
Issues in the Translatability of Law

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For Casimir and Imogene, who live in translation.

Consider statutes and judicial decisions, two of the most common legal artifacts. If one accepts that statutes are not enacted by legislatures and that judicial decisions are not made by courts with a view to applying to foreign legal cultures, then legal borrowing across legal cultures is the practice of interrupting intention, which is a form of epistemic violence.¹ Statutes and judicial decisions nonetheless regularly find themselves being imported across legal cultures—that is, across cultures and languages—in order to underwrite local reforming agendas. In the process, these texts pass into new semiotic constellations. However, just as there cannot be equivalence of meaning between, say, a poem-in-translation and the original poem, given that the host language and the host culture attest to constructions of the world that are incommensurable with those propounded by the language and culture where the work originates,² there cannot be equivalence of meaning between the law-in-translation and the original law. A text—whether a poem or a law—requires an adaptive transformation in the course of transit in order to be made understandable elsewhere and to carry the kind of impact or appeal it did in its native environment. But the peregrine text is not alone in undergoing change, for its import enjoins alterations within the host language and host culture themselves. One recalls how Luther's translation of the Bible famously challenged the German language or, more recently, how Corbin's, Waelhens's, Martineau's, and Vezin's translations of Heidegger's *Sein und Zeit* have compelled the French language and French philosophy to undergo the kind of modification allowing for the narrativization of unfamiliar ideas. The adoption of a foreign law has the same transformative impact on the host law and host legal culture.

Against the background of these preliminary observations, this essay seeks to delve into the parallels between legal borrowing and literary translation and between comparatists-at-law (those who wrestle with legal borrowing) and literary

I have used original versions and supplied my own translations throughout except in two cases—Benjamin's *Die Aufgabe des Übersetzers* and Heidegger's *Sein und Zeit*—where the English texts have achieved such currency that it somehow appeared pedantic to ignore them. I owe Sandra Bermann and Nicholas Kasirer for their generous interest in my research and for numerous suggestions, which improved my argument. The usual disclaimer applies.

translators (those who wrestle with languages).³ The argument begins with an overview of the legal scene, with specific reference to the contemporary European experience.

Since the late 1940s, economic considerations relating to the globalization of world markets have led an ever-larger group of Western European countries to unite in the quest for a supranational legal order, which, in time, generated the European Community. The Member States' early decision to promote economic integration through harmonization or unification has involved a process of relentless regulation in the guise of legislation or judicial decisions. This development was foreseeable: once the interaction amongst European legal cultures had acted as a catalyzer for the creation of a supra-culture, the need to achieve reciprocal compatibility between the infra-cultures and the supra-culture naturally fostered the advent of an extended network of interconnections (including legal links), which, as it was realized that the economy could not be neatly detached from other spheres of social action, eventually raised the question of further legal integration in the form of a common law of Europe.

Any proposal in favor of such a "European law" must, however, acknowledge the presence within the Community of legal traditions, that is, of epistemological clusters that have fashioned themselves over the very long term and that have conditioned epistemological approaches to law at the level of local legal cultures. I do not intend "tradition" in the static, linear, totalizing, atemporal, and idealized sense, which detrationalists justifiably condemn. Specifically, I do not adopt the view of grounding in a causally self-sufficient source or subscribe to the doctrine of infant determinism or suggest that traditions are to be envisaged as windowless monads allowing neither for cross-cultural interaction nor for cultural overlap. Rather, I have in mind something like structures of attitude and reference having normative force for legal communities (even though operating beneath consciousness), both by empowering legal agents and by limiting their possibilities of experience in ways that attest to the fact that positionality or situatedness is never fully individual.⁴ In brief, the notion of "legal tradition" is meant to embrace the idea of tacit knowledge as it defines a horizon of meanings and possibilities with respect to the theoretical and practical information that can be acquired and used within a legal culture. It refers to an idiosyncratic—and often unexplicitable—cosmology of *dispositions* (or, perhaps, *predilections*) allowing for an infinite array of world-defining responses and discriminations. This socially-generated and shared context of meaning, which renders action intelligible to those involved and delineates the boundaries of relevance and irrelevance within a legal culture, accounts for cognitive, intuitive, and emotional approaches to law, legal knowledge, the role of law in society, the way law is or should be learned, the place assumed by legislation in society, the function of the judge, and so forth.⁵ As the comparatist considers the development of law in Europe since Roman times, it appears that there have emerged at least two discrepant conceptions of law, one where structures of attitude and ref-

erence relate insistently to enacted law and the other, very much in reaction to the first, where structures of attitude and reference gesture primordially to the drawing by the courts of factual isomorphs across judicial decisions. These nomothetic and idiographic perspectives remain current. Most of the European Community's legal cultures claim allegiance to the former historical configuration—what anglophones are fond of labeling the “civil-law” tradition. Two “common-law” jurisdictions, the United Kingdom and Ireland, joined the Community in the 1970s.

Given the presence of these contrapuntal epistemological frameworks, one might have expected that whatever scholarly initiatives were concerned with legal integration in Europe would have wanted to address the law in its local, specific context (whether historical, social, economic, or political) with a view to promoting understanding across legal traditions and legal cultures. This kind of project would have been concerned to show how law-in-context inevitably differed across legal traditions and legal cultures, to explain why these differences made sense at local levels, and to examine to what extent they could or should be circumscribed. But such endeavours have not materialized. Instead, one has witnessed the mushrooming of instrumental initiatives purporting to show that the problem of understanding is a false one, because, in effect, there is very little difference between European laws. In other words, there has been no attempt at implementing a strategy of complexification, which would have aimed at explicative re-presentations of the various laws on their own terms, which would have stressed that “the specific legal practices of a culture are simply dialects of a parent social speech,” and which would have insisted that there is no reason why a legal culture should be expected to “depart drastically from the common stock of understanding in the surrounding culture.”⁶ This brand of research would have attended to recurrently emergent, relatively stable, institutionally reinforced social practices and discursive modalities (a certain lexicon, a certain range of intellectual or rhetorical themes, a certain set of logical or conceptual moves, a certain emotional register, and so forth) acquired by the members of a community through social interaction and experienced by them as generalized tendencies and educated expectations congruent with their conception of justice.⁷ Instead, one is faced with a whole range of strategies of simplification. The point is no longer to ascribe meaning to a legal experience and to appreciate why it has developed in a way that is historically, sociologically, economically, or politically—that is to say, culturally—different from another, but to argue that difference is simply not there or, at least, that it is not there in a meaningful way. In thrall to the serviceable principle of parsimony, which prefers simple, coherent, and consistent solutions, such philistine tactics—whether seeking to unify contract, torts, civil procedure, administrative law, criminal law, or trusts⁸—wish to efface difference, to erase it. Difference is inconvenient. Worse, difference is a curse.

