
Comparative Law – Engaging Translation

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Withholding translation

Pierre Legrand

Askanted thinking matters. By way of counterpoint to the principal theme of this volume perspicuously urging upon comparative legal studies to engage translation such as to overcome the woeful under-theorisation that continues to plague the field, I want to argue that there must remain situations where translation ought not to govern, where the prevailing motion rather needs to be one of circumspection, restraint and, indeed, avoidance. In other words, I claim that there are instances of *overtranslation* that must be eschewed. ‘Legal-origins’ theory, which emerged in the late 1990s, offers a prominent example of the predicament I wish to address (La Porta, Lopez-de-Silanes and Shleifer 1998, 2008; Glaeser and Shleifer 2002; Beck, Demirgüç-Kunt and Levin 2003). Briefly, proponents of this model defend the existence of isomorphs between traditional legal allegiance and economic development. More specifically, they suggest that law can be recast in terms of economic indicators showing common law jurisdictions to be better at ‘doing business’ than countries hailing from the civil law world – this expression having become the title of an annual report produced by the World Bank since 2003 and purporting to offer a comparative ranking of local regulatory environments according to an ‘ease-of-doing-business’ index (World Bank 2004). The chief assumption informing ‘legal-origins’ theory in general and the World Bank’s *Doing Business* reports in particular is that law can unproblematically be converted into economics in order to generate ‘objective’ data, allowing for a comparative appreciation of the legal mercifully free of the ambiguity – the *play* – that otherwise characterises life-in-the-law.

From the standpoint of analysts undertaking this repurposing of law into the language of economics, their initiative is unassailably productive. For these individuals, the reformulation of law they offer must be seen as a sophisticated striation of the legal into measurable units, allowing it to be harnessed towards the rightful attainment of modern opportunity (where to start a firm? where to buy real estate? where to invest in stocks?).¹ While the proponents of ‘legal origins’ assume an unalloyed gain, I want to argue that in the way law is made to undergo the kind of massive reductionism that deprives it of its experiential fabric, the process features, in fact, a huge detriment. Indeed, I claim that the mobilisation of ‘legal origins’, and the attendant articulation of the legal into a strictly

computational language, assumes a disparagement of law through the imposition of purposive form so serious as to disqualify this approach as an epistemological operator for comparative purposes. Rather than be given free rein, the desire for unalloyed mathematisation of the law ought to be refrained. In other words, *translation must be withheld*.

But I want to refute more than the intoxicating hubris leading to the utter impoverishment of the law-world. I also object to the threshold assumption positing an easy relationality between two monolingualisms (law and economics) even as these languages are so discrepant as to reveal no rapport, originary or otherwise. While I hold that there cannot be a translation that could ever be called 'true' (Glanert and Legrand 2013: 513–32) – so that I do not fault 'legal origins' for not offering a true rendition of the laws it chooses to scrutinise – I defend the view that there can be mistranslations or, more accurately, *overtranslations*. I have in mind situations where the transformation to which the source-text is being subjected acts as an unacceptable betrayal of it. As it defects from the source-text, as it fails to abide by the cardinal translative goals of recognition and respect, as it does so much violence to the source-text as to move to a beyond of the inescapable translative disjointure, 'translation' emerges as the enemy of singularity. When, as with 'legal origins', two languages (law and economics) are conjugated in one declension only (economics), when 'translation' in fact purports to efface the source-language, when 'translation' becomes a celebration of univocity, it is not effectively performing as *trans-lation* but perpetrating *linguicide* – and, indeed, *epistemicide*.

Apart perhaps from some stray Luddites, few observers would be willing to doubt the importance of economic measurement in the ways of the world. For my part, I do not propose to challenge the opinion that numbers hold identifiable virtues.² Nor is it the case that I want to reify the matter of *adaequatio* or emphasise stylistic or semantic conformity. It is not, then, that I require commensurability or similarity or likeness across languages in order to warrant translation. And it is certainly not that I aim to fetishise law as language, that I pursue anything like legal fixity or essentialism. I do not seek a kind of 'semantic zoning' whereby languages – say, the legal and the economic – would be solipsistically quarantined in their own worlds (Apter 2006: 3).

While I note that the idealised rationalism on offer from the partisans of 'legal origins' very much reveals itself as an exercise in (transcendental or theological) governmentality, which benefits rather than contests anglobalisation – the worldwide spread of capital and accompanying authoritarian surveillance mechanisms – my immediate epistemological concerns lie elsewhere (although I cannot fail to emphasise without further ado how there is no part of 'legal origins' that is not thoroughly shaped by cultural processes or that escapes cultural politics). I argue that when it purports to say the legal by way of economics, 'legal origins''s articulation is so partial – so *deficient* and so *biased* – that it assimilates or appropriates this other language (law) such as to destroy its identity (a point I make bearing in mind many of the concerns latterly associated with the idea of 'identity').

To be sure, any statement having, say, a law as its object, is bound, even as it is uttered, ultimately to act as a self-reformulation and thus as a modification of what there is, there – Jacques Derrida aptly remarks that ‘everything that is given to me in the light seems to be given to me by myself’ (1967: 136).³ However, ‘legal origins’s’ alteration of alterity, its radical demotion of the source-text, the loss it countenances, is so excessive as to prove uncreditable. The inscription of ‘legal origins’s’ model of ‘translation’ politics is tantamount to a writing of disaster.

