p. 1-494.

[43] See Gadamer, **T&M** (note 28). The first translation is GADAMER, H.-G. **Truth and Method.** J. Cumming; G. Barden (transl.). London: Sheed & Ward, 1975.

mer's impact has ranged across many disciplines,[44] including law.[45] Indeed, in *Truth and Method*, Gadamer devotes a section to legal interpretation, which he regards as holding "exemplary significance" ("exemplarische Bedeutung") for his general model of interpretation.[46] It is crucial to insist that Gadamer's philosophical argument "developed explicitly out of Heidegger's concept and practice of language".[47] Like his mentor's, Gadamer's critique therefore stands as an arresting and cogent indictment of the Cartesian project.

In the opinion of Descartes (1596–1650), representativeness, objectivity, and truth are legitimate, realistic, and desirable ambitions for a subject to behold provided one is prepared to harness a method in order to channel their application. According to this early-modern intellectual enterprise whose sweeping reach, notably relayed via Kantianism, unmistakably inspires Zweigert and Kötz's own infatuation, method can indeed lead the subject to truth.[48] For their part, Heidegger and Gadamer both dispute method's epistemic capability. While Heidegger relievingly exclaims that he is free from method – "I would presently be in the greatest embarrassment if I ought to describe my method […]. And I am happy not to obey the shackles of a technique"[49] – Gadamer attacks "naive faith in method" ("naive[r] Glaube an die Methode"),[50] what he names "naivete […] truly abysmal" ("Naivität […] wahrhaft abgründig"),[51] and he warns against the attendant risk of "an actual deformation of knowledge" ("eine[r] tatsächliche[n] Deformation der Erkenntnis").[52] In effect, every method being

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[44] See eg MISGELD, D.; NICHOLSON, G. (eds.). **Hans-Georg Gadamer on Education, Poetry, and History.** L. Schmidt; M. Reuss (transl.). Albany: State University Press of New York, 1992; CODE, L. (ed.). **Feminist Interpretations of Hans-Georg Gadamer.** University Park: Pennsylvania State University Press, 2003; KIDDER, P. **Gadamer for Architects.** London: Routledge, 2013; SVENAUEUS, F. Hermeneutics of Medicine in the Wake of Gadamer: The Issue of Phronesis. **Theoretical Medicine & Bioethics.** Washington, D.C., vol. 24, n. 5, p. 407-431, 2003.

[45] See eg MOOTZ, F. J. (ed.). **Gadamer and Law.** London: Routledge, 2007; GREENAWALT, K. **Legal Interpretation.** Oxford: Oxford University Press, 2007. p. 149-179; LEYH, G. (ed.). **Legal Hermeneutics.** Berkeley: University of California Press, 1992; GOODRICH, P. **Reading the Law.** Oxford: Blackwell, 1986. p. 126-167; GLANERT, S.; GIRARD, F. (eds.) **Law's Hermeneutics: Other Investigations.** London: Routledge, 2017.

[46] Gadamer, **T&M** (note 28), p. 321 (English); Gadamer, **W&M** (note 28), p. 330 (German).

[47] STEINER, G. **Martin Heidegger.** Chicago: University of Chicago Press, 1991. p. 152.

[48] See DESCARTES, R. **Regulæ ad directionem ingenii.** In **Œuvres de Descartes.** vol. 10. C. Adam; P. Tannery (eds.). Paris: Cerf, 1908 [1701†]. p. 379: "The whole method consists entirely in the ordering and arranging of the objects on which we must concentrate our mind's eye if we are to discover some truth". I refer to rule V, and I adopt the English translation in DESCARTES, R. **Rules for the Direction of the Mind.** D. Murdoch (transl.). In **The Philosophical Writings of Descartes.** vol. 1. J. Cottingham; R. Stoothoff; D. Murdoch. (transl.). Cambridge: Cambridge University Press, 1985. p. 20. The *Regulæ* were most likely written in 1628. For an exploration of Zweigert and Kötz's Cartesianism, see LEGRAND, P. Paradoxically, Derrida: For a Comparative Legal Studies. **Cardozo Law Review.** vol. 27. n. 2, p. 631-718, 2005. p. 645-654.

[49] HEIDEGGER, M. Letter to Julius Stenzel. In: Briefe Martin Heideggers an Julius Stenzel (1928–1932). **Heidegger Studies.** vol. 16, p. 11-33. 2000 [31 December 1929]. p. 19 ["Ich wäre heute in der größten Verlegenheit, wenn ich meine Methode beschreiben (…) sollte. Und ich bin glücklich, (…) nicht die Fesseln einer Technik zu spüren"].

[50] Gadamer, **T&M** (note 28), p. 352 (English); Gadamer, **W&M** (note 28), p. 364 (German).

[51] *id*, p. 398 (English) and 400 (German).

[52] *id*, p. 300 (English) and 306 (German).

someone's method, and every method being designed by someone with a particular interest in mind (within comparative law, Zweigert and Kötz's hegemonic method, functionalism, is specifically articulated with a view to showing that "different legal systems give the same or very similar solutions, even as to detail, to the same problems of life"[53]), there can be expected to prevail "deformation of knowledge" in the sense at least that method features an intrinsic bias in favour of some information and against other. Under such integral circumstances – method inherently operates in this binary (inclusionary/exclusionary) way – it rapidly becomes implausible that method, any method, should be able to guarantee representativeness, objectivity, and truth. Gadamer could hardly be clearer: "I propose *no method*".[54] For Theodor Adorno, method is "a gigantic tautology" inasmuch as it "exerts a total dominance over what it has itself prepared and formed".[55] Yet, very few theoreticians and practitioners of comparative law appreciate the deep fraudulence at stake.[56]

GADAMER'S FLAIR

Gadamer's principal contention is that one necessarily brings to interpretation a "historically effected consciousness" ("wirkungsgeschichtliches Bewußtsein") – in other words, that one's interpretive consciousness will inevitably have been impacted, in advance of any interpretation, through the action of history. Note that Gadamer's focus is not, in fact, on "history" *stricto sensu*. Indeed, "[w]hat Gadamer has in mind is

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53 Zweigert and Kötz (note 5), p. 39. What is, in fact, an extraordinarily inept assertion in the service of a nefarious ideology has somehow been cast as "common sense": HUSA, J. **A New Introduction to Comparative Law.** Oxford: Hart, 2015. p. 183. But see HYLAND, R. **Gifts.** Oxford: Oxford University Press, 2009. p. 66, where the author perspicuously remarks that, "ha[ving] caused almost no one to think twice", "the obviousness of the [statement] only serves to conceal the fact that it is wrong".

54 GADAMER, H.-G. Historismus und Hermeneutik. In **Gesammelte Werke.** vol. 2. Tübingen: Mohr Siebeck, 1993 [1965]. p. 394 [hereinafter Historismus]. It is regrettable that Gadamer's exposition of the deep scientistic misunderstanding attendant upon methodological expectations in the humanities (broadly understood) does not emanate optimally from his principal book's title. But it is well known that Gadamer reluctantly agreed to "Wahrheit und Methode" ("Truth and Method") only at his publisher's insistence. He would have preferred "Verstehen und Geschehen" ("Understanding and Event"). See GADAMER, H.-G. Die Kehre des Weges. In **Gesammelte Werke.** vol. 10. Tübingen: Mohr Siebeck, 1995 [1985]. p. 75. Upon submission, Gadamer had initially deployed yet another title, "Grundzüge einer philosophischen Hermeneutik" ("Fundamentals of a Philosophical Hermeneutics"), which eventually became the published book's sub-title. See Grondin (note 41), p. 97. Incidentally, Derrida writes "No method" ("Point de méthode"), thereby offering an excellent example of his agreement with Gadamer on important issues concerning textual understanding: DERRIDA, J. **La Dissémination.** Paris: Editions du Seuil, 1972, p. 303.

55 [TIEDEMANN, R.] Nachbemerkung des Herausgebers. In ADORNO, T. W. **Vorlesung über Negative Dialektik.** R. Tiedemann (ed.). Frankfurt: Suhrkamp, 2007 [2003]. p. 339 ["eine gigantische Tautologie"]; ADORNO, T. W. **Zur Metakritik der Erkenntnistheorie.** Frankfurt: Suhrkamp, 1970 [1956]. p. 19 ["Allherrschaft (…) nur (…) über das, was sie schon präpariert, sich selbst angebildet hat"].

56 But see GLANERT, S. Method? In MONATERI, P. G. (ed.). **Methods of Comparative Law.** Cheltenham: Elgar, 2012. p. 61-81; FRANKENBERG, G. The Innocence of Method – Unveiled: Comparison as an Ethical and Political Act. **Journal of Comparative Law.** vol. 9, n. 2, p. 222-258, 2014.

that […] the interpreter is always […] the effect of prior interpretation".[57] As he refers to the past so as to emphasize the determinative role of "background" within interpretation, Gadamer is thinking of "custom, tradition, particular commitments, perspectives, insofar as they predispose our understanding and action",[58] his recurring term of predilection being "tradition". Gadamer thus writes that "[u]nderstanding is […] not so much to be thought of as an act of subjectivity, but as involvement in an event of tradition [Überlieferungsgeschehen]".[59] While I agree with Gadamer's basic insight that understanding is determined, I find that the determinative process at work does not pertain principally to the somewhat narrow idea of tradition, but to the more open-textured and indeed dynamic notion of culture. To Gadamer's "tradition-determinateness of understanding" ("Traditionsbestimmtheit des Verstehens"),[60] I therefore confidently substitute "culture-determinateness of understanding". Meanwhile, I reserve tradition to refer to the component part of culture that gestures specifically towards epistemic clusters having developed over the long term or very long term, for example, "deeply rooted […] attitudes […] about the way law is or should be made, applied, studied, perfected, and taught".[61] In other terms, I understand tradition to stand as *culture-in-time*.

Whether one envisions encumberment as a traditionary or cultural process, two variations on the theme of worldliness (one's existence is worldly, one's being is of the world and in the world – and it cannot be anywhere else and it cannot be nowhere, either), the pivotal insight arising from Gadamer's philosophical thought holds: far from being free, interpretive consciousness is irrevocably encumbered, such encumberment indeed evincing itself irrespective of the interpreter's perception, routinely lying beneath the range of awareness in a way that outstrips one's ability to bring it to reflective transparency and therefore potentially going "entirely unnoticed" ("ganz unbemerkt").[62] Encumberment is an integrally constitutive feature of consciousness; it concerns the very way in which consciousness is configured. On account of the encumbrances inevitably weighing on one's consciousness, it must follow that one's interpretation unavoidably intervenes from an encumbered standpoint, that one's interpretation is necessarily slanted. In Gadamer's words, "we are heirs – all of us and always".[63] Key

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57 LAWN, C.; KEANE, N. **The Gadamer Dictionary.** New York: Continuum, 2011. p. 79.

58 SANDEL, A. A. **The Place of Prejudice.** Cambridge: Harvard University Press, 2014. p. 163.

59 Gadamer, **T&M** (note 28), p. 293 (English) [German word added]; Gadamer, **W&M** (note 28), p. 295 (German) [emphasis omitted].

60 GADAMER, H.-G. Nachwort zur 3. Auflage. In **Gesammelte Werke.** vol. 2. Tübingen: Mohr Siebeck, 1993 [1972]. p. 453.

61 MERRYMAN, J. H. **The Civil Law Tradition.** 2nd edn. Palo Alto: Stanford University Press, 1985. p. 2. This edition is the last to have appeared under Merryman's own signature.

62 Gadamer, **T&M** (note 28), p. 271 (English); Gadamer, **W&M** (note 28), p. 273 (German).

63 GADAMER, H.-G. Philosophie und Philologie. In **Gesammelte Werke.** vol. 6. Tübingen: Mohr Siebeck, 1985 [1982]. p. 277.

and straightforward interpretive implications arise from the impossibility of detached judgement: interpretation cannot be representative (there is "no mere reproduction or repetition"),[64] objective ("the interpreting word […] is not, as such, objective"),[65] or true ("there can be no statement which is absolutely true"),[66] and it cannot be subjective either ("our understanding of a text is not an act of subjectivity").[67]

NO REPRESENTATIVENESS, NO OBJECTIVITY, NO TRUTH

An interpreter – say, a comparatist-at-law – is simply unable to generate a representative, objective, or true interpretation of a text – say, a foreign law-text. The three terms that I underscore (representativeness, objectivity, and truth) are interlaced.

The interpreting consciousness's encumberment always-already precludes objectivity, irrespective of anyone's confidence in the possibility or desirability of such epistemic achievement. For Gadamer, there are the "limits of objectification" ("Grenzen der Vergegenständlichung"),[68] of the process of making-objective, objectivity being "so alien" ("so fremd") to "immediate understanding" ("unmittelbare[m] Verständnis").[69] (Note that the idea of "immediate understanding", in order not to prove self-refuting, must allow for a modicum of reflective activity, that is, for a measure of interpretation.) Worse, objectivity operates detrimentally, since it intervenes as a source of "obstructions" ("Hemmungen") detracting from a disposition on the interpreter's part to acknowledge the "concretion" ("Konkretion") – the coalescence – of the interpretive consciousness and of the text whereby any ascription of meaning is bound to the encumbered consciousness, any enunciation in effect taking the form of an invention, an exercise indissociably featuring both finding and fashioning, the two etymological dimensions of "invention" (the comparatist finds the foreign law having been inscribed in the law-texts before him and, through countless micro-decisions, then proceeds to fashion it into his account thereof).[70]

In Gadamer's parlance, because the interpreting consciousness cannot keep its encumbrances out of interpretive play, since it cannot unload them so as to leave them

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64 Gadamer, **T&M** (note 28), p. 468 (English); Gadamer, **W&M** (note 28), p. 477 (German).

65 *id*, p. 469 (English) and p. 477 (German).

66 GADAMER, H.-G. Was ist Wahrheit? In **Gesammelte Werke.** vol. 2. Tübingen: Mohr Siebeck, 1993 [1957]. p. 52.

67 Gadamer, **T&M** (note 28), p. 293 (English); Gadamer, **W&M** (note 28), p. 298 (German).

68 GADAMER, H.-G. Die griechische Philosophie und das moderne Denken. In **Gesammelte Werke.** vol. 6. Tübingen: Mohr Siebeck, 1985 [1978]. p. 5 [hereinafter Griechische Philosophie]. The published English version adds that there are "clear limits in our power to objectify": GADAMER, H.-G. Greek Philosophy and Modern Thinking. In **The Gadamer Reader.** R. E. Palmer (ed. and transl.). Evanston: Northwestern University Press, 2007. p. 270.

69 Gadamer, Griechische Philosophie (note 68), p. 5.

70 Gadamer, **T&M** (note 28), p. 268 and 295 (English); Gadamer, **W&M** (note 28), p. 270 and 298 (German).

out of interpretation's way, interpretation is simply unable to make itself properly "representational" ("gegenständlich");[71] it must operate as re-presentation, that is, it must deploy a different presentation of the text now being interpreted, a repetition-with-a-difference, an iteration.[72] This is the best that interpretation can achieve, and this is in fact all that interpretation can achieve – again, no matter how rigorous, how meticulous, how scrupulous the interpreter. The presumption that one can understand a text in abstraction from one's own predispositions or predilections, that one can suspend one's epistemic circumstances in order to see a text as such (or *tel quel* or *an sich*) quite simply neglects the genuine ramifications of situated thought, which is that because no one's reasoning can be immune to its worldly accretions (one's being is inherently in-the-world), no understanding can be untainted by one's situatedness. To think that one can neutralize one's facticity is hubris: no interpreter can make himself "free-floating" ("freischweben[d]"),[73] which means that one always-already exists factically. If you will, any report that would be inscribing a text-as-such can only be inscribing a text-as-such-for-one.