Underlying all these initiatives is a formalist understanding of “law” whereby the “legal” is, in substance, reduced to rules—which are usually not defined, but are conventionally taken to mean legislative texts and, though less peremptorily,

judicial decisions. The governing idea is that law can somehow have an empirical existence that can be detached from the world of meanings that characterizes a legal culture and that it can, therefore, easily move from one legal culture to the next so as to foster the commonalities I have mentioned. One can, for instance, take the Belgian law as regards a specific question concerning consumer contracts and transport it to Ireland in pursuit of the ideal of uniformity in the conviction that it will operate over there in the self-same way it has over here. Or one can adopt an international text—such as a European Community directive—and assume that the rule embodied in, say, article 3 of the document, will be applied in a uniform manner in the various legal cultures implementing the accord. Change in the law, then, would be largely independent of the workings of any linguistic, cultural, historical, or social substratum; it would rather—and rather more simply—be a function of laws, of rules being imported from another legal culture. Indeed, it has been said that “the transplanting of legal rules is socially easy.”⁹ Clearly, such assumptions, which rapidly engender a frenetic and hasty search for commonalities—that-clearly-must-be-there-since-we-want-them-there, propound normalized schemes based on rational and (so-called) scientific principles showing small regard for context and none for contingency. They relegate the cognitive asymmetries between the civil-law and common-law worlds to ignorable differences, to the realm of epiphenomena, and show confusion between the legitimate desire to overcome barriers of communication across legal traditions and legal cultures, on the one hand, and the alleged need to elucidate presumed similarities, on the other. Basil Markesinis seems to have gone furthest by expressly condoning the “manipulation” of data in order to make laws look similar across Europe.¹⁰

Now, to focus on selected titbits of “black-letter” law without any consideration of the historical, social, economic, or political environment is to deceive on a massive scale by intimating that the superficial and brittle similarities regarding legislative texts or judicial outcomes matter more than the traditionary and cultural differences that dictate the epistemological framework within which a statute is enacted or a case is addressed (an approach evidently unconvincing to anyone who has studied and taught both in civil-law and common-law environments). Insensitivity to questions of cultural heterogeneity fails to do justice to the situated, local properties of knowledge, which are no less powerful because they may remain inchoate and uninstitutionalized. In the way it refuses to address plurijurality at the deep, cultural level, the rhetoric of commonality simply deprives itself of intercultural and epistemological validity. It deserts serious thought for earnest prostration before the instrumentalist sabotage of cognition.

Were lawyers to show greater sensitivity to the characteristic features of laws and experiences of law that are not theirs, they could be expected to address the limits within which any “convergence” agenda must operate and the constraints that, ultimately, must defeat it. The fact is that even though we live them simultaneously and manage to reconcile them in an obscure and private economy, civil law’s nomothetism and common law’s idiographism are irrevocably *irreconcilable*.¹¹ In my view, the realization that legal convergence can never fully tran-

scend the manifestations of localism, including the historicity of law, is not to be regretted. No matter how insistently the bureaucratic ethos of technical/universal homogeneity promotes its centralizing and uniformizing ambitions, the reformulation of legal Europe cannot condone a disempowering of local histories in a context where the specificity of European legal discourse arguably lies precisely in its historicity. In an argument he devotes to the European experience, Jacques Derrida writes about "the *duty* to answer the call of European memory." He claims that that duty "dictates respect for difference, the idiomatic, the minority, the singular and commands to tolerate and respect everything that does not place itself under the authority of reason."¹² Elsewhere, Derrida observes that "this responsibility toward memory [ought to] regulat[e] the justice and the justness of our behaviour, of our theoretical, practical, and ethico-political decisions."¹³

As a comparatist-at-law, my goal is, accordingly, to redeem local knowledge, best described in terms of its plasticity, pliability, diversity, and adaptability. I wish to foster resistance to the trends toward the ever-increasing technological standardization of law and the ready political subordination of the lawyer (within or without the academy) to the comforting values of orthodoxy and reiteration. I advocate a militant approach, which argues for greater sensitivity to the characteristic features of laws and experiences of law that are not ours. Lawyers seeking to elicit epigrammatic answers from foreign laws must accept that, within the structural constraints set by the human interpretive apparatus, such understanding of a law or of an experience of law other than one's own as is possible can only arise from cultural contextualization.¹⁴ What is required in an age of globalization, therefore, is not yet more illusory formalization of law on any given point. Rather, there is an urgent need to appreciate how various legal communities think about the law, why they think about the law as they do, why they would find it difficult to think about the law in any other way, and *how their thought differs from ours*. It is this kind of fundamental information about alterity-in-the-law that lawyers—and, in particular, comparatists-at-law—should be seeking to disseminate. I suggest that this goal can best be effectuated by securing pertinent anthropological, philosophical, and psychological insights. Indeed, I claim that lawyers can only account in a meaningful way for how the law is constructed in a foreign legal culture through an interdisciplinary investigation. The point, for instance, is that in enacting a *loi* for the reasons they do and in the way they do, as a product of the way they think, with the desires and ambitions they have, in enacting a specific *loi* (and not others), the French are not just doing *that*: they are also doing something typically French and are thus alluding to a modality of legal experience that is intrinsically theirs. In this sense, because it communicates the French sensibility to law, the *loi* can serve as a focus of inquiry into legal "Frenchness" and into Frenchness *tout court*. It need not be regarded only as a *loi* in terms of its effectivity as rule. There is more to *loiness* than *loi-as-rule*. Indeed, *loi-as-rule* is a "cognitive intoxicant" bound to entail persistent misapprehension of the French experience of the legal.¹⁵ A *loi* is necessarily an incorporative cultural form. As a compactly allusive accretion of cultural elements, of traditionary features that constitute individual autonomy and identity within

a community, it is supported by impressive ideological formations. A *loi* is "encrusted, beyond lexical-grammatical definition, with phonetic, historical, social, idiomatic overtones and undertones. It carries with it connotations, associations, previous usages, and even graphic, pictorial values and suggestions (the look, the 'shape' of words)."¹⁶ The part never states its own meaning, for it is an expression of the whole assumptive background: it conveys morally and politically resonant ascriptions. To borrow from Marcel Mauss, each manifestation of the law must be apprehended as a "*fait social total*," a complete social fact (which is emphatically not to say that every manifestation of law within a culture is nothing but an example of that entire culture being acted out).¹⁷ And it is precisely this ability to see the whole in the part, to move away from the underbrush of detail and lead to a clearing of responsive perception, that must define the interpretive competence of comparatists-at-law. In an era of globalization, their task is to appreciate the semantic field to which the rule belongs, to grasp the latent patterns of interest and struggle that shape the existence of postulated realities, the production of associations to which the rule is a clue.

To refute the view that legal rules are somehow modular and interchangeable entities unencumbered by linguistic, epistemological, or cultural baggage is to accept that a given rule cannot be equally at home everywhere in the world. Indeed, I claim that this is an important constitutive feature of law, not an inconvenient limitation. I argue that no form of words purporting to be a "rule" can find itself completely devoid of semantic content, for no rule can be without meaning. The meaning of the rule is an essential component of the rule; it partakes in the *ruleness* of the rule. The meaning of a rule, however, is not entirely supplied by the rule itself; a rule is never totally self-explanatory. To be sure, meaning emerges from the rule so that it must be assumed to exist, if virtually, within the rule itself even before the interpreter's interpretive apparatus is engaged. To this extent, the meaning of a rule is acontextual. But meaning is also—and perhaps mostly—a function of the application of the rule by its interpreter, of the concretization or instantiation of the rule in the events it is meant to govern.¹⁸ This ascription of meaning is predisposed by the way the interpreter understands the context within which the rule arises and by the manner in which he frames his questions, this process being determined by who and where the interpreter is and, therefore, to an extent at least, by what the interpreter, in advance, wants and expects (unwittingly?) the answers to be. Hence, the meaning of the rule is a function of the interpreter's epistemological assumptions, which are themselves linguistically and historically, that is, culturally conditioned. These *pre-judices* (in the etymological sense of the term) are actively forged, for example through the schooling process in which law students are immersed and through which they become impressed with the values, beliefs, justifications, and the practical consciousness that allow them to consolidate a cultural code, to fashion their identities, and to become professionally socialized. Inevitably, therefore, a significant part of the very real emotional and intellectual investment that presides over the formulation of the meaning of a rule lies beneath consciousness, because the act of interpretation is embedded, in ways

that the interpreter is often unable to appreciate empirically, in a morality, in a culture, and in a tradition, in sum, in a whole *ambience* that guides the experience of a concept—a process of embeddedness constituting what Hans-Georg Gadamer refers to as “pre-understanding.”¹⁹