Not only is an interpreter – say, a comparatist – unable to be objective vis-à-vis the entities that he is examining – say, foreign law-texts – because, in Heidegger's forceful words, "[t]he interpretation of something as something is essentially grounded in fore-having, fore-sight, and fore-conception",[74] since "[i]nterpretation is never a presuppositionless grasping [ein voraussetzungsloses Erfassen] of something previously given",[75] but such an interpreter is also unable to be objective vis-à-vis oneself, that is, one is incapable of knowing precisely how and why one is not being an objective interpreter. One knows that one is not objective and that one cannot be (this is a known known) – "[m]eaning [is] structured by fore-having, fore-sight, and fore-conception"[76] – but one cannot tell in what ways and to what extent one will not be objective (this is a known unknown). Indeed, "[t]he concept of situation is characterized by the fact that one does not stand in front of it and hence cannnot have any knowledge of it as object. One stands in it, finds oneself always-already within a situation, the enlightening of which is a never completely achievable task".[77] Since the place of situatedness within understanding is properly inescapable, it must be clear that a comparatist cannot tame his worldliness so as to approach a foreign law-text with the guarantee that his

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71 *id*, p. 469 (English) and 477 (German).

72 I refer to Leibniz's Law: *supra* (note 4).

73 Heidegger, **B&T** (note 36), p. 255, where Stambaugh retains "unattached". For the German text, see Heidegger (note 34), p. 276.

74 *id*, p. 146 (English) and 150 (German).

75 *id*. [German words added].

76 *id*, p. 147 (English) and 151 (German) [emphasis omitted].

77 *id*, p. 301 (English) and 307 (German).

interpretive appreciation would not be inflected in the least through the slightest epistemic inclination.[78] Indeed, it must be obvious that to pursue "[a] correct interpretation 'as such' would be a thoughtless ideal".[79] Rather, interpretation retains "a *fundamental* accidentality" ("eine *grundsätzliche* Akzidentialität").[80] It is accidental to the extent at least that the interpreter's enculturation is accidental. I accidentally wrote my comparative law dissertation at Oxford, and I accidentally did so under the supervision of the late Professor Bernard Rudden. But since only within the pregiven sign-system within which one is framed does one engage in sense-making, does one find and fashion meaning, if I had spent my *Lehrjahre* at the university of Vienna instead, I would come to the interpretation of foreign law-texts against a different background, and my understanding of them would evidently differ. For example, I would not regard Zweigert and Kötz's reference to comparative law being a "*science pure*" as so ludicrous.[81] *Interpretation depends, and no report on foreign law inscribes an "unquestionably given text"* ("fraglos gegeben[er] Tex[t]").[82]

Once more, representativeness, objectivity, and truth are braided. To return to my anagram, if one cannot have ro (representativeness + objectivity) – and one cannot, because "[e]very statement is motivated", "[e]very statement has its presuppositions, which it does not express"[83] – then one cannot have t (truth). Even assuming, *concessio* firmly *non dato*, that there would exist, out of all possible interpretations of a foreign law-text, the "true" interpretation (which I do not accept, because a "true interpretation" is a contradiction in terms; again, though, let me postulate an allowance), the fact of the matter is that this "true" interpretation could only be accessed through a representative or objective account of foreignness. It must stand to reason, indeed, that a non-representative or non-objective report on a foreign law-text – which is all that a comparatist can ever produce – requires to forsake, *ipso facto* so to speak, any enunciation of the truth concerning foreignness.

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78 Cf. GORDON, P. E. Heidegger, Metaphysics, and the Problem of Self-Knowledge. In BOWLER, M.; FARIN, I. (eds.). **Hermeneutical Heidegger.** Evanston: Northwestern University Press, 2016. p. 176: "[W]hatever it is that I can call self-knowledge is something to which I have access only through the mediation of my being-in-the-world. It follows that self-knowledge is mediated by [cultural] knowledge". In this passage, Gordon explains Heidegger approvingly. I have replaced Gordon's "social", a term whose semantic extension is too narrow, with my "cultural".

79 Gadamer, **T&M** (note 28), p. 398 (English); Gadamer, **W&M** (note 28), p. 401 (German).

80 *id*, p. 401 (English) and 404 (German).

81 Zweigert and Kötz (note 5), p. 6. The expression appears in italicized French in the English text and in quotation marks in the German text (ZWEIGERT, K.; KÖTZ, H. **Einführung in die Rechtsvergleichung.** 3rd edn. Tübingen: Mohr Siebeck, 1996. p. 6). Incredibly, the obsession with scientificity within comparative law remains current more than fifty years after Zweigert and Kötz decided to orient themselves by reference to that particular lodestar. See eg KHOSLA, M. Is a Science of Comparative Constitutionalism Possible? **Harvard Law Review.** vol. 135, n. 8, p. 2110-2149, 2022.

82 Gadamer (note 63), p. 276.

83 Gadamer (note 66), p. 52.

NO SUBJECTIVITY (ABOUT THE OWN AND THE THROWN)

The interpreter – the comparatist-at-law – faces a double bind. Indeed, quite apart from representativeness, objectivity, and truth, subjectivity is also foreclosed. The best explanation for this state of affairs is Heidegger's and involves the concept of "thrownness" ("Geworfenheit"), a key Heideggerian motif capturing the idea that one is delivered over to a factical existence that pertains to the public space and is not of one's own making.[84] Again, whether one frames it as tradition or culture, the worldly background very much operates as an "existential structure" ("existenziale Struktur")[85]. Since it is a structure that precedes any and all understanding, any and all articulation of intelligibility, indeed a structure that makes sense-making possible, its anteriority is usefully captured by the expression "fore-structure" ("Vor-Struktur"), another term of Heidegger's: "[E]very interpretation operates within the fore-structure".[86] Key characteristics pertaining to this fore-structure are that it is not of one's own making and that one is thrust into it, "never having chosen to enter it, and now wrapped within it so thoroughly that one is compelled to see all one's surroundings in a definite light".[87] Specifically, one is thrown into the constitutive features of one's existential fore-structure such as language, religion, morality, forms of politeness – or law. And it is the existential fore-structure that supplies one with one's interpretive equipment. Heidegger thus refers to the self that "gets constituted in the throw" ("des Entwurfs konstituiert wird").[88] Predispositions and predilections of all kinds – pre-judgements or, etymologically (and not derogatorily), prejudices – *constitute* selfhood.[89] Indeed, "[p]rejudices are so pervasive that it is unreasonable to project their eradication".[90] The fore-structure necessarily operates as a *prejudicial* fore-structure.

Plainly, "there is no understanding or interpretation in which the totality of this existential structure does not function, even if the intention of the knower is none other than to read 'what is there' and to extract from the sources 'how it really was'".[91] I repeat that this interpretive condition is unsurmountable: "[What] belongs to its facticity is

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84 See eg Heidegger, **B&T** (note 36), p. 135-139 and 351 (English); Heidegger (note 34), p. 143-148 and 383 (German).

85 *id*, p. 136 (English) and 145 (German).

86 *id*, p. 147 (English) and 152 (German). See generally ROUSSE, B. S. Fore-structure. In WRATHALL, M. A. (ed.). **The Cambridge Heidegger Lexicon.** Cambridge: Cambridge University Press, 2021. p. 325-328.

87 RICHARDSON, J. **Existential Epistemology.** Oxford: Oxford University Press, 1986. p. 34.

88 Heidegger, **B&T** (note 36), p. 136 (English); Heidegger (note 34), p. 145 (German).

89 The rehabilitation of "prejudice" according to its etymological rather than disparaging sense is a key commitment of Gadamer's. See eg Gadamer, **T&M** (note 28), p. 273-278 (English); Gadamer, **W&M** (note 28), p. 275-281 (German). See generally Sandel (note 58), p. 157-184.

90 MAKKREEL, R. A. **Orientation and Judgment in Hermeneutics.** Chicago: University of Chicago Press, 2015. p. 95.

91 Gadamer, **T&M** (note 28), p. 252 (English); Gadamer, **W&M** (note 28), p. 266-267 (German).

that the Dasein, *as long as* it is what it is, remains in the throw".[92] There is accordingly, and inevitably, "[t]he thrown-character of understanding" ("[d]er Entwurfcharakter des Verstehens").[93] Observe, moreover, that one is not in a position to idiosyncrasize the fore-structure, since one must proceed as "they" do: one must feminize French words the way "they" do, one must greet by pecking on the cheek the way "they" do, and one must treat the normative value of judicial decisions the way "they" do. Over against the Cartesian fiction heralding the mind's autonomy from the world and the mind's agential supremacy over the world – Derrida refers to "Descartes's novels" ("[l]es romans de Descartes")[94] – "[w]hether explicitly or not, [one] *is* [one's] past".[95] One is one's education, one's socialization, one's institutionalization, one's epistemologization: one is one's *inculcation*. In Heidegger's terms, the interpreter thus exists as *having-been*. In particular, the German language allows Heidegger to write "[l]ch bin-gewesen", literally "I am-having-been".[96] There is, then, the interpreter's primordial "beenness" (his "Gewesenheit") as a constitutive element of his very interpretive existence. Meanwhile, subjectivity properly understood is but a "flickering" ("Flackern") in the "closed circuits of historical life" ("geschlossenen Stromkreis des geschichtlichen Lebens").[97] To be sure, a prejudicial fore-structure is not a static "something" that would apply to a given problematic through mechanical subsumption. Rather, a prejudicial fore-structure develops through a continuously evolving process of implementation. And it operates "protectively" in the sense that it spontaneously seeks self-preservation.[98]

Consider the matter from another angle. If psychoanalysis has taught one anything, it is that one does not generate oneself from within. Rather, one is fashioned through experiences, interactions, and even traumas – all of which one in-corporates as encultured being. It is not, then, that the intrusion of the exterior is subsequent to

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92 Heidegger, **B&T** (note 36), p. 172 (English); Heidegger (note 34), p. 179 (German).

93 *id*, p. 140 (English) and 145 (German).

94 DERRIDA, J. **Du droit à la philosophie.** Paris: Galilée, 1990. p. 311.

95 Heidegger, **B&T** (note 36), p. 17 (English); Heidegger (note 34), p. 20 (German).

96 *id*, p. 299 (English) and 326 (German) [emphasis omitted]. In Heidegger, **B&T**/1962 (note 35), p. 373, Macquarrie and Robinson retain "I-am-as-having-been" [emphasis omitted]. Typically, this translation is gentler on anglophone eyes, but less loyal to the source text: Heidegger does not have "as" ("als").

97 Gadamer, **T&M** (note 28), p. 278 (English); Gadamer, **W&M** (note 28), p. 281 (German). While the space into which one is thrown inscribes the range of acceptable interpretive possibilities (it allows some and forecloses others), the process does not deny pluralism. In other words, even assuming a minimal "community" only (and acknowledging that any "community" is constructed and contested), not everyone within this "community" will speak the "community"'s language identically (which means that there remains important – and irreducible – room for the first-person perspective). But everyone will be speaking the "community"'s language (a fact that the very idea of community indeed assumes), a language that one was not invited to choose and that one is not permitted to make radically personal.

98 Like other organisms, the prejudicial fore-culture strives to maintain a state of equilibrium in connection with its environment and indeed seeks to perpetuate itself: it thus aims to overcome transgressions. Thus, "Johann Sebastian Bach", "Galileo", and "Julius Caesar" are "Jean-Sébastien Bach", "Galilée", and "Jules César" in French.

the emergence of the self: it *is* the emergence of the self. But one does not command this process. Specifically, one does not control what goes into the constitution of the self: one does not choose the memories that one retains or the dreams that one has, for example, and one does not select one's anxieties and traumas either. One can neither access nor direct one's *haunting*. Hence, Freud's pithy insight: "[T]he ego is not a master in its own house" ("[D]as Ich [ist] nicht Herr [...] in seinem eigenen Haus").[99]

CONSEQUENCES

In the following statement, Gadamer offers, in my view, an exemplary enunciation of the principal epistemic implications arising from one's situatedness: "Wanting to avoid one's own concepts in interpretation is not only impossible, but blatant absurdity [offenbarer Widersinn]. To interpret means precisely to bring one's own preconcepts into play so that the meaning of the text can really be made to speak for us".[100] While his reference to "preconcepts" arguably encapsulates (if most economically) the range of issues pertaining to rots that I have addressed already, Gadamer's words carry eight further important ramifications at least, which all deserve emphasis. As comparatists--at-law discard rots, they must accept these epistemic repercussions – no matter how disruptive from the perspective of their positivism.

1 No Comparatist Has an Open Mind

It ensues from the existence of a Heideggerian prejudicial fore-structure, of Gadamerian pre-concepts – from the requirement for the expulsion of rots – that the idea of an interpretive mind existing as an open mind, as a mind wholly unoccupied by prejudices (anterior inclinations, pre-existing dispositions, antecedent predilections), must be foreclosed. Even as they pride themselves on being open-minded in a way that their fellow jurists who confine themselves to the study of local law can never be, comparatists are not, strictly speaking, *open-minded*. On account of the prejudicial enculturation to which the comparatist must have been exposed, there can be no question of a blank consciousness. Rather, to avail myself once more of Gadamer's words, the consciousness that is applying itself to the interpretation of foreign law-texts is inevitably an "effected consciousness",[101] a consciousness that is the effect of enculturation, that has been shaped and framed by enculturation – an encultured consciousness.

[99] FREUD, S. **Eine Schwierigkeit der Psychoanalyse.** In **Gesammelte Werke.** vol. 12. A. Freud *et al* (eds.). Frankfurt: Fischer, 1947 [1917]. p. 11. The conventional English title of this short text is "A Difficulty in the Path of Psychoanalysis". Cf. LACAN, J. **Écrits.** Paris: Editions du Seuil, 1966 [1953]. p. 421: "He is autonomous! That is quite a good one" ["Il est autonome! Celle-là est bien bonne"].

[100] Gadamer, **T&M** (note 28), p. 398 (English) [German words added]; Gadamer, **W&M** (note 28), p. 401 (German).

[101] *Supra* (note 57 at text).

Envisage Richard Polt, a noted exponent of Heidegger's thought: "The most authentic and original artwork, political decision or personal choice is dependent on the range of possibilities available in one's culture".[102] Indeed, there is the "intrinsic prejudicialness of all understanding" ("wesenhaft[e] Vorurteilshaftigkeit alles Verstehens").[103] Any foreign consciousness that purports to make sense of the French "juge", for example, can only be an encultured consciousness. For instance, a Brazilian consciousness, that is, a consciousness having been encultured into Brazilian law and legal culture, seeking to ascribe meaning to the French "juge" will, perforce, materialize relatively to the enculturation – the prior acquaintance with the Brazilian "juiz" – against which its strategy of sense-making must necessarily unfold.[104] (I am deliberately leaving to one side Brazilian terms like "ministro" or "disembargador" that would complicate even further the process of imputation of meaning deploying itself in France.) The interpretive bridge that one constructs allowing one to make one's way towards the other and allegedly to reach the other is necessarily *one's* bridge, a bridge that one can only build with the materials at *one's* disposal.[105] I write "allegedly" on purpose. Since the self cannot be the other, because "there *is* the distance" ("il y a l'éloignement"),[106] every effort on the part of the self to reach otherness effectively stands, at best, as "a patient and provisional and forever deferred arrival into the performative of the other".[107] "[N]o two ever meet".[108]

Not only is open-mindedness unrealistic, then, but it is also undesirable. Contrary to Kant who, in his third critique, defined enlightenment as the "emancipation from prejudices generally" ("Befreiung von Vorurteilen überhaupt"),[109] or to Descartes, who had earlier encouraged an "effort to extract prejudices from the mind" ("quo mentem præjudiciis exuere conatus"),[110] I hold that an open mind ought not even to qualify

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[102] POLT, R. **Heidegger: An Introduction.** London: Routledge, 1999. p. 63. For Heidegger, there is freedom for Dasein, "although always within the limits of its thrownness". I refer to Heidegger, **B&T** (note 36), p. 348 (English); Heidegger (note 34), p. 366 (German).

[103] Gadamer, **T&M** (note 28), p. 272 (English); Gadamer, **W&M** (note 28), p. 274 (German).

[104] Cf. TAYLOR, C. Comparison, History, Truth. In **Philosophical Arguments.** Cambridge: Harvard University Press, 1995. p. 150: "[O]ther-understanding is always in a sense comparative. That is because we make the other intelligible through our own human understanding. This is always playing a role, and can't just be put out of action. The more we think we have sidelined it or neutralized it, […] the more it works unconsciously and hence all the more powerfully to ethnocentric effect".