Lawyers must adopt a view of law as a polysemic signifier, which connotes *inter alia* traditional and cultural referents. If one agrees that, in significant ways, a rule receives its meaning from without and if one accepts that such ascription of meaning by an interpretive community effectively partakes in the ruleness of the rule—indeed, in the *nucleus* of ruleness—it must follow that there could only occur a meaningful “legal transplant” when both the propositional statement as such *and* its ascribed meaning—which jointly constitute *the rule*—are transported from one legal culture to another. Given that the meaning ascribed to the rule is itself culture-specific, it is difficult to conceive, however, how this transfer could ever genuinely happen. In linguistic terms, one could say that the signified (meaning the idea content of the word) is never displaced since it always refers to an idiosyncratic semiotic situation. Rather, the propositional statement, as it finds itself technically integrated into another law, is understood differently by the host culture and is, on account of a process of semantic reconfiguration, ascribed a culture-specific meaning at variance with the earlier one (not least because the very appreciation of the notion of “rule” may itself differ): “one understands differently, when one understands at all.”²⁰ Accordingly, a crucial element of the ruleness of the rule—its meaning—does not survive the journey from one law to another. In other words, the act of communication involves the communication of *something to someone* and the tension between these two poles inevitably resolves itself in favor of the latter.

The relationship between the inscribed words that constitute the rule in its bare propositional form and the idea to which they are connected is largely arbitrary in the sense that it is culturally determined. Thus, there is nothing to show that the same inscribed words will necessarily generate the same idea in a different culture, a fortiori if the inscribed words are themselves different because they have been rendered in another language. As Walter Benjamin writes, “the word *Brot* means something different to a German than the word *pain* to a Frenchman.”²¹ And as José Ortega y Gasset observes in his *Miseria y esplendor de la traducción*, the Spanish “*bosque*” does not mean the German “*Wald*.”²² In other terms, as words cross boundaries, a different rationality and a different morality intervene to underwrite and effectuate them: the host culture continues to articulate *its* moral inquiry (even at the level of the *mémoire involontaire*) according to standards of justification that are accepted and acceptable locally. Accordingly, the imported form of words is ascribed a different, local, *iconoclastic* meaning, which defeats the *sui generis* relation that the rule had instituted with language, culture, and tradition in its native environment and which makes the rule *ipso facto* a *different* rule. As the understanding of a rule changes, the meaning of the rule changes. And as the meaning of the rule changes, the rule itself changes. Meaning simply does not lend itself to transplantation; it is not negotiable internationally. Cross-cultural influences, rather than generate a kind of immanent

rationalization across laws, lead to a local *métissage*, which, because the elements in the mix are specific to local circumstances, is itself idiosyncratic.²³

Until the one universal, unassailable, and unassailed political truth is revealed in its univocally significant reality, every law remains an expression of the language, culture, and tradition that called it into being. There is always at work, if you like, an active agent of domestication, and that agent lives locally. At best, what can be displaced from one legal culture to another is, literally, a *meaningless* form of words. To claim more is to claim too much. In any *meaningful* sense of the term, "legal transplants" cannot happen (the idea of "transplant," therefore, bespeaks far less the continued life of the plant than a displacement of its ground). As it crosses boundaries, the original rule necessarily undergoes a change that affects it *qua* rule. The disjunction between the bare propositional statement and its meaning prevents the displacement of the *rule* itself—a point which current anthropological research on cognition captures thus: "The fact that exactly the same word gets printed or uttered again and again does not mean that exactly the same meaning (which is half the word) spreads from minds to minds."²⁴ To quote from Eva Hoffman, "[y]ou can't transport human meanings whole from one culture to another any more than you can transliterate a text." This impossibility arises because, in the words of this writer again, "[i]n order to transport a single word without distortion, one would have to transport the entire language around it." There is more: "In order to translate a language, or a text, without changing its meaning, one would have to transport its audience as well."²⁵ In the way in which memory is not recuperation of past time but rather the figuration that time assumes in the moment of remembering, legal borrowing is less a repository for what is elsewhere than a modality of its (virtual?) *Darstellung*. But rather than point to an unproblematic reverberation, the kinship between the new and the original law generates their difference: on what basis could the new law claim to duplicate the original if no law, however original, in turn guarantees the objective reality of that which it names? (Indeed, how could the second performance replicate in all respects that of the opening night?) This means that the "logic" governing the circulation of legal rules is one of *connectedness* rather than identity, sameness, or mimesis: there is no *reprise*.²⁶ One is reminded of Benjamin's exposition of Romantic epistemology and of (some aspects at least of) his relational—and, hence, differentiating—motif of "*Zusammenhang*."²⁷

What happens when a legal rule is formulated or reformulated in one legal culture on the basis of a legal rule prevailing in another is, indeed, closely analogous to the act of literary translation. In both instances, texts are intentional and relational. In both instances, the meaning of the original is assumed not to reside wholly within the original itself. In both instances, there are silences to be addressed.²⁸ In both instances, there is a certain "mutational" element occurring in every "copying" event. (In German, in fact, the language makes this link almost explicit: while "*über setzen*" conveys the idea of transportation to another shore—which could apply, at least metaphorically, to the adoption of legal rules across legal cultures—"übersetzen" means "to translate.") Just as the "transplant"

gives rise to the “untransplantability” of law and the idea of a “remainder,” literary translation gives birth to the “untranslatability” of language and the idea of a “remainder.” The way in which literary translators are faced with the relationship between texts and culture, both in the guest and in the host languages, and the way in which they bring to the act of translation, whether consciously or unconsciously, their theory of language, their ideas on words and meaning, their cross-cultural knowledge, their sense of what is possible given specific cultural frames, cultural regularities, and cultural key mechanisms, is akin to the manner in which lawyers are required to approach legal borrowing across legal cultures.²⁹

First, the literary translator must adapt the work-in-translation so as to facilitate understanding by the readership in the host language even though this strategy entails moving away from a strictly literal approach. Thus, in Gilbert Adair’s English translation of Georges Perec’s famous lipogram, although the hero remains French and the action continues to be set in France, Anton Voyl becomes Anton Vowl.³⁰ And while Perec has his main character proclaiming his admiration “*pour Cyrano*,” the translator writes “for Rostand’s *Cyrano*.” Also, the translator substitutes adaptations of Shakespeare and Milton for those that Perec had offered of Mallarmé and Hugo. Another well-known illustration of the acculturation process I am contemplating is found in Pierre Leyris’s French translation of T. S. Eliot’s “The Love Song of J. Alfred Prufrock,” which seeks to reproduce the poet’s rhymic effect. Eliot has:

In the room the women come and go
Talking of Michelangelo.

The French text reads thus:

*Dans la pièce les femmes vont et viennent
En parlant des maîtres de Sienne.*³¹

There are, of course, many such examples—some of which have become familiar. I have in mind one of Robert Adams’s favorites: in the Inuktituk version of the Bible, the “lamb of God” becomes the “seal of God.”³²

Second, the literary translator must adapt the host language in order to accommodate alterity—the point of translation being, of course, to allow a readership to partake in diversity, which cannot, therefore, be obliterated lest the idea of translation itself be betrayed. In other words, the translator must accept that the original presence of the guest language ought not to be effaced. Indeed, Gayatri Spivak writes of the need for the translator to “surrender” to language.³³ A translation must not aim to look so “natural” within the host language as no longer to appear like a translation. Otherwise, it denies the entitlement of alterity to exist as alterity and, ultimately, refuses to grant it hospitality. In the way it purports to abandon the normal articulation of French sentences, Chateaubriand’s translation of *Paradise Lost* offers a good example of an attempt to overcome ethnocentricity in the host language.³⁴ In 1836, as he was proceeding to translate Milton, Chateaubriand stood as the unchallenged master of French prose, which he had carried to a degree of sophistication that has since possibly

been surpassed only by Proust. Yet, in his observations on his translation strategy, Chateaubriand, crucially, wrote as follows: "I have not been afraid to change the regime of verbs whenever, had I remained more French, I would have made the original loose something of its precision, of its originality, or of its energy."³⁵ Chateaubriand himself illustrated this statement with an example, which he drew from Milton's description of Pandemonium, the palace of Satan:

Many a row
Of starry lamps
Yielded light
As from a sky [.]

*Plusieurs rangs
de lampes étoilées
émanent la lumière
comme un firmament [.]*

The translator offers the following explanation to justify the way in which he derogates from the canons of French syntax: "I know that *émaner* in French is not an active verb: a sky does not *émane* light, rather light *émane* from a sky; but if you translate like this, what becomes of the image? At least, the reader here enters into the genius of the English language; he learns about the difference that exists between the regimes of verbs in that language and in ours."³⁶ In this sense, Chateaubriand makes the French language hospitable to alterity through a rather sophisticated adaptive strategy—all the while showing how "fidelity" need not be subordinated to the notion of "communicative efficacy."³⁷

Whether one is moving away from the literal rendition of the guest text or reworking the host language, one is engaged in an act of violence, which, however, must ultimately yield to the fact of untranslatability, that is, to the textness of the text's obstinate self-affirmation.³⁸ In this sense, failure inheres to the act of literary translation—a point captured by Chateaubriand in his allusion to the grief experienced by the translator.³⁹ But the failure is not complete, for translation inscribes alterity at the heart of identity through the new forms it creates "in the ductile matter of language."⁴⁰ Thus, the host language makes the work other-than-itself while the work offers the host language the opportunity to differ from itself. In this way, literary translation reveals the genuine nature of hospitality, which is that both the guest and the host should be exposed to a risk: the guest agrees to put herself in the hands of the host, the host agrees to change his ways in order to welcome the guest.⁴¹ As this interaction takes place, emphasizing a shared condition of vulnerability,⁴² there happens a displacement of the borders confining and ordering the existence of each language, a deterritorialization. Literary translation denationalizes language and inscribes it in a history, which does not reduce itself to that of its "native" speakers. Through translation, both the guest and the host languages make the point that they can potentially be at home "elsewhere" or "elsehow" and assert the possibility of acknowledging alterity through a movement of differentiation from oneself. They emphasize a

phenomenon of disappropriation.⁴³ What is the case for literary translation applies also to legal borrowing, which, as I have observed, also inscribes alterity at the heart of identity by showing the adaptability of law, whether guest or host. Literary translation and legal borrowing allow the text to "ris[e] above itself, above its own linguistic enmeshments."⁴⁴ They encourage it to find fulfilment in something other than the original setting, they justify its transgression of boundaries, they favor its liberation from itself, they make possible its *redemption*. There is more, for translation can be apprehended as a (re)construction of the experiential continuity of the world in that it "express[es] the innermost relationship of languages,"⁴⁵ to the extent at least that all individual languages, although they differ in terms of words, sentences, and structures, intend to *disclosé*. Likewise, one could say that legal borrowing expresses the innermost relationship of laws insofar as all laws intend to regulate.

In the same way as literary translators accept that words do not *just* travel across languages, lawyers must begin to appreciate that laws do not *just* travel across legal cultures. And in the same way as literary translators accept that translation requires modifications to the work-in-translation, lawyers must accept that legal borrowing requires modifications to the law-in-transit, if only as a condition of the acceptability of alterity by the interpretive community inhabiting the host law, as a condition of alterity *making sense* for that community. It is, therefore, simplistic to approach the matter of legal borrowing as if rules were interchangeable across space and time. Consider, by way of example, Alan Watson's assertion—one of many statements advanced by this author along the same lines: "Before the *Code civil* the Roman rules [on transfer of ownership and risk in sale] were generally accepted in France [. . .]. This was also the law accepted by the first modern European code, the Prussian *Allgemeines Landrecht für die Preussischen Staaten* of 1794."⁴⁶ Now, the fact is that the Roman "rules" were written in Latin and purported to regulate the dealings of citizens in sixth-century Constantinople. The French rules mentioned by the author were written in French and intended to govern citizens in pre-revolutionary France. And the Prussian rules to which the author refers were written in German and were concerned with legal relationships in what remained feudal Prussia. I argue that cultural constructions of reality and of law and of rules in the three settings would harbour certain distinctive characteristics, which would, therefore, affect the interpretation of the rule, that is, which would determine the ruleness of the rule according to the distinctive cultural logics of the native legal communities. These rules, therefore, are not the same rules. Any similarity stops at the bare form of words itself, for every form of words, because it emerges in a shared local context that is already meaningful locally and through which alone there can be any local understanding at all, can only get its meaning by fitting into and contributing to the local whole. Even then, this conclusion does not account for the fact that the inscribed words appear in three different languages with each language suggesting a specific relationship between the words and their signifying content (for example, "[n]o language divides time or space exactly as does any other [. . .]; no language has identical taboos with any other [. . .]; no language dreams precisely like any other").⁴⁷ In this respect, Benjamin's observation may

be usefully recalled: "Whereas content and language form a certain unity in the original, like a fruit and its skin, the language of the translation envelops its content like a royal robe with ample folds. For it signifies a more exalted language than its own and thus remains unsuited to its content, overpowering and alien."⁴⁸ Language—and the same could be said of culture—, whether having to do with poetry or law, acts as an operator of difference—not, to be sure, an absolute difference, not the kind of difference that would imply irrevocably divided realms, but the difference that Rodolphe Gasché calls, after Benjamin, a *caesura*: "difference is achieved in the fleeting touch of what is to be disregarded, in fidelity to what is to be abandoned."⁴⁹

Arguments purporting to establish sameness of laws across legal cultures, which Watson's juxtaposition shows to rest on a comprehensive attitude *preceding* the facts that are supposed to call these claims forth, are necessarily based on a repression of differences located in the contextual matrix within which any manifestation of posited law is inevitably ensconced.⁵⁰ As against Watson's constitutive exclusions—which effectively remove legal relations from the field of direct experience of particular persons in their mutual involvement, force individuals to renounce their autonomy and assign them to the impersonal forces of the market in legal ideas, and replace a mode of engagement with a perfectly artificial and ideological mode of construction of axiomatic patterns established through strict reference to the formalized elements of law—the task of comparatists-at-law is to measure the gap or the *écart* between laws, not unlike the way in which literary translators constantly seek to apprehend the distance between languages. Comparative legal studies is best regarded as a phenomenological inquiry, that is, as the hermeneutic explication and mediation of plural and different forms of legal experience within a descriptive and critical meta-language—an important feature of this programme of disclosure being embodied in Paul Ricoeur's notion of a *hermeneutics of suspicion*.⁵¹ Because insensitivity to questions of cultural heterogeneity does not do justice to the situated, local properties of knowledge, comparatists must never pretend to overlook the distance between self and other. Rather, they must allow the self to make the journey and see the other in the way she must be seen, that is, *as other*. Comparatists must permit the other to realize her vision of her world. Ultimately, comparative legal analysis must not have a unifying but a multiplying effect: it must aim to organize the diversity of discourses around different (cultural) forms and *counter* the tendency of the mind toward uniformization.⁵² It must recognize the reproduction of distances at the very heart of the mechanisms of imitation. Comparative legal studies must grasp legal experience *diacritically*. Accordingly, comparatists-at-law must rebut any attempt at the universalization of singularity under the guise of ascribed similarity, such as is propounded by the positivistic defenders of the "legal transplants" thesis.