[105] Cf. Heidegger, **B&T** (note 36), p. 140 (English); Heidegger (note 34), p. 149 (German): "The 'as' forms the structure of the explicitness of what is understood; it constitutes the interpretation".

[106] DERRIDA, J. **La Carte postale.** Paris: Flammarion, 1980 [9 juin 1977]. p. 34 [emphasis in English added].

[107] SPIVAK, G. C. **Death of a Discipline.** New York: Columbia University Press, 2003. p. 13.

[108] BECKETT, S. Closed Place. In **Fizzles.** In **Texts for Nothing and Other Short Prose, 1950–1976**. M. Nixon (ed.). London: Faber & Faber, 2010 [1976]. p. 147. Cf. Derrida (note 22), p. 31: "[T]here are only islands" ["(l)l n'y a que des îles"].

[109] KANT, I. **Kritik der Urteilskraft.** K. Vorländer (ed.). Hamburg: Meiner, 1993 [1790]. § 40. p. 146.

[110] DESCARTES, R. Responsi authoris ad quintas objectiones. In **Œuvres de Descartes.** vol. 7. C. Adam; P. Tannery (eds.). Paris: Cerf, 1904 [May-June 1641]. p. 348 [emphasis omitted]. This reply is to Pierre Gassendi (1592–1655), a French philosopher who had sent Descartes extensive objections upon the publication of the

as an aspiration, and there are three reasons at least why this is the case. Not only is the quest for an open mind hopeless from a cognitive standpoint, but open-mindedness would effectively and fatally disempower the comparatist. Such disablement would arise, because even as a prejudicial fore-structure instills cognitional limitations, it also acts, through a paradoxal interweaving, as an interpretive resource. Without being always-already familiar with the Brazilian "juiz", how could the Brazilian comparatist distinguish the French "juge" from a poet or a plumber? There is more, for the raison d'être of comparative law is precisely to apply a foreign perspective on local law. In other words, the Brazilian slant on the French "juge" is wanted. Note how the fact that the Brazilian interpretation will be, at best, a little below or a little above the French understanding – that it will be "deficient" ("deficiente") or "exuberant" ("exuberante") vis-à-vis the local configuration[111] – does not detract from its comparative merit. Indeed, what point would there be for a Brazilian jurist in duplicating a French view on the French "juge" when there are French law textbooks of all formats, and many French law reviews also, already supplying the gamut of French stances on the French "juge"? What value would there be in a Brazilian comparatist adding yet one more French outlook to the large array of French outlooks already on display? It would be thoroughly self-defeating for comparative law to operate as a mimetical venture. It ought to go without saying that along the merry way, the Brazilian comparatist will also acquire fresh perspectives on the Brazilian "juiz". This is indeed one of comparative law's gambits: that self-understanding will not be enhanced strictly through solipsistic introspection, but also via comparison with otherness.

Although the fact that one hails, say, from a multicultural society – and that one does not therefore come to the comparative task with an open mind – will prejudice one's examination of the French statutory prohibition on religious attire at school (I return to this law-text presently), one's multicultural background need not prevent one from assessing the French model *justly*. While it would be mistaken to suggest that the workings of a prejudicial fore-structure are incompatible with a just treatment of foreignness, it remains that the Brazilian comparatist must actively seek to keep his ethnocentrism – more accurately, his *juricentrism* – in check. One would like to think that any sentiment along the lines of bigotry or hatred should be straightforwardly

latter's *Meditationes de prima philosophia* (*Meditations on First Philosophy*) earlier in the year 1641. See also DESCARTES, R. Epistola ad G. Voetium. In **Œuvres de Descartes.** vol. 8. C. Adam; P. Tannery (eds.). Paris: Cerf, 1905 [May 1643]. p. 37, where Descartes holds that "prejudices" ("præjudicia") must be "set aside" ("deponere"). This letter is to Gisjbert Voet (1589–1676), a professor of theology at the university of Utrecht.

111 ORTEGA Y GASSET, J. La reviviscencia de los cuadros. In **Obras completas.** vol. 8. 2nd edn. Madrid: Alianza Editorial, 1983 [1946]. p. 493. While Ortega's claim concerns translation, it also applies to interpretation (translation *is* interpretation).

manageable, but it is important to bear in mind that undue biases may come into interpretive play insidiously.[112]

2 Every Comparing Mind Is a Prison

Both the Heideggerian prejudicial fore-structure and the Gadamerian pre-concepts constitute a prison in the sense at least that one must accept "a disclosive submission to world out of which things that matter [to one] can be encountered" and that one cannot release oneself from the grip of this process of subordination (which is, of course, why rots makes no sense and must be jettisoned).[113] I derive the term "prison" from Adorno's and Fredric Jameson's, who use it with specific reference to language, arguably the foremost application of enculturation.[114] In the way one's native language can never be obliterated, a comparatist's native law can never be erased. Specifically, I maintain that a French comparatist, socialized and institutionalized into French law and French legal culture, will never eradicate "his" binary view of the law, which he was taught to articulate in terms of a primordial division between the private and the public spheres. The basic fact is that enculturation is consubstantial with existence; indeed, it has perspicuously been said that the self exists as "a moving extension" of culture.[115] And this incorporation (*in* + *corporare*: to form into a body) or this embodiment of culture is the reason why Gadamer refers to the fact that interpretation *must* involve the "bring[ing] into play" of "one's own concepts", that he insists on the impossibility of "avoid[ing] one's own concepts", and that he contends how trying to achieve such desistance would be "blatant absurdity".[116] Quite simply, one does not have one's enculturation "at [one's] free disposal" ("zu freier Verfügung").[117] In particular, I cannot make it such that the very first judicial decision I ever read and researched was not an English Court of Appeal opinion or that I never had Professor Bernard Rudden as my dissertation supervisor during my Oxford years. I cannot extirpate any of these socialization or institutionalization processes from my body, from what I am and from who I am. These events have happened, they have constituted me, and they continue to mark me: I am their captive. Even "[s]elf-understanding [is] not […] an available self-possession",[118] since as I reflect critically upon my enculturation, I reflect from within it. (I simply cannot achieve a view of myself from nowhere.) For example, the

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112 For an apt warning to this effect, see DERRIDA, J. **De la grammatologie.** Paris: Editions de Minuit, 1967. p. 178.

113 Heidegger, **B&T** (note 36), p. 134 (English); Heidegger (note 34), p. 137-138 (German).

114 ADORNO, T. W. **Metaphysik.** R. Tiedemann (ed.). Frankfurt: Suhrkamp, 1998 [1965]. p. 107, where the author refers to "the prison of language" ("Gefängnis der Sprache"); JAMESON, F. **The Prison-House of Language.** Princeton: Princeton University Press, 1972.

115 FISH, S. **Doing What Comes Naturally.** Durham: Duke University Press, 1989. p. 13.

116 *Supra* (note 100 at text).

117 Gadamer, **T&M** (note 28), p. 295 (English); Gadamer, **W&M** (note 28). p. 301 (German).

118 Gadamer, Historismus (note 54), p. 406.

understanding that I have of myself as a comparatist – as the comparatist that I have become and as the comparatist that I ought to become – very much pertains to my Oxford training, itself a crucially important dimension of my enculturation. I am what my Oxford experience has made me, and I cannot now make it such that my Oxford experience has never made me. I can try to understand the cultural conditioning of my existence, but I cannot change it. I repeat that, after Heidegger, every comparatist-at-law must say to himself: "I am-having-been".[119] Indeed, "[o]ne remains imprisoned by one's upbringing",[120] hence, no doubt, Heidegger's blunt reference to "the hardness of [one's] fate" ("die Härte seines Schicksals").[121]

3 Every Comparatist's Concern Is Himself

It is the case that not only does any experience of interpretation necessarily emerge out of one's enculturation (there is no open mind) and that enculturation is unsuppressible (one is hostage to it), but the further fact is that "[h]e who wants to understand a text always performs a projection",[122] which means that, in effect, any understanding must be accommodated to fit within one's self-understanding. Ultimately, whether through projection or accommodation, every understanding takes place *as* self-understanding.[123] (I mean, of course, the thrown self, since there can be no question of a subjective self). To frame this proposition more literarily (and no less philosophically), I am minded – as is often the case – to quote from Samuel Beckett's array of pithy enunciations: "One believes to be choosing a thing, and it is always oneself that one chooses."[124] And the necessary presence of the self within the comparative endeavour – that is, within the assemblage of foreign law and within the composition about foreign law – entails that, *pace* Zweigert and Kötz,[125] no comparative research can be disinterested, a finding that holds irrespective of whether selfness is understood as a useful pragmatic fiction or as a neurological materiality (and whether it is articulated

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[119] *Supra* (note 96 at text).

[120] MacINTYRE, A. On Having Survived the Academic Moral Philosophy of the Twentieth Century. In O'ROURKE, F. (ed.). **What Happened in and to Moral Philosophy in the Twentieth Century?** Notre Dame: University of Notre Dame Press, 2013. p. 31.

[121] Heidegger (note 23), p. 291.

[122] Gadamer, **T&M** (note 28), p. 269 (English); Gadamer, **W&M** (note 28), p. 271 (German).

[123] Cf. *id*, p. 251 (English) and 265 (German): "[A]ll […] understanding is in the end a self-understanding" [emphasis omitted]. *Adde*: DEVEREUX, G. **From Anxiety to Method.** The Hague: Mouton, 1967. p. 148: "All research is […] self-relevant and represents more or less direct introspection".

[124] BECKETT, S. Letter to Marthe Arnaud. In FEHSENFELD, M. D.; OVERBECK, L. M. (eds.). **The Letters of Samuel Beckett.** vol. 1. Cambridge: Cambridge University Press, 2009 [10 June 1940]. p. 683. Beckett penned his letter in French. For his part, Heidegger writes, somewhat more cryptically: "The being which this being is *concerned about* in its being is always my own". I refer to Heidegger, **B&T** (note 36), p. 42 (English); Heidegger (note 34), p. 42 (German).

[125] See Zweigert and Kötz (note 5), p. 34.

as an entity unitary or as a complex fragmented, famously, into the id, the ego, and the superego – or, indeed, along any other lines). As the very word indicates, and no matter how semantically slippery, selfness involves a reflective concern: the self acts *concernfully* – it acts for its sake (even if it proceeds through the fig-leaf of altruism). At the most basic operational level, then, the self acts deliberately or purposefully, if not intentionally. At the very least, for example, the comparatist's research is informed by a self-understanding of what counts as good comparative law. And at the very least, too, one's comparative intervention is therefore seeking to promote such self-understanding – which means that the comparatist is striving to foster or to enable himself, always. Otherwise said, the exclusion of the self from the comparison is never an option: selfness is insistently at work in the comparison, if in surreptitious ways.

4 Foreign Law Is Without a Meaning

Gadamer reminds one that, counter-intuitively perhaps, interpretation cannot assume that a text's meaning is there, within the text, in the text's words themselves, as the text, awaiting its interpreter, whose task would be to collect or harvest it without further ado. In this regard, then, one's ambition must be to overcome the myth of the given.[126] Consider the French statute on religious attire at school that came into force on 15 July 2004. This legislative enactment, now consolidated into the Code of Education (Code de l'éducation), includes a pivotal article that, in my current English translation, states as follows: "In public primary and secondary schools, the wearing of signs or attire whereby students ostensibly demonstrate a religious belonging is prohibited".[127] *Quaere*: does the statute extend to secular items of clothing that an individual privately invests with a religious connotation? Think of a bandana looking like an ordinary bandana to everyone, but that a student is wearing, for himself or herself, as a Sikh turban or as a Muslim headscarf. Do the statute's words, then, extend to the prohibition of a private investment of religiosity? If the meaning of the text is taken to be there, within the text, in the text's words themselves, as the text, awaiting its interpreter, then the question whether the French statute prohibits private investment of religiosity must depend on the contents of the law-text itself, as it exists, there. And this position must entail that the French statute would prohibit private investment of religiosity – or not – even before any French jurist or U.S. comparatist were to sit himself in the Sorbonne law library to study the law-text's words and irrespective of any reading that such an interpreter would commend. Along with Gadamer, I resist this simplistic understanding of meaning.[128]

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126 *Supra* (note 82 at text).

127 See <www.legifrance.gouv.fr/loda/id/JORFTEXT000000417977>.

128 *See* Legrand, What Is That? (note 25). For a detailed argument against "meaning-centrism" in international legal thought, see ASPREMONT, J. D'. **After Meaning.** Cheltenham: Elgar, 2021.

While the French statute and its words are a (grammatical) reality, they do not, and cannot, exist as containing a meaning – say, "the prohibition of private investment of religiosity" – without an interpreter coming to them to make them mean that meaning. Specifically, the words of the statute cannot mean "the prohibition of private investment of religiosity" or indeed anything else – they cannot mean anything, in fact – without a reader coming to the text in order to make it mean or, if you will, without a reader "meaning in". Far from inertly lying within the text and awaiting its harvesting, meaning is therefore ascribed from the outside: "What a text says is actually what some actor on the text says it should say".[129] In other terms, "the reader's response is not *to* the meaning; it *is* the meaning".[130] As Gadamer contends, to interpret is thus to "bring one's own preconcepts into play" with a view to ascribing meaning to a text. It is the interpreter who is conveying meaning to the text, who is making sense of the text. Think of the interventionism that the expression "to make sense" actually suggests: to make… sense, that is, *to fabricate sense*. Meaning is the interpreter's work, which is one reason, for instance, why it makes all the difference whether *King Lear*'s interpreter is James Shapiro or Brian Vickers – or indeed Stanley Cavell.[131] (And it would not, if meaning were some immobile matter existing within Shakespeare's text itself that Shapiro, Vickers, and Cavell all simply came to the text to collect.) A further observation is in order regarding the argument from immanence. Any view that a text's meaning would be immanently contained within it is self-refuting, for that view must inherently stand as an interpretation of the text.

I find that the expression "counter-signature" helps to carry the idea that the interpreter is also signing the text, if differently from its author (which is why "joint signature" would not do). Now, if "counter-signature" evokes the idea that the interpreter would somehow be counterfeiting the text, such resonance is etymologically apt, since the Latin "contra facere" means "to make in opposing imitation, to make in contrast to imitation". Indeed, interpretation cannot be imitation – again, interpretation involves re-presentation rather than representation. Note that interpretation is not opposing the text (which would be a silly contention to maintain); rather, it is opposing the idea that it would be imitating the text.[132] As he responds to the text, the interpreter is investing it with meaning: he is conferring an "increase in being" ("Zuwachs an Sein") to it.[133]

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129 SHILLINGSBURG, P. **Textuality and Knowledge.** University Park: Pennsylvania State University Press, 2017. p. 65.

130 FISH, S. **Is There a Text in This Class?** Cambridge: Harvard University Press, 1980. p. 3.

131 See SHAPIRO, J. **The Year of Lear.** New York: Simon & Schuster, 2015; VICKERS, B. **The One King Lear.** Cambridge: Harvard University Press, 2016; Cavell (note 26).

132 I draw on DERRIDA, J. Contresignature. Unpublished, 2000. p. [30] (on file). At this writing, Derrida's essay remains inedited in its source version. For a published English translation, see DERRIDA, J. Countersignature. M. Hanrahan (transl.). **Paragraph.** Edinburgh, vol. 27, n. 2, p. 7-42, 2004.