Law is part of the symbolic apparatus through which entire communities try to understand themselves better. Comparative legal studies can further one's understanding of other peoples by shedding light on how they understand their law. But unless comparatists-at-law can learn to think of law as a culturally-situated phenomenon and accept that the law lives in a profound way within a culture-

specific—and, therefore, contingent—discourse, comparison rapidly becomes a pointless venture. I argue that the priority of alterity—best expressed through the consilience of individualizing and phenomenalist elements—must act as a governing postulate for comparatists: even international conventions will not create legal uniformity given the inherently localized properties of language, culture, and tradition.

Just as there is no universal correspondence between words and world, such that literary translation is necessary, there is no universal correspondence between laws and world, such that legal borrowing is necessary. Whether one is considering literary translation or legal borrowing, only in deferring to the non-identical can the claim to *justice* be redeemed.⁵³ In the same way as literary translation cannot be subsumed under the governance of the same, legal borrowing must escape from the confines of reductive reproductibility. Literary translation is neither mere interpretation of the original text nor mere departure or license from the original. It does not purport to achieve unity and truth in language. Rather, it is that which repudiates the reflexivity of re-presentation—that which disrupts, decenters, and displaces re-presentation—through the multiplication and the constant renewal and the ultimate inexhaustibility of meanings and truths. Instead of falling within the logic of sameness, literary translation has sameness-resisting and difference-creating power.⁵⁴ It shares these key features with legal borrowing, which also exemplifies the openness of law to transformation and renewal and its inherent inexhaustibility. Any idea that law is reproducible and is, in fact, reproduced from one legal culture to the next forgets that here, too, the again is always the anew: *duo si idem dicunt, non est idem*. To borrow from Carol Jacobs writing about Benjamin's theory of literary translation: legal borrowing does not transform an original foreign law into one the importers may call their own, but rather renders radically foreign that law they envisage as being theirs.⁵⁵

In French, one can refer to a "*parti pris*" and talk about "*prendre son parti*." Either formulation connotes three meanings that jointly capture three important facets of my argument. First, one can have a "*parti pris*" in the sense of showing purposefulness. For example, a French sentence can run thus: "*Chez lui, le parti pris de faire du bien se remarquait vite*" (In him, the determination to do good could easily be noticed). A variation on this sentence reads: "*Il avait pris le parti de faire du bien*" (He had determined to do good). Second, a "*parti pris*" refers to a prejudice as in the sentence, "*il y a trop de parti pris dans ses jugements*" (there is too much prejudice in his opinions). Third, "*prendre son parti*" can mean "to resign oneself." After one has lost an important vote, it can be said that "*il en a pris son parti*," that "he has resigned himself to it." Purposefulness, prejudice, and resignation are three cardinal features of the brand of comparative legal studies I advocate. I argue that comparatists must resign themselves to the fact that law is a cultural phenomenon and that, therefore, differences across legal cultures can only ever be overcome imperfectly: not everything can be hygienically totalized.⁵⁶ Disclaiming any objectivity (and, therefore, bringing to bear their own

prejudices as situated observers), they must *purposefully* privilege the identification of differences across the laws they compare lest they fail to address singularity with authenticity. For them, the challenge then becomes “how to restore to the singular, to the unexchangeable, to muteness, the attributes of power and, therefore, of health, of sovereignty—given that language, communication, exchange have attributed to *gregarious conformity* what is healthy, powerful, sovereign.”⁵⁷ But academic proposals concerning the matter of European legal integration reveal the magnitude of the task. One of the integrationists’ animating desires as they engage in their futile suburban enterprises is specifically to avoid gaining contextual knowledge and thick understanding, to ignore law’s *facticity*, to *deworld* the law. Indeed, such cognitive deficit is constitutive of “doing law” for these individuals, which means that remedying one’s ignorance by addressing the primordial questions that have been avoided heretofore can hardly be a genuine option as this would entail that one is no longer “doing law”: “to be really good at ‘doing law,’ one has to have serious blind spots and a stunningly selective sense of curiosity.”⁵⁸

Nonetheless, only the pursuit of cultural understanding can engender an illuminating contrast to the comparatist’s own assumptions, that is, can serve as an anchor for a renewed relation to lived experience, an improved self-understanding, and, ultimately, enhanced freedom—what Ortega y Gasset calls a new “in-oneness.”⁵⁹ Ricoeur makes this point in the following terms: “It is the enlargement of one’s own understanding of oneself that [the interpreter] seeks through the understanding of the other. Any hermeneutics is thus, explicitly or implicitly, the understanding of oneself through the detour of the understanding of the other.”⁶⁰ The question to be asked is not What are they like?, but Why are they different from us?, and, therefore, What makes us what we are?. Comparison, like psychoanalysis, is a transference process whereby one redefines oneself in the course of renegotiating one’s relation with the other and, ultimately, with oneself—always bearing in mind, of course, that the other cannot be preconstituted in its otherness prior to the encounter, for otherness is a product of the encounter.⁶¹ Through its inscription in something like Derrida’s *écriture suspendue*, something like Maurice Blanchot’s *entretien infini* thus generates something like Heidegger’s *Erläuterung*. Here lies comparative legal studies’s *emancipatory* interest. Here lies comparison-at-law’s compelling affinity with translation,⁶² aporetic experiences both on account of the fact that dealing with others-in-the-law or with others-in-language involves “the simple and necessary and yet so unattainable proposition that their way of being we, [is] not our way and that our way of being they, [is] not their way.”⁶³

NOTES

1. I understand the notion of “legal culture” to mean the framework of intangibles within which a legal community operates and that determines the identity of a legal community as *legal community*. The indeterminacy of “culture” or, if you will, the impossibility

of distinguishing between "culture" and "non-culture" in a way that would allow the identification of empirically verifiable causal relationships accounting for "cultural" explanations of legal behavior, has prompted many lawyers (within or without the academy) in search of mechanistic explications of experience to disqualify the notion altogether. To those who do not like the idea of "culture," I ask: What is your competing model of social cohesion? Or do you not like the idea of "social cohesion" either?

2. The fact that all significance is sayable does not detract from the further fact that sayability occurs within incommensurate lexicons. In other words, assertions do not determine truth conditions by virtue of their propositional content alone. Rather, true statements can only be made relative to a lexicon. For an influential thesis to this effect, see Friedrich Schleiermacher, *Ueber die verschiedenen Methoden des Uebersetzens*, in *Sämmtliche Werke*, tome III, vol. 2 (Berlin: Reimer, 1838), p. 239: "Each language contains one system of concepts which, precisely because they touch, join, and complement each other in the same language, constitute a whole, the different parts of which do not correspond to any of those of the system of other languages" [(Es enthält jede Sprache (. . .) Ein System von Begriffen in sich, die eben dadurch daß sie sich in derselben Sprache berühren, verbinden, ergänzen, Ein Ganzes sind, dessen einzelnen Theilen aber keine aus dem System anderer Sprachen entsprechen], 1813.

3. I deliberately do not address the matter of "legal translation" as such, that is, the actual translation of "legal texts." For an insightful overview of some of the crucial theoretical issues arising in this context, see, for example, Nicholas Kasirer, "François Génys's *libre recherche scientifique* as a Guide for Legal Translation," *Louisiana Law Review* 61(331), 2001. See also Janet E. Ainsworth, "Categories and Culture: On the 'Rectification of Names' in Comparative Law," *Cornell Law Review* 82(19), 1996; Peter Goodrich, *Law in the Courts of Love* (London: Routledge, 1996), pp. 204–9. This author develops his sophisticated argument further in "Europe in America: Grammatology, Legal Studies, and the Politics of Transmission," *Columbia Law Review* 101 (2003), 2001.