133 Gadamer, **T&M** (note 28), p. 135 (English); Gadamer, **W&M** (note 28), p. 145 (German).

Paradoxically, any meaning that is imputed to a text must also be *of* the text (which is why the concept of invention is so useful inasmuch as it compresses the ideas of finding and fashioning). Even as I argue for the necessary recognition of the interpreter's power – every individual interpretation is selective (it makes a choice) and determinative (it makes a decision)[134] – I hold that the text being interpreted acts as a kind of charter framing the interpreter's autonomy. To offer a provocative illustration, there is no way in which the word "tenues" in the French statute on religious attire in public schools could meaningfully be translated into English as "nuclear rockets". Contemplate Derrida: "One does not do anything whatsoever with language".[135] There are the words there are, there, and while a text can have more than one meaning it cannot have every meaning. The control that the interpreter is in a position to exercise – and his authority is considerable – must therefore contend with the text's words themselves. Since no interpretation is fully exempt from reference – every interpretation is an interpretation *of* something – the interpreter's interpretive sovereignty cannot be unconditional, at least if the exercise must be worthy of being designated an "interpretation". For an interpretation to exist as an interpretation *of* a text, it must demonstrably engage with the text, with *that* text. If you will, despite the fact that "[t]he interpreting word always has something accidental [to it]",[136] there must be a "going-along-in-understanding" ("im Verstehen mitzugehen") that requires to be involved in the process of interpreting a text.[137] In other terms, the text being interpreted must inhere to the interpretation: it must be present within it, it must haunt it. Envisage interpretation, then, as giving effect to a (singular) deployment of inherence.

Now, because interpretation is of a text and since – conventionally, at least – a text can only signify within a bounded semantic framework, when it comes to meaning it is the words of the text that have the last word.[138] This textual preponderance – this resilience – has to do neither with anything like the essence of the inscribed words nor with any form of transcendental withstanding characterizing the text. Rather, it concerns the way in which a given linguistic community has conventionally invested

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[134] For an arresting illustration of the extent of the narrator's interpretive authority, see BECKETT, S. **Molloy**. S. Weller (ed.). London: Faber & Faber, 2009 [1955]. p. 184: "Then I went back into the house and wrote, It is midnight. The rain is beating on the windows. It was not midnight. It was not raining". In principle, the comparatist ascribing meaning to foreign law enjoys a latitude akin to Moran, Beckett's character, writing about the time and the weather.

[135] DERRIDA, J. **Apprendre à vivre enfin.** J. Birnbaum (ed.). Paris: Galilée, 2005. p. 38. Although showing itself to be remarkably open, language thus frames the extent of its own possible unfolding as it reveals "powers of coding or of overcoding, otherwise said, of control and of self-regulation": DERRIDA, J. **Psyché.** vol. 1. 2nd edn. Paris: Galilée, 1998. p. 354.

[136] Gadamer, **T&M** (note 28), p. 401 (English); Gadamer, **W&M** (note 28), p. 404 (German).

[137] GADAMER, H.-G. Hermeneutik auf der Spur. In **Gesammelte Werke.** vol. 10. Tübingen: Mohr Siebeck, 1995. p. 161.

[138] Cf. Gadamer (note 63), p. 276: "[T]he text has the last word".

the relevant term – say, "tenues" – with a received semantic extension or an accepted meaning, often over the long or very long term. Otherwise said, "[t]he meaning of an utterance […] is its experience".[139] There are therefore limits, or "built-in" conventional semantic constraints, to cabin how much the interpreter's assertion of individual consciousness can strike an independent course from the social aspect of human understanding – which entails that there is no unlimited or infinite semiosis: "The words themselves block the way".[140] An interpretation that fails to adjust itself to the text (a prejudicial fore-structure or pre-concepts engage in an interpretive to and fro with the text) can therefore be impugned as an over-interpretation, at least as a conventionally inadmissible over-interpretation, that is, as an interpretation *lying* beyond what a text can legitimately be taken to mean at a certain time within an ascertainable linguistic constituency under any reasonably intelligible or persuasive view.[141] It can be false – even as no interpretation can be true. And falsehood is the kind of transgression that cannot be allowed.[142] Note that limits on interpretive freedom also arise, and importantly so, on the side of the reader, who is exercising supervisory control over the proposed interpretation: there is what the reader will prove willing to accept, or not – what the reader's enculturation will make possible for him to accept, or not. (A comparatist-at-law's reader is an interpreter's interpreter.)

In the absence of a meaning within the text and as the text, in the presence of more than one exercise in ascription of meaning, of more than one interpretation, it is key to insist on the fact that far from amounting to the disqualifying chaos that would prompt an abrupt dichotomization between right and wrong along established positivist lines, interpretive pluralism stands as a signal opportunity. The deliberations that varied interpretations make feasible, and indeed encourage, afford a commendable occasion for the refinement of one's views and of one's understanding, that is, for an enhancement of one's appreciation of otherness. Ultimately, the fact that there is more than one interpretation in co-presence as to whether the French statute prohibits private investment of religiosity makes every interpreter into a sharper analyst of the foreign law-text. Contrariwise, the imposition of truth-in-meaning, and the authoritarianism attendant upon such exaction, would immediately and damagingly thwart further discussion.[143]

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[139] Fish (note 130), p. 65.

[140] HARTMAN, G. H. **Saving the Text.** Baltimore: Johns Hopkins University Press, 1981. p. 157.

[141] Even an advocate of over-interpretation such as Jonathan Culler concedes that "meaning is context bound": CULLER, J. In Defence of Overinterpretation. In COLLINI, S. (ed.). **Interpretation and Overinterpretation.** Cambridge: Cambridge University Press, 1992. p. 120.

[142] Cf. Derrida (note 112), p. 227: "[Reading] cannot legitimately transgress the text towards something other than itself" ["(La lecture) ne peut légitimement transgresser le texte vers autre chose que lui"].

[143] See eg DERRIDA, J. **Papier machine.** Paris: Galilée, 2001. p. 398 and 306.

5 Foreign Law Is What the Comparatist Says It Is

One mistake that the proponents of a hiatus-free seamlessness between an interpretable foreign law-world and a comparing legal mind appear frequently to indulge concerns the role of language. Those who assume that a comparing legal mind can exactly – objectively and truthfully – duplicate an interpretable law-world seem to think that language comes after the foreign event, that it can survey foreign facticity and from its vantage of subsequence convey an interpretable foreign law-world exactly – that it can, conqueringly, represent foreignness objectively and truly. But this assumption misunderstands the operation of language whose working is rather one of *obsequence*. It is not, then, that language intervenes once the foreign facts are clearly *in situ* and that the only question outstanding remains the issue of formulation. Rather, language acts at a much earlier stage *quae* condition of sense-making of a foreign law-world. There is the "original linguisticality of man's being-in-the-world".[144] In other words, language is an intrinsic part, *ex ante facto*, of any act of sense-making of a foreign law-world by a comparing legal mind. It is always-already present within the appreciation or appropriation of foreignness, which means that it is impossible to imagine any understanding of an interpretable foreign law-world other than through and as language. Consider Heidegger's formulation: "[W]e do not utter what we see, but on the contrary we see what one says about the matter".[145] The mountain exists, but one sees the mountain in words, in one's words. In one's head, one says: "It is huge"; "It is beautiful"; "It is white"; "There is snow". Without words, without one's words, one cannot *see* the mountain. And when one calls the mountain "huge", one is appreciating or appropriating the mountain and ascribing "hugeness" to it, which means that one is effectively making the mountain "huge", that one's interpretation is yielding a "huge" mountain. If you will, one is actively doing something to the mountain even as one purports to tell the mountain as it is, to describe it. Now, understanding of foreign law is no exception. Within a comparative dynamic featuring the self-in-the-law and the other-in-the-law, otherness is cast *in the self's language*, too. The French *Cour de cassation* decision exists, but the U.S. comparatist sees the judgment in his words. In his head, he says: "That judgment is bereft of policy considerations"; "That judgment is devoid of accountability". Without his words, the U.S. comparatist cannot *see* the French decision and cannot yield an interpretation of it. To emphasize how all understanding within comparative law is ultimately linguistic and how there are no non-linguistic comparative situations, I suggest contemplating another illustration.

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144 Gadamer, **T&M** (note 28), p. 440 (English); Gadamer, **W&M** (note 28), p. 447 (German).

145 HEIDEGGER, M. **Prolegomena zur Geschichte des Zeitbegriffs.** P. Jaeger (ed.). In **Gesamtausgabe.** vol. 20. Frankfurt: Klostermann, 1994 [1925]. p. 75.

U.S. sentencing practice exists in U.S. statutes and judicial decisions, but the French comparatist sees the U.S. law-texts in words, in his words. In his head, he says: "C'est sévère" ("It is harsh"). Without words, without his words, he cannot *see* the U.S. law-texts and cannot *yield* his interpretation of them. When a French comparatist calls sentencing practice in the United States "sévère" ("harsh"), he is appreciating and appropriating a U.S. practice, and he is ascribing "sévérité" ("harshness") to it, which means that he is effectively making U.S. sentencing "sévère" ("harsh"). To read is to *do* something. And it is that interpretable foreign law-world now having been interpreted by the comparing legal mind, that sentencing-now-having-been-made-"sévère", that will come to the attention of the comparatist's readers – it will be *that* sentencing practice as-read that will constitute U.S. law for the French comparatist's readership.[146]

Being at once indexical and performative, language is therefore what opens an interpretable world to intelligibility before all else, *thus* making possible an interpretation by a comparing legal mind. It follows that an interpretable foreign law-world comes to a comparing legal mind *quae* interpretation through language and as language – the comparing mind's language – which must entail the need to revisit any understanding of language as emphasizing representation over signification or, if you will, denomination over differentiation. Formulation of the facticity that exists *there* into the language that operates *here* is emphatically an interpretive act. And, as the thoughtful comparatist-at-law must realize, a seen text is always-already a transformed text: *interpretation cannot be description*.[147]

6 Foreign Law Will Always Conceal a Secret

No matter how much the observer says about the mountain, he cannot utter all there is to say about the mountain, which means that something that could be said about the mountain will necessarily remain unsaid. Not even a very long book concerning the mountain would address the issue of unsaturability, because the matter is structural: the self cannot be the other, and only an identity could afford a perfect replication. The issue of the comparison's necessary unfinishedness arising on account of the comparing self's inevitable finitude likewise frames comparative law. Quite apart

[146] While this instance shows that there cannot be an interpretation without a judgement, such evaluation need not at all pertain to truth. It is at once legitimate and reasonable for the comparatist to call U.S. sentencing "sévère" *and* to take the view that he is thereby offering an interpretation of U.S. law rather than objectively telling the truth about it. To be sure, one can expect this comparatist to be thoroughly invested in his interpretation and to contend that his interpretation is more compelling than all other extant interpretations inasmuch as its interpretive yield prevails over that of other interpretations. But the prudent comparatist, no matter how enthusiastically self-confident about the merit of his understanding, will not leave the field of interpretation to engage on some fool's errand in search of the mirages of objectivity or truth.

[147] Heidegger convincingly articulates the epistemic fact that no assertion can distinguish itself ontologically from an interpretation. See Heidegger, **B&T** (note 36), p. 153 (English); Heidegger (note 34), p. 158 (German).

from the fact that a perfect replication of foreignness would be comparatively useless, its full manifestation is structurally impossible because of the inevitable slanting that I have already ascertained. The irreducibility of the comparatist's selfness (as thrownness) that prevents transparent access to foreign law as such within the comparison must be understood to entail that some feature or other of the foreign law under examination will necessarily resist comparative enunciation. In other terms, foreign law must always harbour information that stays hidden from the comparatist-at-law. If you will, foreign law must forever keep a secret.

Consider a U.S. comparatist purporting to understand a French *arrêt*. This U.S. interpreter of a French law-text inevitably approaches the matter of sense-making from within a prejudicial fore-structure, that is, armed with pre-concepts, for instance, bringing to bear an appreciation of U.S. Supreme Court opinions. It is therefore from this particular angle that this U.S. comparatist comes to the interpretation of that French *arrêt*. Otherwise said, the U.S. comparatist can only locate the significance of a French *arrêt* by reference to what he already knows. The U.S. comparatist's understanding must arise in relative terms. If the French *arrêt* is to carry any meaning for him, if it "can really be made to speak for [him]",[148] to reprise Gadamer's words, it must be interpreted by reference to a U.S. judicial opinion, even though the referential process be less than fully conscious. For instance, as he elucidates the French *arrêt*, the U.S. comparatist will situate it as terse or formal thereby meaning, in effect, "more terse" or "more formal" than a U.S. judicial opinion, which partakes of his pre-existing interpretive situatedness – of a prejudicial fore-structure or of pre-concepts – through the patterns of socialization and institutionalization, of enculturation and epistemologization, that he will have experienced in a U.S. law school and within the U.S. legal community. *Comparison is inherently relative*.

Because the U.S. self must view the French other at a distance, be it a mere slit, which is also to view the other at an angle, be it so narrow – the U.S. self will never be able to elicit all the French information that could potentially be conveyed regarding the French *arrêt*: some Frenchness at least will escape his U.S.-slanted interpretation. One important consequence is that there will always remain a secret about the French *arrêt* for the U.S. comparatist. Envisage another illustration. A U.S. comparatist can only ascribe meaning to a Brazilian "ministro" sitting on the *Supremo Tribunal Federal* via an ethnocentric or juricentric projection effectively instituting the U.S. Justice sitting on the U.S. Supreme Court as a referential figure. Since the re-signification that is taking place (indeed, "ministro", which is already signifying in Brazil, is now made to re-signify from the standpoint of the comparatist) necessarily unfolds from within the comparatist's prejudicial fore-structure or in line with his pre-concepts, no angled elucidation

[148] *Supra* (note 100 at text).

can ever tell the "ministriness" of the "ministro" as such, no interpretation can ever be other than oblique, that is, no interpretation can ever be other than other vis-à-vis what would be the genuinely and exhaustively Brazilian.[149] The "ministro" – that instantiation of foreignness – will always keep a secret from this U.S. comparatist. The agonistic dimension of the matter being inevitable, it makes sense, after Derrida, to talk of a *negotiation* taking place: there is what a comparing legal mind elects to say, or finds itself being able to say, about an interpretable foreign law-world that resists it.[150]

A further observation is apt. As foreignness preserves a secret, as it eschews fully fledged appropriation or full scale arrogation by the comparing self, as it relucts, it thereby avoids being dissolved into the comparatist's selfness. By thus holding the comparatist-at-law to adjacency or alongsideness, foreignness *lives on* as otherness – a pluralist configuration warranting comparative law's principled rejoicement. And this is why foremost philosopher and literary critic Edouard Glissant defends a a "right to opacity" with a view to the preservation of singularity against assimilation.[151]

7 Foreign Law Does Not Exist, After All

From the moment the comparatist discerns what there is "out there" as law, it is no longer foreign to him. And as long as what there is "out there" remains foreign to the comparatist, he cannot establish it as law. Only indecipherability therefore allows the foreign to retain its foreignness, and indecipherability makes the determination of foreign law impossible. It follows that the expression "foreign law" effectively stands as an oxymoron from the vantage point of the comparatist, for whom *foreign law cannot exist*. Consider comparison's *modus operandi*.

When the foreign *res* is processed into the comparing *intellectus* through and as the comparatist's language, it finds itself being transformed *ipso facto* (the *intellectus* also being changed as it meets the *res*). An analogy may perhaps be drawn, *pace* Alan Sokal, with Werner Heisenberg's conclusions to the effect that the photon, *quae* measurement tool, alters the electron in the very process of measurement (and finds its own frequency modified because of the encounter). From the moment it comes to comparing cognizance linguistically, a foreign law-world's foreignness is compromised, because the comparatist's linguistic input, photon-like, changes it so that it is no longer "itself". If you will, "the self-identity of the [text] withdraws itself and displaces itself

[149] Daniel Hachem – my friend, translator, colleague, and mentor *in rebus brasiliensibus* – advises me against the Portuguese neologism "ministridade" lest my argument fall prey to utter incomprehensibility.

[150] DERRIDA, J. (with LABARRIÈRE, P.-J.). **Altérités.** Paris: Osiris, 1986. p. 85. Spoken in the context of an oral discussion, the transcribed words are Derrida's.

[151] GLISSANT, E. **Poétique de la relation.** Paris: Gallimard, 1990. p. 204 ["droit à l'opacité"]. See generally *id*, p. 203-209.

incessantly"[152] – which is a further reason why the comparatist cannot generate a description of foreignness. Adorno makes this key point compellingly: "The interpretation of the given reality and its abolition are connected to each other".[153] Because the other law is told, and can only be told, in the language that the self employs as a means of self-expression, legal otherness is necessarily framed within this particular manifestation of selfness and finds itself instantaneously interrupted. Instead of the comparatist's words ensuring the presence of foreign law, they inscribe its loss. Think Orpheus and the loss of Eurydice, for example.[154] (Of course, as I have indicated, it is not that foreignness is completely absented from the report. Rather, foreign law persistently haunts the narration. And Eurydice haunts Orpheus, too.)

8 Failure and Antagonism Are Democracy

The finitude within which the comparative dynamic unfolds permits no breakthrough to representativeness, objectivity, or truth allowing for an understanding of foreign law that would be immune to the sensible intuitions by which individuals endowed with cognitive capability can get to make sense of a foreign law-world. Anything like transcendental cognition must remain out of the reach of the comparatist's discourse. *It cannot take place* (literally, it cannot occupy a place, it cannot place itself). In particular, the fact of the matter is that there is no epistemological strategy that can make "truth" assertible, that can bring "truth" (even assuming its existence) within the compass of the comparatist-at-law's knowledge, that can confer upon "truth" anything other than the comparatist's (own/thrown) warrant. Accordingly, I claim that interpretations of foreign law do not admit of the characterization "true"; they are not a truth-apt discourse. Comparative law cannot therefore be beholden to what Bernard Williams calls a "truth-acquiring" type of inquiry.[155] For me, "[t]he first step toward a new

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[152] Derrida (note 112), p. 72 ["l'identité à soi du (texte) se dérobe et se déplace sans cesse"].

[153] ADORNO, T. W. Die Aktualität der Philosophie. In **Philosophische Frühschriften.** R. Tiedemann (ed.). Frankfurt: Suhrkamp, 1973 [1931]. p. 338 ["Die Deutung der vorgefundenen Wirklichkeit und ihre Aufhebung sind auf einander bezogen"]. *Adde*: NANCY, J.-L. **Être singulier pluriel.** Paris: Galilée, 1996. p. 101: "[T]he otherness of the other constitutes precisely that to which recognition itself prohibits access" ["L'altérité de l'autre constitue précisément ce dont la reconnaissance même interdit l'accès"].

[154] As befits Greek mythology, the story of Eurydice, one of the daughters of Apollo, comes to us in many guises. The most famous version casts her as Orpheus's wife, who dies prematurely after having been bitten by a viper. In his unfathomable distress, Orpheus makes his way to the underworld and plays such mournfully enticing music to Hades and Persephone (the god of the infernals and his wife) that he is allowed to return to the realm of the living with Eurydice. However, one term is set: Orpheus is to walk in front of Eurydice and not look back at her until both have reached the surface. As he attains daylight, Orpheus promptly turns to admire his beloved. But Eurydice had not yet crossed the threshold separating the two regions. She thus instantaneously vanishes into the underworld and is forever lost to Orpheus. To look was to cause to disappear.

[155] WILLIAMS, B. **Truth and Truthfulness.** Princeton: Princeton University Press, 2002. p. 127 [emphasis omitted].

[comparative] legal stud[ies] is the bracketing of any truth claims for or about law".[156] (I emphasize that I am addressing the interpretation of foreign law, specifically research into foreign law-texts. I am therefore challenging neither the Krebs cycle nor cryogenics – nor, indeed, any aspect of the physical world, but then the physical world does not organize itself culturally.) Ultimately, my plea is an argument for the democratization of comparative law.

Indeed, "the general idea of objectivity […] can never be dissociated from an overpowering determination to silence or eradicate […] inadequately credentialed claimants to knowledge" – or, more accurately, claimants to knowledge *deemed* to be inadequately credentialed.[157] Once the representative statement, the objective formulation about foreign law, has been dogmatically expressed, what would there be left to discuss? In effect, what more to say once the truth has been authoritatively proclaimed? What would be the point for comparatists to continue a conversation about ascription of meaning to foreign law after Oneness had assertively spoken? Instead of a post-enactment negotiation, there would materialize the imposition of an intellectual regimen of closure of the mind strikingly adverse to scholarly inquiry.

While truth and the devotion to representativeness and objectivity that underwrites this idea suggest a restricted – in fact, a totalitarian – semantic configuration obstinately preoccupied with the effacement of multiplicity in favour of unitarity, the general semantic economy that I defend accepts, indeed extols, the manifold. It postulates a democratic and vital thought that, as transposed to law, encounters the "legal" in its constitutive complexity and, with reference to foreign law in particular, in its insurmountable entanglements with the (inevitably) situated comparatist speaking of it. It assumes a thought that, having jettisoned "any lingering attachment to such traditional shibboleths as truth [and] objectivity",[158] having released itself from "the patronising dogmas of the truth" and "giv[en] way to critical theories of the particular",[159] is willing to accept, any deep nostalgia for Oneness notwithstanding, that the self/other irrelation, because it must feature a gap, must herald a differend,[160] that "[i]t suffices to say that one understands *differently, when one understands at all*",[161] which means that there will be as many interpretations as there are interpreters of the foreign law-texts being

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156 KAHN, P. W. **The Cultural Study of Law.** Chicago: University of Chicago Press, 1999. p. 34.

157 STENGERS, I. Comparison as a Matter of Concern. **Common Knowledge.** Durham, vol. 17, n. 1, p. 48-63, 2011. p. 57-58.

158 HUTCHINSON, A. C. **The Province of Jurisprudence Democratized.** Oxford: Oxford University Press, 2009. p. 17.

159 GOODRICH, P. **Languages of Law.** Cambridge: Cambridge University Press, 1990. p. 1-2.

160 Cf. BASS, A. **Interpretation and Difference.** Palo Alto: Stanford University Press, 2006. p. xi: "Nonmetaphysical interpretation is actively differentiating".

161 Gadamer, **T&M** (note 28). p. 296 (English); Gadamer, **W&M** (note 28). p. 302 (German).

interpreted, none representative, none objective, none true – none being capable of being made into any of these doctrinaire figures through the comparatist's sheer will power.

Comparative research does not exist to gratify the comparatist-at-law's metaphysical urges. The fact that interpretation features the self's persistence and the further fact that the self's (ineluctable) presence within the comparison must qualify one's access to otherness both compel a renunciation to any transcendental or onto-theological idea of reconciliation between selfness and otherness, an abdication of Oneness's epistemic imperiousness. Felicitously, the ensuing pluralism – there is the other-in-the-law, the self-in-the-law's invention of the other-in-the-law, the self-in-the-law, indeed, there is potentially an array of selves-in-the-law, each harbouring its own invention of the other-in-the-law – promote the democratic character of comparative law.

But can the comparative account do *justice* to foreignness? At best, the comparatist stands on the verge of foreign law (again, the self cannot be the other). If you will, comparatism is confined to vergency: *vergency is all that can ever be achieved*. And one's interpretive task is therefore to deploy strategies that will prove conducive to the optimization of one's interpretive yield while appreciating that one's interpretation will always fail to account for foreignness identically. How, then, to minimize one's interpretive failure? In this regard, counter-intuitively perhaps, one can usefully draw on the antagonism across different interpretations. Because what is ultimately the unbridgeable distance, the ineliminable hiatus, between the comparatist-at-law and foreignness must spawn unavoidable interpretive slippage – or *play* – the necessary misunderstanding deserves to be regarded as salutary. Misreading is the pre-requisite to the very ethics of negotiation and to enhanced interpretive sophistication that a self (say, a comparatist) proclaiming the truth about the other (say, a foreign law-text), in effect asserting that his account of the foreign law-text and that law-text itself are *ad idem*, would promptly cancel. Perhaps it may assist if I offer an iteration of my thesis. Because the comparatist must read foreign law in his language, and must therefore misread it, and since other comparatists must misread foreign law, too, there arises an interpretive opportunity – a structural opening – for ameliorated understanding arising out of this gamut of failed and antagonistic misreadings. Keeping the argument on the hither side of reason, the more different understandings there are, and the more different *inter se* the understandings that there are, the more fructuous the quest for deep appreciation is likely to prove.[162] Contrariwise, an interpretation that would pretend to exactitude – an idea that assumes objectivity and truth (let the comparing mind try to imagine such

[162] For an excellent appreciation of the value of appreciation within comparative law, see WATT, G. Comparison as Deep Appreciation. In MONATERI, P. G. (ed.). **Methods of Comparative Law.** Cheltenham: Elgar, 2012. p. 82-103.

a mathematical configuration for a fleeting moment...) – would detrimentally cancel any further discussion.[163]

IN SUM, DIFFERENCE

It is not that rots will suddenly go missing once this article's argument is implemented. The behaviour of orthodox comparatists-at-law notwithstanding, rots has never existed, in fact, and the idea that rots was ever present within comparative law pertains to fiction.[164] Comparatists-at-law have never written representative, objective, or true reports on foreign law, and they have never been able to will representativeness, objectivity, or truth into epistemic being. *Their narrations of foreign law have always been different from the foreign law they have been narrating*. And because the myth of rots is very damaging indeed as it pretends that comparative law can achieve epistemic results that are beyond reach (and undesirable in any event), comparative law must rid itself of this fallacy in short order. Descartes's all-consuming aspiration to a "clara [...] & distincta perceptio" ("clear and distinct perception") is an epistemic goal utterly delusional,[165] and comparative law's ambition must be the destruction of the delusion (to write it in German, bearing Hamburg in mind, *die Zerstörung dieser Delusion*). In my view, Heidegger aptly captures the impossibility of epistemic coincidence across self-and-other lines: "We […] are at most always only 'thereby'" ("Wir […] sind höchstens immer nur 'dabei'").[166] As I seek to elevate enculturation of understanding into a primordial governing principle within comparative law, I invite comparatists-at-law to make peace with the fact that rots always belonged to the realm of belief only, that it never enjoyed any epistemic reality whatsoever. It follows that the ambition that foreignness should be recounted exactly must be replaced by the aspiration that it should be conveyed *justly*.

While orthodox comparative law maintains that rots would implement epistemic acuteness ("I offer an exact account of foreign law", "I am objective", "What I write on foreign law is true", "I can do it"), one is, in effect, contemplating a seventeenth-century, early-modern conceit at best. Far from being modern, rots is Descartes-modern. It is an intellectual scheme issuing from someone who famously assumed that he could sit

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163 See Derrida (note 143), p. 306-307. In a text devoted to Virginia Woolf's *To the Lighthouse*, Gayatri Spivak writes at the outset that "[her] essay is not necessarily an attempt to illuminate *To the Lighthouse* and lead us to a correct reading": SPIVAK, G. C. **In Other Worlds**. London: Routledge, 2006 [1987]. p. 41. Meanwhile, Zweigert and Kötz remain mired in a hapless quest for ... "exactitude": *supra* (note 5 at text).

164 Cf. McDOWELL, J. **Having the World in View.** Cambridge: Harvard University Press, 2009. p. 184: "There is no ground, and it was wrong to suppose there was any need for one".

165 DESCARTES, R. Meditatio III. In **Meditationes de prima philosophia.** In **Œuvres de Descartes.** vol. 7. C. Adam; P. Tannery (eds.). Paris: Cerf, 1904 [1641]. p. 35.

166 Heidegger, **B&T** (note 36), p. 230 (English); Heidegger (note 34), p. 239 (German).

"all day immured alone in a stove" ("tout le jour enfermé seul dans un poësle"),[167] then to withdraw completely from the world, and somehow marshal the wherewithal to recalibrate himself as an objective representor thereof in touch with truth. Genuine sophistication stands at the diametrically opposite end of the epistemic spectrum, and it means having the wisdom to recognize that the self is inevitably, all-incompassingly, *in* the comparison – the only outstanding issues having to do with the forms this presence will adopt and with the depths or lengths to which it will go. If you will, the comparatist's presence in the comparison is an epistemic fact. What remains to be ascertained is the modalities that his presence will assume and the extent of its manifestation within any specific comparison (not all of which is actually ascertainable).

I am ultimately making a straightforward two-pronged claim. Because of the deplorable state of epistemic play within comparative law, however, this elementary double-barrelled contention runs the risk of coming across like a massively seditious argument. Still, I am holding, simply, that the comparing self is meaningfully present within any report on foreign law and that such presence is ineliminable. Correlatively, I maintain that foreign law as it exists "out there" is significantly absent from the comparatist's language as its presence adopts the form of a haunting. It must follow, empirically, that rots requires to be discarded from the staging of comparative interventions, whether in the form of assertion or as aspiration. When it comes to objectivity or truth, for instance, there is no point in retaining any (Kantian) *focus imaginarius*. It would be useless to make objectivity or truth into a regulative idea or ideal directing the cognitive process, into a task that would be detaining one's attention. Now, this fortright contention leaves a key question outstanding.

Is the ancient dream of rots, its intransigent commitment to exactness, its unabashed craving for epistemic sovereignty, too, are these most deeply-ingrained shibboleths of our little comparing lives not so profoundly woven into the comparative way of thinking about foreignness that their eradication may, in effect, prove unachievable – no matter how epistemically indispensable this elimination? Can the neurosis that is unable to tolerate ambiguity or indeterminacy, that cannot accept interpretive play, that thinks in terms of "paralyzing experiences of contingency",[168] that regards dependency (the fact that interpretation depends, whether on the comparatists themselves or on the comparatists' readers) as a major epistemological fault-line, that envisages

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[167] DESCARTES, R. **Discours de la méthode.** In **Œuvres de Descartes.** vol. 6. C. Adam; P. Tannery (eds.). Paris: Cerf,1902 [1637]. p. 11. Descartes was writing near Ulm, in Germany, where he found himself on 10 November 1619. He follows the then current usage in deploying the word "stove" as a synecdoche to refer to a room heated with a furnace.

[168] HABERMAS, J. **Nachmetaphysisches Denken.** Frankfurt: Suhrkamp, 1988. p. 181. Castigating its unquestioning belief in itself, Habermas is deeply critical of positivism, of its enveloping scientism, and of its attendant quest for predictability. One can heartily concur with Habermas's indictement of positivism without adhering to his broader philosophical project.

indisciplined complexification as a threat, that cannot bear the epistemic responsibilization of the comparing mind, can such fixation on fixity, then, ever be overcome? Or must the myth of rots endure as the searing indictment of orthodox comparative law's mental derangement? Is comparative law doomed to the infinite rehearsal of its "blatant" psychological disorder?[169] Is the obsession for rots *sans issue*? I wish I could answer with certainty.

ADORNO'S PRECURSIVE VOICE

The epistemic (in)disposition that I expose in this article is congruent in a number of significant respects with the philosophical critique that Adorno developed in Frankfurt starting with the delivery in 1931 of his inaugural lecture as the holder of a *venia legendi* when he claimed, scandalously to the ears of many, that "the mind is indeed not capable of producing or grasping the totality of the real, [though] it may be possible to penetrate the detail, to explode in miniature the mass of merely existing reality".[170] A Frankfurter by birth, Adorno was a university student in Frankfurt where he later taught until his forced emigration in 1934 on account of his Jewishness, initially to England and later to the United States. He returned to Frankfurt in 1949 to resume his teaching until his death twenty years later. Along the way, Adorno became the director of the famous *Institut für Sozialforschung* in 1958 and affirmed himself as a leading player in the so-called "Frankfurter Schule", or "Frankfurt School", that eventually epitomized critical thought planetwide. He also grew into a conspicuous member of the philosophical, literary, and musical scenes in post-war Germany.

In contradistinction to Hegel (1770–1831), Adorno denies that identity between world and thought-about-world is achievable.[171] Instead, there can only be attempted

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169 *Supra* (note 100 at text).