4. The notion of "tradition" is to be apprehended in terms of "antecedents" rather than "causes." My basic point is that "one cannot be a self on one's own": Charles Taylor, *Sources of the Self* (Cambridge, MA: Harvard University Press, 1989), p. 36. See also Alasdair MacIntyre, *After Virtue*, 2nd ed. (London: Duckworth, 1985), pp. 126–27, 130, 221–22, and *passim*. For a sensitive treatment of the idea of "tradition" allowing for agency and reflexivity, see Gerald L. Bruns, *Hermeneutics Ancient and Modern* (New Haven: Yale University Press, 1992), pp. 195–212. The notion of "structures of attitude and reference" to which I refer is a central motif in Edward W. Said, *Culture and Imperialism* (New York: Knopf, 1993). Although my argument focuses on translation from interlinguistic and intercultural perspectives, the idea of "tradition" also raises the matter of intralinguistic and intracultural translation given how members of any community must inevitably presentiate the past, which is always foreign and strange. For example, see Hans-Georg Gadamer, *Truth and Method*, 2nd, rev. ed., trans. Joel Weinsheimer and Donald G. Marshall (London: Sheed & Ward, 1989), p. 387: "The fact that a foreign language is being translated means that this is simply an extreme case of hermeneutical difficulty—i.e., of alienness and its conquest. In fact all the "objects" with which traditional hermeneutics is concerned are alien in the same unequivocally defined sense. The translator's task of re-creation differs only in degree, not in kind, from the general hermeneutical task that any text presents," 1960. For the German text, see *Wahrheit und Methode*, 6th ed. (Tübingen: J.C.B. Mohr, 1990), p. 391: "Die Fremdsprachlichkeit bedeutet nur einen gesteigerten Fall von hermeneutischer Schwierigkeit, d. h. von Fremdheit und Überwindung derselben. Fremd sind in dem gleichen, eindeutig bestimmten Sinne in Wahrheit alle "Gegenstände," mit denen es die tradi-

tionelle Hermeneutik zu tun hat. Die Nachbildungsaufgabe des Übersetzers ist nicht qualitativ, sondern nur graduell von der allgemeinen hermeneutischen Aufgabe verschieden, die jeder Text stellt."

5. For historical aspects of the way in which civil law and common law have—and have not—intersected, see, for example, Peter Goodrich, "Poor Illiterate Reason: History, Nationalism and Common Law," *Social & Legal Studies* 1(7), 1992. A sophisticated differential analysis of relevant epistemological issues across these legal traditions is offered in Geoffrey Samuel, *Epistemology and Method in Law* (Ashgate: Dartmouth, 2003).

6. Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36(57), 1984, p. 90.

7. I closely follow Barbara Herrnstein Smith, *Belief and Resistance* (Cambridge, MA: Harvard University Press, 1997), p. 92.

8. See, for example, Hein Kötz and Axel Flessner, *European Contract Law*, tome I (by Kötz): *Formation, Validity, and Content of Contracts; Contract and Third Parties*, trans. Tony Weir (Oxford: Oxford University Press, 1997); Christian von Bar, *The Common European Law of Torts*, tomes I and II (Oxford: Oxford University Press, 1998 and 2000); Walter van Gerven, Jeremy Lever, and Pierre Larouche, *Tort Law* (Oxford: Hart, 2000); Commission on European Contract Law, *Principles of European Contract Law*, eds. Ole Lando and Hugh Beale (Deventer: Kluwer, 2000); Marcel Storme, ed., *Rapprochement du droit judiciaire de l'Union européenne / Approximation of Judiciary Law in the European Union* (Dordrecht: Martinus Nijhoff, 1994); Mauro Bussani and Ugo Mattei, "The Common Core Approach to European Private Law," *Columbia Journal of European Law* 3(339), 1997–98; Jürgen Schwarze, ed., *Administrative Law Under European Influence* (London: Sweet & Maxwell, 1996).

9. Alan Watson, *Legal Transplants*, 2d ed. (Athens, GA: University of Georgia Press, 1993), p. 95.

10. Basil Markesinis, "Why a Code is Not the Best Way to Advance the Cause of European Legal Unity," *European Review of Private Law* 5(519), 1997, p. 520.

11. I adopt and adapt Jacques Derrida, *L'écriture et la différence* (Paris: Le Seuil, 1967), p. 427. See also *supra*, note 2.

12. Jacques Derrida *L'autre cap* (Paris: Minuit, 1991), pp. 75–77 [le devoir de répondre à l'appel de la mémoire européenne (. . .) dicte de respecter la différence, l'idiome, la minorité, la singularité (. . .) et commande de tolérer et de respecter tout ce qui ne se place pas sous l'autorité de la raison], emphasis original.

13. Jacques Derrida, *Force de loi* (Paris: Galilée, 1994), p. 45 [Cette responsabilité devant la mémoire est une responsabilité devant le concept même de responsabilité qui règle la justice et la justesse de nos comportements, de nos décisions théoriques, pratiques, éthico-politiques].

14. See, for example, Paul W. Kahn, *The Cultural Study of Law* (Chicago: University of Chicago Press, 1999).

15. Mark A. Schneider, *Culture and Enchantment* (Chicago: University of Chicago Press, 1993), p. 40.

16. George Steiner, *Errata* (London: Weidenfeld & Nicolson, 1997), pp. 18–19.

17. Marcel Mauss, "Essai sur le don," in *Sociologie et anthropologie*, 6th ed. (Paris: Presses Universitaires de France, 1995), pp. 274–75 and *passim*, 1925.

18. Paul Ricoeur observes that even "between the least contradicted rule and its application, there always remains a hiatus": *Philosophie de la volonté*, tome I: *Le volontaire et l'involontaire* (Paris: Aubier, 1950), p. 165 [entre la règle la moins contredite et son application il demeure toujours un hiatus].

19. For Gadamer's notion of "pre-understanding," see his *Truth and Method*, *supra*, note 4, pp. 265–71 and 291–300. For the German text and the idea of "Vorverständnis," see *Wahrheit und Methode*, *supra*, note 4, pp. 270–76 and 296–305. For Gadamer's considera-

tion of "prejudice," see *Truth and Method*, pp. 271–85. For the German text and the notion of "Vorurteil," see *Wahrheit und Methode*, pp. 276–90. The gist of Gadamer's claim appears from *Truth and Method*, pp. 276–77: "the prejudices of the individual, far more than his judgments, constitute the historical reality of his being", emphasis original. For the German text, see *Wahrheit und Methode*, p. 281: "die Vorurteile des einzelnen weit mehr als seine Urteile die geschichtliche Wirklichkeit seines Seins", emphasis original. This notion is indebted to the Heideggerian idea of "fore-conception" ("Vorgriff"). See Martin Heidegger, *Being and Time*, trans. John Macquarrie and Edward Robinson (Oxford: Blackwell, 1962), p. 191: "the interpretation has already decided for a definite way of conceiving [the entity we are interpreting], either with finality or with reservations; it is grounded in something we grasp in advance—in a fore-conception," 1926, emphasis original.

20. Gadamer, *Truth and Method*, *supra*, note 4, p. 297, emphasis original. For the German text, see *Wahrheit und Methode*, *supra*, note 4, p. 302: "man anders versteht, wenn man überhaupt versteht", emphasis original. An alternative way to make this point is to observe that it is precisely to the extent that something cannot let go of its source that communication fails. See Goodrich, *Courts of Love*, *supra*, note 3, p. 205. I should not be understood as claiming that communication across legal cultures is somehow made absolutely impossible. In fact, a legal culture can communicate its difference from other legal cultures to other legal cultures. But the existence of a taste for the foreign ("die Lust am Fremden"), of a sentiment of foreignness ("das Gefühl des fremden"), of a respect for foreignness ("Achtung für das fremde"), and of an inclination to translate ("die Neigung zum Uebersetzen") permit a limited closing of the gap with alterity. The German formulae are from Schleiermacher, *Methoden*, *supra*, note 2, pp. 221, 215, 243, and 223.