170 Adorno (note 153), p. 344 ["wohl vermag der Geist es nicht, die Totalität des Wirklichen zu erzeugen oder zu begreifen; aber er vermag es, im kleinen einzudringen, im kleinen die Maße des bloß Seienden zu sprengen"]. To claim that Adorno is propounding the argument that ideas cannot represent objects, since they cannot be like objects, that ideas cannot therefore give one knowledge of things that are outside of one, and to maintain that he is stating his case in a way that I find particularly compelling, cannot be taken to imply that he would have been the first to fashion this specific insight. For example, Simon Foucher (1644–1696), a French philosopher, in a text that he devoted to a critique of Malebranche and Descartes in 1675, offers an early formulation of Adorno's contention: "[I]t is difficult to conceive (that our Soul) can represent anything other than its own Ideas. [...] [O]ur Senses do not make Us know the Things that are outside of Us. Because these objects have nothing in Them that be similar to what they produce in Us; since Matter cannot have Ways-of-being that be similar to those of which the Soul is capable": [FOUCHER, S.] **Critique de la recherche de la verité**. Paris: Coustelier, 1675. p. 45-46 ["(I)l est difficile de concevoir [que nostre Ame] puisse representer autrechose que ses propres Idées. (…) (N)os Sens ne Nous font pas connoistre les Choses qui sont hors de Nous. Parce que ces objets n'ont rien en Eux, qui soit semblable à ce qu'ils produisent en Nous; car la Matiere ne sçauroit avoir de Façons-d'estre qui soient semblables à celles dont l'Ame est capable"].

171 Although his thought ran counter to the Enlightenment and despite his critique of Cartesianism, Hegel ultimately articulated his philosophy around the idea of "Aufhebung", which the word "sublation" purports to capture in English.These terms themselves gesture towards notions like "reconciliation" or "synthesis".

identity, in effect, non-identity, that is, difference. Thought, in claiming to be able to make itself identical to world (that is, to be in a position to duplicate world exactly) effectively octroys itself upon world in a way that suppresses world's singularity. Adorno frames the issue compellingly: "Nothing can be interpreted out of something that is not interpreted into it at the same time" – which is to say that even if, *concessio non dato*, a law-world "as such" were to be in existence, comparatists could not access it and would therefore be unable to relay it without it becoming a law-world-for-them along the way.[172] According to Derrida, this discrepance is "evidence essential, absolute and definitive": "[T]he other can never be given to me in originary fashion, but only through analogical appresentation".[173] This "necessity", for Derrida, "confirms and respects the separation [between otherness and selfhood]" that stands as "the opposite of a victorious assimilation" of the other by the self – of the kind that comparative law's orthodoxy so readily favours through such unexamined constructions as the "præsumptio similitudinis".[174] (Most familiar to all comparatists-at-law, the "præsumptio similitudinis" is the absurd claim that laws are similar "even as to detail" and "even [as regards] countries of different social structures or different stages of development".[175] Astonishingly *from the standpoint of comparative law*, the "præsumptio similitudinis" effectively proclaims that "out of the familiar nothing unfamiliar, nothing other should possibly arise".[176])

As positivism dissolves world into concepts and categories while discrediting and ignoring aspects of world that pertain to discontinuity or unassignability, that withstand articulation or expression in conceptual and categorical forms, such operation reveals an authoritarian urge to appropriate and frame world within preset formalist arrangements. As facticity is so reductively recast in order to assuage the administrative urge to capture world by bringing it under control through an encasing of it into concepts and categories – "when the process of comparison begins, each of the solutions must be freed from [its] context"[177] – this strategy of epistemic domination undermines the very idea of knowledge: while rationality may appear triumphant because it manages to corral reality into logical formalism, in effect it fails to conceive of the "human significance" of facts.[178] Pursuant to Adorno, undue conceptualization or categorization

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[172] ADORNO, T. W. Der Essay als Form. In **Noten zur Literatur.** R. Tiedemann (ed.). Frankfurt: Suhrkamp, 1974 [1958]. p. 11 ["Nichts läßt sich herausinterpretieren, was nicht zugleich hineininterpretiert wäre"].

[173] DERRIDA, J. **L'Écriture et la différence.** Paris: Editions du Seuil, 1967. p. 182 ["évidence essentielle, absolue et définitive"/"(L)'autre (...) ne peut jamais m'être donné de façon originaire (...), mais seulement par apprésentation analogique"].

[174] *id* ["nécessité"/"confirme et respecte la séparation"/"le contraire de l'assimilation victorieuse"].

[175] Zweigert and Kötz (note 5), p. 40, 39, and 46.

[176] Adorno (note 55), p. 46 ["aus Bekanntem soll nichts Unbekanntes, kein anderes hervorgehen können"].

[177] Zweigert and Kötz (note 5), p. 44.

[178] HORKHEIMER, M.; ADORNO, T. W. **Dialektik der Aufklärung.** Frankfurt: Fischer, 1947. p. 33 ["menschlichen Sin(n)"].

is thus an obstacle to insight rather than a source of elucidation inasmuch as it fakes a clarity that the factical intricacy of world effectively precludes. In significant ways, Adorno's philosophy of dissonance recalls Leibniz's Law, the proposition that distinct entities (say, world and mind) cannot be *ad idem*.[179]

By conducting an "intrinsic endeavour" to draw otherness "into its own sphere of control",[180] orthodox comparative law pursues precisely the identity-logic that Adorno deems impossible and indeed forcefully chastises. Within the field of comparative law, I argue that the conceptual or categorical overlaying, whose arraignment of world so troubles Adorno, manifests itself precisely according to the cult of domination and after the logic of repression he castigates. As positivism puts the "social, historical, human significance" of foreign law under erasure,[181] as foreign law finds itself insistently *unworlded*,[182] the singularity of foreign law as it exists is sacrificed and repeated injustice is done to it.[183] This epistemicide is driven by repressive institutional forces inflicting restrictive and determinate forms on foreign modes of thought and imagination; imposing the taming through thought, ideally without any remnant, of foreign laws that exist inherently beyond thought; pursuing an instrumentalization designed to suit a self-serving ideological and dogmatic agenda.[184] I beg to differ, and I earnestly say no to the imperial or colonial mindset. Instead, I invite recognition and respect – justness and justice – for foreignness, and I ask that foreign laws be addressed in exigently fidelious ways. Yes.

Whereas Hegel's absolutization of concepts or categories, his dialectic, gestures towards a kind of intellectual purity seeking to cover (and to counter) the complexity and ambiguity of world, his exercise in synthesis or reconciliation ultimately amounting to an identity between identity and non-identity (that is, to the similarization of the differend, to the amalgamation of world and mind), Adorno's theory emphasizes

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179 See Leibniz (note 4).

180 ADORNO, T. W. **Vorlesung über Negative Dialektik.** R. Tiedemann (ed.). Frankfurt: Suhrkamp, 2007 [1965]. p. 21 ["immanente(s) Bestreben"/ "in seinen eigenen Herrschaftsbereich"].

181 Horkheimer and Adorno (note 178), p. 33 ["gesellschaftlichen, historischen, menschlichen Sin(n)"].

182 See Zweigert and Kötz (note 5), p. 44: "[T]he solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones".

183 For a striking illustration of injustice vis-à-vis foreign law, see GORDLEY, J. Comparative Legal Research: Its Function in the Development of Harmonized Law. **American Journal of Comparative Law**, Berkeley, vol. 43, n. 4, p. 555-568, 1995. p. 563: "There [is] nothing distinctively German, French or American about [German, French, or American judicial] decisions".

184 For a stunning example of epistemic suppression of the singularity of foreign law, see MARKESINIS, B. S. Why a Code Is Not the Best Way to Advance the Cause of European Legal Unity. **European Review of Private Law**, Alphen aan den Rijn, vol. 5, n. 4, p. 519-524, 1997. p. 520: "[O]ur laws on tort […] can be made to look [similar] with the help of some skilful (and well-meaning) manipulation" (the word is indeed "manipulation"!). Further demonstration of the sinister conquering *mentalité* at work include ZIMMERMANN, R. Der europäische Charakter des englischen Rechts. **Zeitschrift für Europäisches Privatrecht**, Munich, vol. 1, n. 1, p. 4-50, 1993; ZIMMERMANN, R. *Statuta sunt stricte interpretanda?* Statutes and the Common Law: A Continental Perspective. **Cambridge Law Journal**, Cambridge, vol. 56, n. 2, p. 315-328, 1997.

non-identity between identity and non-identity (that is, it entails the preservation of the differend across world and mind). It is to mark his opposition to Hegel's dialectic that Adorno calls for a "negative dialectic" – a critique of a certain approach to the interaction between world and mind or, if you will, a rejection of subjectivism understood here as epitomizing the unproblematized idea of the subject's exorbitant self-enactability as it would exercise purportedly unalloyed authority over world, as it would engage in world-producing, object-determinative activity. In a book boldly entitled *Negative Dialektik*, his *magnum opus* on epistemology that he released in 1966 with Suhrkamp (then based in Frankfurt) and that was posthumously published in an English translation with Routledge in 1973,[185] Adorno unfolds his theory of experience to the effect that non-critical philosophy misrepresents the so-called world-mind or "object-subject" interplay.

For Adorno, then, "[n]egative dialectic is to be the dialectic of non-identity".[186] In his own words, "[i]n the unreconciled condition [between world and mind], non-identity is experienced as negativity".[187] And I, too, claim that the comparative orthodoxy has sought, in epistemically impoverished fashion, to efface the non-identity separating foreign laws from the comparing mind, suppressing the laws' facticity (again, what Adorno styles their "social, historical, human significance"),[188] eliminating the fact of the comparatist's irredeemable distantiation from otherness, ignoring this differend. Now, comparative law's epistemic domineering must be expressly challenged,[189] and a negative comparative law deployed in order to overcome positivism's comparative law. Indeed, "[comparative] thought itself [...] is [to be understood as] negativity".[190] As I enter a plea for negative comparative law, I am mindful of Kafka: while "the positive is already given us", "[t]o do the negative is still imposed on us".[191] I value the fact that such was Giacometti's view also: "I must manage to reach the negative".[192] And it is certainly

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185 ADORNO, T. W. **Negative Dialektik.** Frankfurt: Suhrkamp, 1966 [hereinafter **Dialektik**]; ADORNO, T. W. **Negative Dialectics.** (E. B. Ashton, transl.). London: Routledge, 1973.

186 Tiedemann (note 55), p. 343 ["(n)egative Dialektik sei Dialektik der Nichtidentität"].

187 Adorno, **Dialektik** (note 185), p. 41 ["(i)m unversöhnten Stand (…) wird Nichtidentität als Negatives erfahren"].

188 *Supra* (note 181 at text).

189 For an arresting instance of the denunciation I have in mind, see BONILLA MALDONADO, D. **Legal Barbarians.** Cambridge: Cambridge University Press, 2021. For my review, see LEGRAND, P. On Comparative Law's Repressed Colonial Governance. **American Journal of Comparative Law.** vol. 71, n. 1, 2023.

190 Adorno (note 180), p. 23 ["Denken selber (…) sei (…) Negativität"].

191 KAFKA, F. Betrachtungen über Sünde, Leid, Hoffnung und den wahren Weg. In **Gesammelte Werke.** vol. 9. M. Brod (ed.). Frankfurt: Fischer, 1953 [1917]. p. 42.

192 ISAKU, Y. **Avec Giacometti.** (V. Perrin, transl.). Paris: Allia, 2014 [1969]. p. 132. From 1956 to 1961, the Japanese philosopher Yanaihara Isaku posed for Giacometti at the sculptor and painter's Paris atelier on 230 occasions or so. Having appeared in Japanese in 1969, the sitter's account included a narrative of his liaison with Giacometti's wife, Annette, a relationship that Giacometti welcomed and encouraged. Giacometti having died in 1966, his widow undertook to administer his estate and to safeguard the couple's reputation as she saw it. In

not a coincidence that Beckett should have concurred: "The artist is active, but negatively".[193] I do not have in mind an alternative comparative law as a faded positivity, but a comparatism that strikes a deeply critical chord bringing about a thorough negation of the orthodoxy's epistemology.

Encouraged by such percipiently subversive company committedly maintaining that "negativity is a *resource*",[194] resolutely operating on the understanding that "the progress of knowledge […] assumes progress in the knowledge of the conditions of knowledge",[195] I proceeded to release ***NCL*** unto an unsuspecting (but no doubt eager) readership, my title a nod to Adorno's. After Adorno, ***NCL***'s leitmotiv is at once a refutation of the assumption of any possible identity between the law-world and the comparing mind (the orthodoxy's imperial or colonial claim) – so much frippery or "transcendental contraband"[196] – and a sanguine contention that this non-identity cannot be overcome (there will always be a gap between the foreign law-world and what the comparing mind says of it). The inevitability of the ensuing discordianism is no doubt what Mallarmé had in mind when he wrote that "[a]ny comparison is, at the outset, defective".[197] Observe that the French poet did not say that comparison could not be done or ought not to be undertaken. Instead, he was asserting that it carries a structural flaw. I discern the imperfection as being two-pronged. First, comparison shows that world

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1971, claiming breach of privacy, Annette succeeded in having Isaku's book withdrawn. Some nineteen years after Annette's death and twenty-three years after Isaku's, the Perrin translation restores the initial text in full for the first time. Giacometti's words would have been spoken in November 1956 as "Je dois me débrouiller pour arriver au négatif".

193 BECKETT, S. **Proust.** In **The Grove Centenary Edition.** vol. 4. P. Auster; J. M. Coetzee. (eds.). New York: Grove Press, 2006 [1931]. p. 539.

194 Derrida (note 173), p. 381 ["la négativité est une *ressource*"]. See also BRUNKHORST, H. **Critical Theory of Legal Revolutions.** London: Bloomsbury, 2014. Hauke Brunkhorst has written (in awkward English) a largely abstruse argument that is indebted in significant stifling respects to the ponderous (and unpersuasive) accoutrements of Luhmannian systems-theoretical claims that he combines with Habermasian discourse-theoretical and Kelsenian formalist themes – unpersuasiveness cubed, if you will – all with a view to generating a conception of (constitutional) law prominently featuring the usual hodge-podge consisting of objectivity, truth, transcendentalism, universalism, functionalism, and what not. Interestingly, however, a key strand of Brunkhorst's text is that "[n]egation is *constitutive* of affirmation": *id*, p. 18. In this regard, Brunkhorst contends as follows: "It is *only the negation* and not the affirmative statement that enables reflection and deliberation": *id*. Brunkhorst's claim is that negation typically acts as the driving force informing developmental processes, including moral progress, throughout human history. It is by saying no that one triggers the learning or unlearning ways that will get the planet to change. For example, it would only be by saying no to a hegemonic epistemological order, say, on account of a perceived sense of epistemic injustice, that one might get the established normative position to change. For my part, I would emphatically resist the reference to "the universalizing power of the negative" (*id*) as I do not think that one needs to err on the side of transcendentalization in order to appreciate the strength of negativity.

195 BOURDIEU, P. **Le Sens pratique.** Paris: Editions de Minuit, 1980. p. 7 ["le progrès de la connaissance (…) suppose un progrès dans la connaissance des conditions de la connaissance"].

196 DERRIDA, J. **Glas.** Paris: Galilée, 1974. p. 272a ["contre-bande transcendantale"].

197 MALLARMÉ, [S.]. Tennyson vu d'ici. In Quelques médaillons et portraits en pied. In **Divagations.** In **Œuvres complètes.** vol. 2. B. Marchal (ed.). Paris: Gallimard, 2003 [1892]. p. 138 ["(t)oute comparaison est, préalablement, défectueuse"]. Mallarmé's text adopts the form of a Tennyson obituary.

and mind, with specific reference to foreign law and comparative thought, are *not apart enough* so that world can exist out of mind – which alone would make it theoretically possible for the mind to approach it like an object and to report on it objectively or truly. Secondly, comparison reveals that world and mind – again, the focus is on foreign law and comparative thought – are *apart enough* so that there exists between the two an uneliminable gap ultimately preventing communication and denying the possibility of fully fledged objective or true representation. While a continuous chain of reference (the reading, the musing, the discerning, the writing) can be seen to be joining the foreign law-text and the comparating mind into an assemblage, thus annulling the rigidly dualist Cartesian dichotomy, it remains that the structural gap, the disjointure, across modes of existence cannot be overcome, so that the foreign law-text incontrovertibly persists in existing as text and the comparing legal mind as mind. The epistemic fact of the matter is that the comparatist can only ever write *towards* foreign law. (Meanwhile, comparative law's orthodoxy blithely expects "exactitude".[198])

It is not, of course, that foreign law is unthinkable by a comparing legal mind. But comparative thought cannot control or possess foreign law, which it could not be allowed to do in any event. Like Adorno, I hold that the world (the foreign law) escapes the mind (the comparatist's thought) – and rightly so – even as the mind presses itself on the world.[199] Ultimately, the admonition to the comparatist purporting to convey foreign law with the fully fledged integrity that he must bring to bear to his enterprise can only be Derrida's: "[S]ay and do not say otherwise what I have said"[200] – which means that the injunction can only be Beckett's: "Fail better".[201]

EXEMPLARY (IN ONE WORD, OR SO)

I propose to illustrate the primordial epistemic imposture of rots through a brief example.

Imagine Imogene. On this occasion, picture her as a French comparatist engaging in an interpretation of the U.S. Supreme Court decisions in *District of Columbia* v. *Heller*,[202] *McDonald* v. *Chicago*,[203] and *New York State Rifle & Pistol Association* v. *Bruen*.[204] Envisage her also as having spent significant time at the Université du Québec

198 *Supra* (note 5 at text).

199 Cf. Derrida, J. **La Voix et le phénomène.** Paris: Presses Universitaires de France, 1967. p. 117: "[T]he thing itself withdraws itself always" ["(L)a chose même se dérobe toujours"].

200 DERRIDA, J. **Ulysse gramophone.** Paris: Galilée, 1987. p. 40 ["(D)is et ne dis pas autrement ce que j'ai dit"].

201 BECKETT, S. **Worstward Ho.** In **Company/Ill Seen Ill Said/Worstward Ho/Stirrings Still.** D. Van Hulle (ed.). London: Faber & Faber, 2009 [1983]. p. 81.

202 554 U.S. 570 (2008).

203 561 U.S. 742 (2010).

204 597 U.S. ___ (2022).

à Montréal (U.Q.A.M.) in the course of many research visits over the years. In the process, Imogene thoroughly familiarized herself with federalism (which France resolutely eschews). Under the guidance of her Québec hosts, Imogene indeed progressively became very committed to the idea that federalism is a more appealing mode of political governance than the antiquated monarchical model that France effectively continues to espouse. Moreover, she formed an assertive preference for decentralized federalism – what she styles "progressive" federalism. For Imogene, only such a fluid federalism can conclusively counter the brand of authoritarian tendencies with which France has made her conversant (France arguably not being the worst example of latter-day authoritarianism if one bears in mind early-twenty-first-century instances such as Brazil, China, Hungary, the Philippines, Russia, and Turkey).

As she reflects on her attraction for the federalist model, Imogene does not doubt that her Corsican ancestry and her strong links to Corsican culture would somehow have influenced her predilection. And then, there are France's neighbouring countries. Whether one considers the United Kingdom, Belgium, Germany, Switzerland, Italy, or Spain, all have engaged in some form or other of institutional centrifugalism. As she approaches the three U.S. Supreme Court opinions in *Heller*, *McDonald*, and *Bruen* with a view to ascribing meaning to the decisions for the benefit of a francophone readership, in order to "make sense" of these judgments in French, Imogene is therefore coming to these foreign-law texts interpretively armed, at the very least, with a sustained experience of French anti-federalism, with a favourable prejudice towards the federalist model, and with a meaningful exposure to francophone Québec's pro-decentralized-federalism. Note that Imogene remains imprisoned within the French model in the sense, at the minimum, that she cannot now make it such that the French intensely centripetal configuration was not the initial framework within which she was introduced (or, in this instance, not-introduced) to federalism in law school. To be sure, she could – and did – choose to revisit the monist framework at a later point, largely on the basis of her Québec experience. But she could not make it such that her French education had never happened. At best, she can now seek to be moving away *from it*, which is to say that her early French socialization and institutionalization, her initial French enculturation and epistemologization into the law is destined to continue as primordial or pivotal for her.

As Imogene incorporates or embodies her worldliness – her being-in-the-French-world and her subsequent being-in-the-francophone-Québec-world (a different, more fleeting being) – she appreciates that her mind, far from being open, is occupied. Although she definitely plans to offer an account of the three U.S. decisions featuring all the conventional characteristics pertaining to intellectual honesty and scholarly integrity that she can muster, she accepts that she is inevitably coming to these law-texts at an angle. Indeed, she wants to examine them from the standpoint of federalism and

also from the perspective of the decentralized federalism that she has come to value – and all of this against the background of her first, French, anti-federalist stance: nothing along the lines of a blank page or a clean slate, then, no impartiality or neutrality. Again, it is not that Imogene is approaching the U.S. decisions with a mindset disqualifying her interpretive credentials, but that she is inevitably intervening within foreign law as an encultured interpreter, that is, as an epistemologized interpreter. To be sure, a different interpreter would draw on a different enculturation or epistemologization and might well maintain that if federalism is to operate at all efficiently, it must allow for a strong central power. Indeed, she has an excellent Swiss colleague who thinks precisely along such lines and contends that Switzerland is excessively decentralized. But interpretive pluralism does not bother Imogene in the least. Quite to the contrary, she considers that the existence of a range of interpretive approaches points to the democratic health of comparative law. Specifically, she accepts that a gamut of views regarding the impact of *Heller*, *McDonald*, and *Bruen* on federalism can prompt the kind of beneficial discussion that ought to lead to an enhanced understanding of these decisions and of their institutional implications. In any event, Imogene is satisfied that whatever happens to have been one's enculturation or epistemologization, no one can come to foreign law without any enculturation or epistemologization whatsoever. After all, every comparatist went to law school somewhere and was therefore socialized and institutionalized, encultured and epistemologized, into an ascertainable legal culture, into a particular law, too.

While Imogene deliberately elected to make her way to U.Q.A.M. all these years ago, she finds it more difficult to ascertain what prompted her inclination to take an interest in foreign law. Of course, she had long been critical of French political governance, not least on account of her Corsican roots. And then, she met her dissertation supervisor, whom she saw regularly and at close range over a period of nearly five consecutive years. Now, his subversiveness vis-à-vis the French constitutional model – a very rare instance of serious doctrinal critique within the French legal landscape – clearly has much to do with the matter of Imogene's scepticism as regards the settled legal and constitutional French ways. However, Imogene feels that more of her predispositions have very much been unfolding beneath the radar of her consciousness, so to speak. Be that as it all may, she is satisfied that as long as she keeps her juricentrism in check, the fact that she harbours certain views on federalism cannot be held to preclude her just appreciation of foreignness – although she cannot deny that no matter how committed she is to the idea of doing justice to U.S. Supreme Court decisions, the only just appreciation of foreignness that she can muster is *hers*: it is not anyone else's, and it is certainly not a view from nowhere either. Imogene accepts that her self is ineliminable from the comparative equation; after all, this research is *her* research that she is conducting for *her* reasons and from *her* standpoint. Her principal epistemic challenge is

to achieve optimal interpretive attunement to otherness even as she is fully aware that such optimal interpretive attunement can only be *her* optimal interpretive attunement. Of course, Imogene realizes that when she refers to her interpretation, she does not mean so much her "own" as her "thrown": her interpretive flair is an output, and it is the product of her cultural or epistemological conditioning.

After a few intensive months of work, after meticulous examination of the three U.S. decisions (numbering just short of 500 pages between them); expansive reading in U.S. constitutional law and thorough consideration of key publications in fields like U.S. history, U.S. politics, and U.S. sociology; wide-ranging conversations with various constitutionalists (including four U.S. academics, two of them acknowledged as influential voices); and extensive personal (if encultured) reflection – the very last thing she wants is to be regarded as a sort of *Schmalspurjurist* – Imogene is now engaging in a crucial writerly and rhetorical motion as she opts to retain the French verb "saper" ("to undermine", in the specific sense of "to destroy the foundations of a building, a wall, etc.") in order to describe and inscribe what she regards as the impact of the U.S. Supreme Court's decisions on U.S. federalism. Being thankfully prone to introspection, Imogene readily appreciates that the verb "saper", a critical term, does not partake of description, strictly speaking. If you will, the word is inherently evaluative – and this evaluation, since it is hers, can only be intrinsically encultured. But Imogene says to herself that such must be the case with the mobilization of every purportedly "descriptive" term ("The Court remains *prudent*"; "The judge's treatment of precedent is *problematic*"; "The decision raises *difficulties*"). Ultimately, the complication lies, she thinks, with the word "description" itself, which proves misleading as it suggests a process of objectification that is, in fact, unable to materialize. When it comes to foreign law-texts, Imogene is adamant that there never arises the possibility of stating "what-there-is"; rather, there is only the option of enunciating "what-there-is-for-her", "what-there-is-through-her-eyes-and-in-her-words" – to proceed by way of her worldliness.

Now, it occurs to Imogene that as it applies to the word "words", the possessive demands further thought. "Her" words? *Her* words? Or the words that she, as an interpreter, is ascertaining out of the limited quantity of words that the language into which she is writing is making available to her? As her enunciation ("*Heller*, *McDonald* et *Bruen* sapent le fédéralisme"/"*Heller*, *McDonald*, and *Bruen* undermine federalism") emerges in the midst of a specific comparative endeavour, Imogene is readily tapping into her worldliness – into her enculturation or epistemologization – by deploying the French language, *her* language, the primary language of her enculturation or epistemologization, in particular the verb "saper", as it exists irrespective of her, *before* her. Indeed, Imogene's comparison turns on the words that there are, there, in the language into which she is inscribing her report. Her comparison thus depends on the word "saper" being located in culture if it is to convey any meaning to her readership. Contrariwise,

if the word were to concern the realm of idiosyncratic selfness instead of being situated within encultured selfness, it would carry limited semantic force only and quite possibly not mean very much to her readers. Imogene understands, of course, that the persuasiveness of her interpretation emphatically depends upon her readership. It is her readers, indeed, who will decide to what extent, if at all, Imogene's argument – her ascription of meaning, her sense-making – is attractive. In this regard, her readership's enculturation or epistemologization will be key. Imogene well understands that her Dutch and Brazilian readers, for example, can be expected to react very differently to her federalist claim.

So, Imogene maintains that the U.S. Supreme Court's interpretation of the Second Amendment to the U.S. Constitution in *Heller*, *McDonald*, and *Bruen* forgoes a reading that would have left – that *ought* to have left – the matter of the individual right to "keep and bear arms" for the various states to determine locally. (Contrariwise, she observes that decentralization is precisely the approach that the Court retains in its *Dobbs* v. *Jackson Women's Health Organization* decision on the constitutional disentitlement to abortion.[205]) Imogene maintains that a judgment like *Bruen*, for example, conceals traces of an ideological commitment to a centralized or centripetal model of federalism. While the U.S. Supreme Court does not expressly formulate its decision in these terms, Imogene claims that this allegiance lurks between the lines of the judgment so that it is very much part and parcel of the text even though not operating on the graphical surface of it. In other words, *Bruen* can be traced – and, if Imogene's comparative analysis is to harbour any sophistication, *must* be traced – to a judicial predilection for a strong federalism. Indeed, *Bruen* can be traced to many other discursive configurations also, whether ideological, linguistic, philosophical, sociological, or whatever. Think of *Bruen* as law-text as fabric – a text is a textile – where these various discourses have been woven together into a judicial decision, which then exists as a composite (a *Verbund*, in the unlikely event that one is reading from Hamburg).

For Imogene-as-comparatist-at-law to apply the verb "saper" is precisely to express her pursuit of the activity of being-a-comparatist-at-law. Otherwise said, being-a-comparatist-at-law means, in this instance, to retain the verb "saper" so as to re-formulate, in French, the U.S. Supreme Court's stance in *Heller*, *McDonald*, and *Bruen*. It ought to be clear – but let me repeat – that the marshalling of this word in this comparative assessment is indissociable from Imogene's manifestation of selfhood (again, I have in mind selfhood-in-thrownness). If you will, "saper" is her verb – not "her", of course, in the sense that it would belong to her and be the product of her subjective consciousness, but "her" since it has been chosen by her as it pertains to the language into which she has been thrown and that became a constitutive part of her being, of her body, by

[205] 597 U.S. ___ (2022).

way of a process of incorporation, the language that in effect became her embodied language. Through the assertion of her inclination, Imogene's comparing self is therefore present in this word. Again, it is *her* word. Indeed, instead of "saper" she could well have selected the verb "menacer" ("to threaten"), a term that, as a matter of interpretive play, would constitute a milder evaluation of the U.S. Supreme Court's impact on U.S. federalism.

To opt for "saper" in lieu of "menacer" is for Imogene to-be-Imogene-as-French-comparatist-interpreting-U.S.-law, which means that there is a continuity between the selector of the word, the word selection, and the inscription of the word in the comparative account: the word encloses the comparatist's interpretive reasoning or, alternatively, the comparatist's interpretive reasoning nests within the word. Not unlike the dancer and the dance, the thematizer and the thematization are properly inseparable. It follows that any idea that all traces of selfness could be erased from the comparative enactment is unsustainable. Since the use of language is inextricably bound into the activity of comparing, because there can be no activity of comparing that is not the activity of a comparatist comparing, it must be that language inextricably asserts a comparatist's selfness, say, through a semantic determination in favour of "saper" rather than "menacer". For the comparing self not to haunt the comparing, Imogene would have somehow to disappear behind her preferred word and leave that chosen term to express "purely" – without the least semantic inflection whatsoever – the foreign law under consideration. However, there are simply no words (in French) that will not incline the U.S. decision (in English) in a particular interpretive direction, that will not *angle* it. Neither "saper" nor "menacer" can offer a "pure" exposition of the U.S. decision as such, nor could any other (French) word. The fact of the matter is that each word is inherently and necessarily interpretive – and that each interpretation must be someone's interpretation (no interpretation exists in the air). While Imogene can exclude certain interpretations from her comparing, she certainly cannot exclude herself from her comparing's interpretations. Observe how the eliminability of the comparing self cannot be secured through a more demanding self-introspection on the comparatist's part. No matter how concernful the comparatist proves to be, say, in trying to describe the opinion of the Court in *Heller* as Justice Antonin Scalia writes that "the [Second] Amendment, in addition to furthering a militia-related purpose, also furthers an interest in possessing guns for purposes of self-defense",[206] it would be utter delusion to assume, for example, that the choice of any French verb to reprise the English "furthering" or "furthers" could happen apart from the comparatist's envelopment in culture. Crucially, the predispositions informing the comparatist's decision to select "instaurer" instead of "valoriser", "instituer" instead of "promouvoir", cannot ever be completely and explicitly present

[206] *District of Columbia* v. *Heller*, 554 U.S. 570, 683 (2008).

in a comparatist's scrutiny of herself-comparing so that she could detach herself from her elected and inscribed word and somehow make it possible for the word to exist in the comparison independently from her – and to do so, moreover, in such a way that the French word would duplicate the U.S. judicial statement as such, without the least interpretive orientation whatsoever. Imogene cannot objectify herself-comparing: she cannot face herself-comparing. *All-encompassingly, she is in the comparison* – properly envisioned, then, as *her* comparison.

In effect, even if one can assume an array of wishes, desires, urges, and impulses that might be susceptible to self-contained individuated accounts, an exercise in self-examination of this kind would not begin to address the implicitness and the dispersedness, to say nothing of the temporal breadth, of the experiential primordiality suffusing the comparatist's existence, and therefore her mental having-been-ness, as she marshals this French word rather than that – a primordiality so basic that even as it cannot be denied, it cannot be grasped. To be sure, the French words themselves can never escape the relativizing impact of their own enculturation, that is, they can never overcome their connection with referents identifiable within a general practice of usage locally. But they cannot escape either the infusion of selfness that they carry on the occasion of their timely deployment by this French comparatist within this comparing.