21. Walter Benjamin, "The Task of the Translator," in *Selected Writings*, eds. Marcus Bullock and Michael W. Jennings and trans. Harry Zohn, tome I (Cambridge, MA: Harvard University Press, 1973), p. 257, 1923.

22. José Ortega y Gasset, *Obras completas*, tome V (Madrid: Alianza Editorial, 1994), p. 436, 1937. This point does not deny the existence of "regional modes and dialects" within a language: George Steiner, *After Babel*, 2nd. ed. (Oxford: Oxford University Press, 1992), p. 32.

23. The idea of "métissage," as it connotes fluidity, mutability, ambiguity, and enigmaticity—rather than syncretism, reconciliation, unity, or totality—is usefully thematized in François Laplantine and Alexis Nouss, eds., *Métissages* (Paris: Pauvert, 2001), pp. 7–16 and *passim*. Note, however, that despite the work that alterity performs within selfness, such that the other is not only the non-self but also helps to constitute the self's intimate meaning through an *othering* of the self, neither alterity nor selfness can be reduced to mere amalgamations, a process that would pay insufficient attention to the notion of "endogenous historicity": a Tupi who plays lute remains a Tupi. The quotation is from John Comaroff and Jean Comaroff, *Ethnography and the Historical Imagination* (Boulder: Westview, 1992), p. 27. My illustration is drawn from Serge Gruzinski, *La pensée métisse* (Paris: Fayard, 1999), *passim*, who refers to Brazilian verse—"Sou um tupi tangendo um alaúde"—linking local identity and a European musical instrument.

24. Dan Sperber, "Learning to Pay Attention," *The Times Literary Supplement*, December 27, 1996, p. 14, col. 3.

25. Eva Hoffman, *Lost in Translation* (London: Minerva, 1991), pp. 175, 272, and 273, respectively.

26. Cf. Jacques Derrida, *Marges de la philosophie* (Paris: Minuit, 1972), pp. 374–81, who links the idea of "repetition" with that of "differentiation" through his notion of "iterability"—a neologism which, etymologically, connotes at once "reiteration" and "alterity."

27. For Benjamin's notion of "Zusammenhang", see Anthony Phelan, "Fortgang and Zusammenhang: Walter Benjamin and the Romantic Novel," in Beatrice Hanssen and Andrew Benjamin, eds., *Walter Benjamin and Romanticism* (New York: Continuum, 2002), pp. 69–82.

28. Ortega y Gasset notes that "each language represents a different equation between manifestations and silences": *El hombre y la gente*, in *Obras completas*, tome VII (Madrid: Alianza Editorial, 1994), p. 250 [*cada lengua es una ecuación diferente entre manifestaciones y silencios*].

29. I am not suggesting that there are no differences arising between legal borrowing and literary translation. For example, any literary translator is indebted to the original in the sense that, although he intends to produce neither an original nor a copy of an original, he must give back what has been entrusted to him. There is no such duty on the part of the legal borrower. For the argument from indebtedness, see Jacques Derrida, *Psyché*, 2nd ed. (Paris: Galilée, 1998), pp. 211–12. The kindred notion of "restitution" is addressed in A. L. Becker, *Beyond Translation* (Ann Arbor: University of Michigan Press, 1995), pp. 18–20. Thoughtful theorizations of the ethical demands implied in the act of translation are offered in Anthony Pym, *Pour une éthique du traducteur* (Arras: Artois Presses Université, 1997); Lawrence Venuti, *The Scandals of Translation* (London: Routledge, 1998).

30. Georges Perec, *A Void*, trans. Gilbert Adair (London: Harvill, 1994).

31. T. S. Eliot, *Prufrock and Other Observations*, in *The Complete Poems and Plays* (London: Faber & Faber, 1969), p. 14, 1917; "La chanson d'amour de J. Alfred Prufrock," in *Poésie*, trans. Pierre Leyris (Paris: Le Seuil, 1994), p. 11, 1947.

32. Robert Adams, *Proteus, His Lies, His Truth* (New York: Norton, 1973), p. 7. Eugene Nida, to whom the paternity of this translation is often ascribed, calls the story "intriguing" but "without foundation in actual fact": Eugene A. Nida, *Bible Translating: An Analysis of Principles and Procedures with Special Reference to Aboriginal Languages* (New York: American Bible Society, 1947), p. 136.

33. Gayatri Chakravorty Spivak, *Outside in the Teaching Machine* (New York: Routledge, 1993), p. 183.

34. See Antoine Berman, *La traduction et la lettre ou l'auberge du lointain* (Paris: Le Seuil, 1999), pp. 97–114.

35. Chateaubriand, "Remarques à propos de la traduction de Milton," *Poésie*, N° 23, 1982, pp. 113–14 [*je n'ai pas craint de changer le régime des verbes lorsqu'en restant plus français, j'aurais fait perdre à l'original quelque chose de sa précision, de son originalité ou de son énergie*], 1836. Cf. Paul Valéry, "Variations sur les Bucoliques," in *Oeuvres*, ed. Jean Hytier, tome I (Paris: Gallimard, 1957), p. 210, who observes that the translator favoring an exegetical approach "proses the way one coffins" [*met en prose comme on met en bière*].

36. Chateaubriand, "Remarques," note 35, p. 114 [*je sais qu'émaner, en français, n'est pas un verbe actif: un firmament n'émane pas de la lumière, la lumière émane d'un firmament; mais traduisez ainsi, que devient l'image? Du moins, le lecteur pénètre ici dans le génie de la langue anglaise; il apprend la différence qui existe entre les régimes des verbes dans cette langue et dans la nôtre*].

37. See Antoine Berman, *L'épreuve de l'étranger* (Paris: Gallimard, 1984), p. 17. Not insignificantly, a translation like Chateaubriand's can enhance the translator's status in the reader's eyes by allowing for an appreciation of the translator's authorship. See Lawrence Venuti, *The Translator's Invisibility* (London: Routledge, 1995), pp. 7–9 and *passim*.

38. Cf. Octavio Paz, *Sombras de obras* (Barcelona: Seix Barral, 1983), p. 31: "neither moral and aesthetic significations nor scientific and magical ones are entirely translatable

from one society to the other" [ni los significados morales y estéticos ni los científicos y mágicos son enteramente traducibles de una sociedad a otra].

39. Chateaubriand, "Remarques," *supra*, note 35, pp. 119–20. In "Die Aufgabe des Übersetzers," the original title of Benjamin's essay, "Task of the Translator," *supra*, note 21, the word "Aufgabe" connotes also the one who must renounce and thus alludes to the translator's defeat. See Paul de Man, *The Resistance to Theory* (Minneapolis: University of Minnesota Press, 1986), p. 80. I owe this reference to Simone Glanert.

40. Schleiermacher, *Methoden*, *supra* note 2, p. 213 [in dem bildsamen Stoff der Sprache].

41. The notion of "hospitality" is in Friedrich Schleiermacher, *Ueber Leibniz unangeführt gebliebenen Gedanken einer allgemeinen philosophischen Sprache*, in *Sämmtliche Werke*, tome III, vol. 3 (Berlin: Reimer, 1835), p. 144 [Gastfreiheit], 1831.

42. Cf. Edward Shils, *Tradition* (Chicago: University of Chicago Press, 1981), pp. 10–11, who remarks on "the metaphysical dread of being encumbered by something alien to oneself."