There is more. Even as Imogene is persuaded that her choice of the verb "saper" is interpretively optimal, she recognizes that this French word simply cannot capture the entirety of what the U.S. Supreme Court's decisions are meaning on the subject-matter of federalism. If you will, the French verb is not – and cannot be – *ad idem* with the U.S. decisions. As it is translating the judgments, it is transforming them. Imogene is further convinced that no matter how much she writes, irrespective of how detailed her interpretation of the U.S. judgments, there is no way in which she can tell them identically. Short of cutting-and-pasting the entirety of the decisions – and what would be the point of doing that? – Imogene allows that her interpretation, as rigorous as it is, must differ from the texts she is interpreting. Her text is one more text; and it is therefore another text. The more time – and the more pixels – she devotes to the three U.S. decisions, the more she acknowledges could be written about them – the process being ultimately infinite since the judgments are inexhaustible, unsaturable – the more readily she perceives that some information regarding foreignness must be sacrificed along the interpretive way.

If the comparatist cannot stand apart from her predispositions and predilections, if her inclinations cannot stand in front of her mind, if they cannot stand in front of her language, if the comparatist cannot separate herself from herself-comparing, be it for the most fleeting of instants, if the matter of the comparative attitude is not one of intention or orientation but pertains to a more basic epistemic condition, Imogene's decision to choose one evaluative or translative word in the achievement of her

comparing cannot sever itself from its temporal situatedness, a fact that must cancel any "pure" appreciation of foreignness. Indeed, any appearance of detachment that the comparatist's analysis might be thought to evince in this regard would be due to a surfeit of reliance on the power of cognitive ability – an illicit obfuscation of the weakness of thought, for "the knowing itself is grounded beforehand" ("das Erkennen selbst vorgängig gründet").[207] As a result, any "foreign law", ultimately being the self's "foreign law", is not as "foreign" as appears to be conventionally assumed. Indeed, from the standpoint of the comparatist comparing there can be no such thing, strictly speaking, as "foreign law". Even as the self can never be the other – a fact that must entail intractable foreignness, foreignness beyond all possibility of appropriation – otherness as re-presented always bears the self's mark, which means that the re-presented other is, in the end, less than fully fledged "otherness". The self cannot be the other, but within the comparison the other cannot be the other either – not the representative, objective, true other that a self would have to be in a position to generate for otherness-as-otherness to exist as such. Instead, there can only be the self's otherness: U.S. law is Imogene's U.S. law. And because that is all there can be, since Imogene's account of U.S. law must intrinsically appear as U.S.-law-Imogenized – Imogene cannot eschew the Imogenization of U.S. law in her report – the gallimaufry that is rots within comparative law must be readily jettisoned. In this way, the attempt to do justice to the other law, although ultimately doomed to fail, may at least redeem itself by achieving a failure less catastrophic than would have been the case if the classical, irresponsible, positivist ways had obtained. So forcefully thinks Imogene as she completes her first draft.

While Imogene is convinced that her line of analysis yields the strongest interpretation of the three U.S. Supreme Court decisions she is considering, it would never occur to her to proclaim, dogmatically and Teutonically, that she is asserting the truth with a view to short-circuiting any further discussion. Again, Imogene fully appreciates that as persuaded as she herself is, she will have to appear convincing to others in order for her interpretation to be validated over against competing interpretations. It is not as if, say, the *Bruen* decision featured a meaning – a single and unique meaning for everyone to attest. Indeed, *Bruen*'s meaning lies in the eye of the judgment's reader. And Imogene is aware that her own readers will have before them a large array of interpretations, including those from different U.S. lower courts that will now be making sense of *Bruen* according to any number of possible interpretations (and, perhaps, over-interpretations).[208] Modestly (as befits negative comparative law), Imogene accepts that her interpretation will be but one of the many readings competing for adhesion.

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[207] Heidegger, **B&T** (note 36), p. 61 (English); Heidegger (note 34), p. 61 (German)

[208] With respect to the first decade of judicial interpretations of the *Heller* decision, see eg PECK, S. H. Post-*Heller* Second Amendment Jurisprudence. **Congressional Research Service Report (R44618).** <https://crsreports.congress. gov/product/pdf/R/R44618/14>, 2019.

As she crafts her argument as best she can, she is very much looking forward to seeing how her staging fares with various reading constituencies in various reading locales.

SUPPLEMENT

"The literary creator has the right to disintegrate
the primal matter of words
imposed on him by text-books and dictionaries".

"He has the right to use words
of his own fashioning and to disregard
existing grammatical and syntactical laws".
–*transition*[209]

"Imperfections, too, have their means to recommend themselves".
–Montaigne[210]

"A text […] is at the same time the condensation of a history scarcely delimitable. But this condensation of history […] remains […] indissociable from an event *absolutely* singular, a signature *absolutely* singular, and therefore also of a date, of a language, of an inscription autobiographical".[211] What ascertainable circumstances, then, does this exercise in supplementation herald, this supplement in the sense in which Derrida understands the term, that is, a text come from within "Negative Comparative Law: The Sanitization Enterprise" even as it is written after completion of the text and grafted on to it *in extremis*?[212]

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[209] Published in Paris at irregular intervals from 1927 to 1938, *transition* was an influential literary and experimental review established by U.S. expatriates, most notably Eugène Jolas (who was born in the United States and spent his teenage years and early adulthood in New York and Pittsburgh). Jolas and his fellow editors translated into English the contributions they received from far and wide, although in later years some publications appeared in other languages. In 1929, the magazine released its "Proclamation", a pronouncement about writing whose twelve clauses would become famous (the declaration is often known as the "Revolution of the Word Manifesto"). While sixteen individuals signed the text, its authorship is unattributed. It is clear that Jolas, one of the signatories and the principal editor and main animating spirit of the review, would have been closely involved in the drafting. I quote the sixth and seventh provisions: Proclamation. In **In transition: A Paris Anthology.** New York: Doubleday, 1990 [1929]. p. 19 [capital letters omitted].

[210] MONTAIGNE, M. DE. **Les Essais.** J. Balsamo; M. Magnien; C. Magnien-Simonin (eds.). Paris: Gallimard, 2007 [1595†]. bk III, ch. 9, p. 1009 ["Les imperfections mesme ont leur moyen de se recommander"].

[211] DERRIDA, J. (with ATTRIDGE, D.). "Cette étrange institution qu'on appelle la littérature". In DUTOIT, T.; ROMANSKI, P. (eds.) **Derrida d'ici, Derrida de là.** Paris, Galilée: 2009 [1989]. p. 262. Spoken in the context of an interview with D. Attridge, the transcribed words are Derrida's.

[212] See Derrida (note 112), p. 308.

At the heart of the story must appear wintry Brazil, where I am relievingly, delightedly, and obligedly spending an extended period of time in Curitiba and São Paulo (in Pinheiros, for greater and more revealing precision) as I devote many of my waking hours over a number of weeks to the finalization of my claim. While it is possible to inscribe a few interventions still, endmost marks that I envisage as just-in-time further edifications suddenly evidently *indispensable*, the structure issuing from the argumentation can no longer be substantially disturbed and therefore acts as a material stricture inflexibly circumscribing the range of possible emendation. The idea of this addition thus arises as an act of ultimate resistance to the confoundingly structural character of a text's incompletude, months of incessant research and writing (and rewriting) notwithstanding. And on account of the indulgence of a most gracious editor, I find myself presented with the opportunity to engage in a measure of disclosure imparting to ***NCL*** a modicum of enhanced currency, in effect iterating negativity's deconstructive and reconstructive counter-signature, also deferring a little longer the moment when this entire composition must finally stop.[213] Although the predicament concerning textual unfinishedness, not to mention the attendant cognitive vexation and affective disarray, is arguably liable to haunt every writing, it occurs to me that a comparatist, because of the sense of unacquitted indebtedness he experiences towards the foreign that he has elected to re-present for his own reasons – I refer to the justness and to the justice owed foreignness – feels this disappointment uniquely.

Principally, I understand this article as a condensed reprise of the main contentions that I develop in ***NCL***. Now, I want to articulate this supplement around the specific matter of errata, in particular of errata as resistance – or, if you will, of errata as an attempt, admittedly idiosyncratic, at the affirmation of a measure of authorial sovereignty in the face of various systems that purport to constrain one (including the systems that one has built for oneself over the many years and into which one has effectively ensnared oneself). "Personne ne fait ça" ("No one does that") exclaims a confident to whom I reveal my approach. In advance of empirical study, this assessment is in all likelihood confirmable, which means that I would be standing as an exception. What, then, did I do? In characteristically negative mood, I sought to combat the tyranny of three systems – and of a fourth one. To assert that I proceeded resolutely would be an exaggeration. Never before had I deliberately left errors in a typescript, and I found that withstanding the spontaneous urge to correct – I am nothing if not a perfectionist – proved exceedingly difficult. While I did ultimately exhibit the firmness of mind that allowed the errors to stay, I cannot say that I acted serenely. Once ***NCL*** had been released on 9 June 2022, I initially found it awkward to bring myself to explain my decision even to close friends, and I heard myself more than once circling around the issue out

[213] For the full reference to ***NCL***, see *supra* (note 24).

of embarrassment. Norms do weigh on one, not least such an age-old prescription as the flawlessness of the printed text – a further instance of Heideggerian "Geworfenheit". And I willingly confess to some lingering self-doubt.

The first system – the first order, the first set of rules – that I elected to challenge is the grammatical codification, whether in English, German, or Portuguese. Grammar, I want to suggest, can legitimately be regarded as an oppressive order that editors and publishers readily seek to enforce despite authorial desire for liberty: one must write English, German, or Portuguese as the language is written. Over against such manifestation of "thereness", I insisted on retaining the entitlement to choose the path of "agrammaticality" ("agrammaticalité").[214] Quite apart from repeatedly coining neologisms that suited what I thought I wanted to express – in effect, then, deploying inexistent words – I occasionally and purposefully deviated from the grammatical edict, for example, through misspelling or missyllabizing (!). Otherwise said, I willingly inscribed discontinuities or hiatuses in my typescript so as to rebuff the seamlessness that System, Order, and Rule – relayed by a detailed set of editorial instructions meant to corral any and all manifestations of singularity – assertively sought to prescribe.

If anything, the second system I decided to oppose applies even more compellingly and concedes even less deflective leeway. I refer to the regimen of citation that – whether as regards abbreviature, punctuation, capitalization, italicization, signalization, or spaciosity – commands, most intransigently so, unthinkingly to comply with the appointed model. In striking fashion, the prevailing template – which, as in the case of the "Bluebook", can run to hundreds of pages replete with stupefyingly precise injunctions as technical as they are arcane[215] – throws one into a pattern that one must slavishly implement lest one's references be castigated as incoherent and one be presumed to have been satisfied with the sloppy inscription of one's research (indeed, with sloppy research altogether). In the fervent urge to display blind conformity with the applicable framework, the fact that the contents of the prescribed configuration are thoroughly contingent (no italic character or em dash is *necessary*) tend to be rapidly overlooked. Once more, I disturbed the pressure wrought in the name of citational hegemony by inserting a small array of derogations with a view to asserting my authorial voice even as I realized that I had to project the image of an author obediently operating within the limits of flood-lit and dog-patrolled boundaries.

The third system that I wanted to dispute concerns the typesetting. Yet again, the by-word is uniformity *quoiqu'il en coûte*. For my part, I thought it pertinent therefore to permit some disunity to inform the work. Accordingly, I allowed a handful of typesetting "howlers" to survive.

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[214] BONOLI, L. **Lire les cultures.** Paris: Kimé, 2008. p. 98 [emphasis omitted].

[215] I refer to the Harvard system of uniform legal citation. Recent releases have numbered almost 400 pages.

But there is a fourth system that I felt warranted defiance. Indeed, this fourth system – I refer to my own established writerly strategies – demanded to be questioned even more insistently than the other three. In particular, I felt it important to undermine a key commitment that informs my writing and to which my devotion has long been reflexive (that is, without reflexion). Thus, I took the view that an exercise in the relativization of my absolute allegiance to non-repetitive wording deserved to partake of ***NCL***. In the event, this "travail de soi sur soi" proved the most difficult task. To stare at a repetition within two consecutive paragraphs or over two pages and to allow this restatement to live on, to go to press unemended, proved excruciatingly painful – which is, of course, precisely why such contrapuntal enterprise was so necessary. (In effect, I see a direct correlation between the intensity of my felt torment and the indispensability of my initiative.)

In these four ways, I said no to four orthodoxies, not least to a self-developed peremptoriness, thus credibilizing further the overarching theme of contestation animating the book – which is the sense in which my four ruptures also inscribe an epistemic continuity with my renegade negative comparatism. But my destabilization tactics carry two further consequences at least, both of which I welcome. First, the presence of these hiatuses – there are two dozens of them or so, more or less adroit – is liable to interrupt the readerly monotony that might otherwise be threatening to install itself in a text running to nearly 500 pages. If you will, my disturbances contribute to keeping the text vital and thus to maintain my reader alert. Secondly, through my "pensive and suspensive interruption[s]" ("pensive[s] et suspensive[s] interruption[s]"),[216] by way of my intempestive interventions, I instil an advantageous measure of indeterminacy within the reading process. Any reader coming across any error – whether of the grammatical, citational, typographical, or repetitional ilk – will henceforth find himself framed in undecidability: is the incongruous inscription deliberate or not? So do I manage my terror of the error, even as I must accept the statistical incompressibility of imperfection.

Have I taken agitation to silly extremes, especially in the later texts that appear to disclose more dissentience than the earlier ones? Have I exaggerated the angling that I must inevitably bring to bear upon my comparative work (*my* comparative work...)? I can fully rely on my detractors to contend that my norm-breaking, my production of deviance, stands as a form of moral dereliction bereft of any pedagogical merit, devoid of any assumption of responsibility whatsoever – a caprice utterly lacking in interest. But my refusal to bind myself, my rebuff, is neither a vacuous posture nor an empty pose. And it is not abdication of duty or abrogation of responsibility either. Rather, the fact that the tortuous meanderings of my mind are at odds with the habitual standards of academic communalism befits a difficult, non-conclusive critical inquiry into the

[216] DERRIDA, J. **Béliers.** Paris: Galilée, 2003. p. 36.

possibility of comparison. Here, the counter-intuitive allies with the critical; indeed, it re-emphasizes critique. Accordingly, I claim my indisciplined and unmethodical ways to be contributing, if unconventionally (and unpretentiously), to the power to think and to write differently. Yes. In my view, my experiment in the epistemology of error, my exploration of the aesthetics of error, deserved making, and I remain grateful that I could secure the complicitous assistance I needed in order for these further forays into negativity to materialize.[217] Another form of abetment must now come from my readership. (*Quaere*: do I owe anyone an apology?)

Minute acts of resistance, modest quotidian counter-hegemonic derogations from what are effectively entrenched and stultifying authoritarianisms (including, I daresay, a self-authoritarianism) deserve better than outright dismissal as so many aberrations.[218] Think authenticity, think integrity, too. As long as there are stirrings still,[219] *contrarianism mattters* and indeed remains of the *utmost significance*. Yet, as Albert Camus observed, "[a]t the end of every liberty, there is a verdict.[220] What, then, will be the verdict passed upon my self-authorized licence? Although I cannot ultimately bring myself to be concerned, I am curious.

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217 While relevant correspondence is on file, I cannot make these communications available, not even in a redacted format.

218 Other subversive interventions concern photography, in particular the refusal to be photographed or the decision to be photographed according to certain unconventional modalities only. I have in mind, for instance, Duncan Kennedy's determination, upon his formal installation as Carter Professor of General Jurisprudence at Harvard Law School in 1996 (a position he held until his retirement in 2015), to be officially photographed adopting a certain posture and wearing a certain attire, neither of which one would habitually associate with the formal institutional ways prevailing at a leading U.S. law school. The photograph I discuss is easily accessible at KIMBALL, B. A.; COQUILLETTE, D. R. **The Intellectual Sword.** Cambridge: Harvard University Press, 2020. p. 773. I am grateful to Duncan Kennedy and Daniel Coquillette for helpful correspondence [on file].

219 I refer, of course, to BECKETT, S. **Stirrings Still.** In **Company/Ill Seen Ill Said/Worstward Ho/Stirrings Still.** D. Van Hulle (ed.). London: Faber & Faber, 2009 [1989]. p. 105-115.

220 CAMUS, A. **La Chute.** Paris: Gallimard, 1956. p. 139 ["Au bout de toute liberté, il y a une sentence"].

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