43. Note that the initial fact of language appropriation is rather more limited than one might at first blush suspect, for when one refers to one's language using the possessive "my," one forgets—or hides—how much alienation this "appropriation" camouflages; in effect, a language is a law that comes from beyond the individual through education and socialization, to which, therefore, the individual is inevitably alienated—a point that explains how our own language is incomprehensible to us, as any francophone can verify by returning to Mallarmé. This is the central message of Jacques Derrida, *Le monolinguisme de l'autre* (Paris: Galilée, 1996).

44. Rodolphe Gasché, *Of Minimal Things* (Stanford: Stanford University Press, 1999), p. 68.

45. Benjamin, "Task of the Translator," *supra*, note 21, p. 255. See also pp. 256–57.

46. Watson, *Legal Transplants*, *supra*, note 9, p. 83.

47. George Steiner, *What is Comparative Literature?* (Oxford: Oxford University Press, 1995), p. 10. It seems pertinent to repeat that I should not be understood as arguing that communication across legal cultures is absolutely impossible.

48. Benjamin, "Task of the Translator," *supra*, note 21, p. 258. For an illuminating commentary on this metaphor, see Jacques Derrida, *Psyché*, 2nd ed. (Paris: Galilée, 1998), p. 226.

49. Gasché, *Minimal Things*, *supra*, note 44, p. 78. For Benjamin's argument, see "Task of the Translator," *supra*, note 21, p. 261: "Just as a tangent touches a circle lightly and at but one point [. . .] a translation touches the original lightly and only at the infinitely small point of the sense." Cf. Clifford Geertz, *After the Fact* (Cambridge, MA: Harvard University Press, 1995), p. 28, who draws a helpful distinction between "difference" and "dichotomy": "[a difference] is a comparison and it relates; [a dichotomy] is a severance and it isolates." Of course, the question of "fidelity" plays itself out differently in the context of legal borrowing. See *supra*, note 29.

50. I am reminded of Lawrence Friedman's colorful language, which can usefully be quoted: he "took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones": Lawrence M. Friedman, *A History of American Law*, 2nd ed. (New York: Simon & Schuster, 1985), p. 676.

51. Paul Ricoeur, *De l'interprétation* (Paris: Le Seuil, 1965), pp. 42–46 [l'interprétation comme exercice du soupçon].

52. See Giambattista Vico, *Principi di scienza nuova*, in *Opere* (Milan: Riccardo Ricciardi, 1953), bk. 1, ch. 47, p. 452: "the human mind naturally tends to take delight in what is uniform" [La mente umana è naturalmente portata a dilettersi dell'uniforme], 1744.

53. See James Boyd White, *Justice as Translation* (Chicago: University of Chicago Press, 1990), pp. 257–69.

54. See Stephen D. Ross, "Translation as Transgression," in Dennis J. Schmidt, ed., *Hermeneutics and the Poetic Motion* (Binghamton: SUNY, 1990), pp. 25–42. I owe this reference to Simone Glanert. Indeed, Derrida perspicuously observes that "for the notion of translation, one will have to substitute a notion of transformation: the regulated transformation of a language by another, of a text by another." He adds: "We will never have been involved and never have been involved in fact in the 'transportation' of pure signifieds which the signifying instrument—or the 'vehicle'—would leave intact and untouched, from one language to another": Jacques Derrida, *Positions* (Paris: Minuit, 1972), p. 31 [à la notion de traduction, il faudra substituer une notion de transformation: transformation réglée d'une langue par une autre, d'un texte par un autre. Nous n'aurons et n'avons en fait jamais eu affaire à quelque 'transport' de signifiés purs que l'instrument—ou le 'véhicule'—signifiant laisserait vierge et inentamé, d'une langue à l'autre], emphasis original. This statement was made in the context of an interview with Julia Kristeva.

55. Carol Jacobs, *In the Language of Walter Benjamin* (Baltimore: Johns Hopkins University Press, 1999), p. 76.

56. See Homi K. Bhabha, *The Location of Culture* (London: Routledge, 1994), p. 12. Of course, to assert that difference lies beyond control does not mean that it lies beyond accommodation.

57. Pierre Klossowski, *Nietzsche et le cercle vicieux* (Paris: Mercure de France, 1969), p. 118 [Comment restituer au singulier, à l'inéchangeable, au mutisme les attributs de la puissance donc de la santé, de la souveraineté—dès lors que le langage, la communication, l'échange ont attribué à la conformité grégaire ce qui est sain, puissant, souverain?], emphasis original. Perhaps the most charitable way to assess such trivializing reductions is to observe that an understanding of what comparison means is itself a defining characteristic of any comparatist's being. Nonetheless, the contrast between this kind of snappy compilation acting as an epistemological barrier to knowledge and the thoughtful work on language and culture addressing the phenomenon of alterity in other disciplines is nothing short of shocking. For example, see Sanford Budick and Wolfgang Iser, eds., *The Translatability of Cultures* (Stanford: Stanford University Press, 1996); Paula G. Rubel and Abraham Rosman, eds., *Translating Cultures* (Oxford: Berg, 2003); Michael Cronin, *Translation and Globalization* (London: Routledge, 2003); Umberto Eco, *Experiences in Translation*, trans. Alastair McEwen (Toronto: University of Toronto Press, 2001).

58. Pierre Schlag, *The Enchantment of Reason* (Durham: Duke University Press, 1998), p. 140. For a textbook illustration of the ignorance strategy that Schlag stigmatizes, see Christian von Bar and Ole Lando, "Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code," *European Review of Private Law* 10(183), 2002. For example, these authors' lack of even basic sociological and philosophical knowledge leads them to assert that "law is only that which is binding and [that] only a binding text will have profound practical impact" (p. 232) and to add that a common law of Europe can be "impartial" (p. 222), "dispassionate" (p. 222), and "neutral" (p. 228). An alternative view is developed, for instance, in Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences," *Modern Law Review* 61(11), 1998. But this article, precisely because it adopts a sophisticated interdisciplinary perspective to illustrate the deficiencies of formalist thought, is ignored in Reinhard Zimmermann and Simon Whittaker, eds., *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000), a 750-page text purporting to offer a comprehensive study of its subject matter.

59. Ortega y Gasset, "El hombre y la gente," *supra*, note 28, pp. 79–98 [ensimismamiento], 1957.

60. Paul Ricoeur, *Le conflit des interprétations* (Paris: Le Seuil, 1969), p. 20 [c'est (. . .) l'agrandissement de la propre compréhension de soi-même qu'il (l'exégète) poursuit à travers la compréhension de l'autre. Toute herméneutique est ainsi, explicitement ou implicitement, compréhension de soi-même par le détour de la compréhension de l'autre]. Note that the other is not to be reduced to a simple vehicle for the recovery of the self, a mere occasion for self-consciousness, a variation on the theme of my "I-ness," an opportunity for the self-interested furtherance of self-reflective or monological identity, a maieutics: Egyptians do not owe their existence to Egyptologists. For a compelling introduction to the "hermeneutic motion" with specific reference to translation, see Steiner, *After Babel*, *supra*, note 22, pp. 312–435.

61. For an exploration of the connections between translation and psychoanalysis, see Andrew Benjamin, *Philosophy's Literature* (Manchester: Clinamen Press, 2001), pp. 45–70, who notes that Freud himself introduces the analyst as translator.

62. Interestingly, Ricoeur argues that translation involves the construction of comparables: Paul Ricoeur, *Sur la traduction* (Paris: Bayard, 2004), pp. 63–9.

63. Samuel Beckett, "The Capital of the Ruins," in *As the Story Was Told: Uncollected and Late Prose* (London: John Calder, 1990), p. 25, 1946.