While I want to confine myself to the matter of ‘legal origins’ as a notable example of overtranslation, as a situation where withholding ought to have obtained, the idea of ‘translation’ as metaphorical/organisational frame could easily prompt further reflection, for example, regarding legal migration. Is the 2004 French enactment of provisions whereby, under certain circumstances, an individual charged with a criminal offence can negotiate sentencing against a guilty plea a *translation* of the US law of ‘plea bargain’? Is the 2008 French implementation of constitutional review, pursuant to specific modalities, a *translation* of the US model? Although fascinating in their own right, these permutations on the theme of ‘translation’ must fall beyond the remit of my intervention on this occasion.⁴ Instead, I propose to reconsider a brief text I devoted to ‘legal origins’ when I was commissioned by a law journal a few years ago to write for a focus section it was organising on this topic (Legrand 2009: 215–22). As it appears here, this argument has undergone a certain degree of re-signification, of *translation*, so that it can legitimately claim to appear as a *contribution* to this book.

* * *

‘The reduction of all qualities to quantities is nonsense’
Nietzsche (†1901: § 564 p 304)⁵

For most comparatists-at-law, comparison resolves itself as a generalising activity directed towards one form or other of normative integration. It thus succumbs to the Hegelian temptation of sublating contradiction, that is, of assimilating the singular. I am critical of this disciplinary stance, and I have long sought to forestall this appropriative tendency – which, to my mind, can only be based on fictional relationality across laws. Because it is unavoidably artificial, obstinately instrumental and, indeed, determinedly hegemonic, I want to suspend the connection between comparison and measure. In other words, I advocate processes of comparison that are no longer bound to commensuration. I argue in favour of incommensurability as the primordial absence of common ground between different orders of legal knowledge. ‘Common ground’, any ‘common ground’, must assume a metalanguage; but the empirical fact is that there is *no* language that can dispense with idiomaticity. What there is across laws, and all that there is, is an abyss – an impassable abyss. For me, comparison is thus the site of a problem rather than a solution.

Place, then, is not a mere static backdrop to legal meaning: it is a dynamic constituent of it. In other words, place is not simply a physicalist conception: it is also an existential notion. Law emerges only in and through place (an assertion that does not entail an essentialist, exclusionary, reactionary, conservative or immobile understanding of 'place' – one can, indeed, approach 'place' as source rather than terminus, as that from which something begins in its unfolding rather than that at which it comes to a stop). Law and place are inextricably enmeshed, which means, incidentally, that law can be constitutive of place in its turn. In the same way as there is no ungrounded language, there is no ungrounded law. For law, any law, to be 'as law', it must stand forth in terms of an experience of place. It must *dwell*. If I may be allowed to draw on the possibilities displayed by the German language, I make, in short, a claim for *Ortung* in contradistinction to the seemingly relentless drive for ever more *Ordnung* being promoted by the large majority of comparatists-at-law, who would have us believe that the world today is so mobile, so interconnected and so integrated that it is, in one prominent popular assessment, 'flat' (Friedman 2005).

Those who claim to have elicited a common denominator transcending laws and the places of laws, allowing for a mathematisation of law partaking in some sort of epistemological bilingualism and ultimately permitting a rigorous Archimedean assessment (and ranking) of laws in terms of 'efficiency' only, are, in effect, positing a range of audacious postulates. They argue that they can ascertain, understand and formulate 'the law' governing, say, the sale of real estate in France, both accurately and exhaustively (without their enunciation's being coloured by any pre-understanding of French law that they might carry as a result of their own prior socialisation into 'their' law); that there exists a 'referential' language called 'economics'; that 'the law' governing the sale of real estate in France is translatable into 'economics'; that 'the law' concerning the sale of real estate in France can be translated into 'economics' by economists in a manner that involves no distortion of it; that economists can reiterate precisely the same sequence (ascertainment, understanding, formulation, translation into a 'referential' language) with respect to, say, the law of real estate in England; that economists can then engage assiduously in *wertfreie* comparison and reach *wertfreie* conclusions with respect to the relative 'efficiency' of each law; and that economists can therefore ground their identification of the 'better' law on unasailable (economic) foundations.

The general idea underwriting these various heuristic motions is an apprehension of comparatism as dialectical resolution favouring the progression, through immersion in a utility-maximising framework of calculation, towards a position of knowledge of law-as-price that would enclose local epistemologies – their anachronism, their irrationality – within a fixed system withstanding 'contamination' by culture, offering technically guaranteed meaning and resting knowledge on secure rational ground not unlike the way in which gold once validated banknotes.

While law is, indeed, thoroughly cultural, as any serious archaeological research

must reveal, economics is taken to operate on a more elevated plane, and on a higher ethical plane also, within a ‘beyond’ of culture, if you will, and specifically within a beyond of the law’s naïveté or capriciousness as it manifests itself locally. Whereas law must contend with an economy – an *oikos* – such is deemed not to be the case for economics, which wishes to be taken as a strictly descriptive endeavour, as being able to tell it *like it is*. After property, contract, torts, procedure, corporate law, bankruptcy, secured transactions and criminal law, economists have come to consider that they can scientificise comparative legal studies by purporting to move it away from the legal pluralism and attendant relativism in which it has been (oh so distressingly!) mired, the pluralistic and relativistic agendas being antagonistic to the capitalist axiomatic, which, in sum, embraces the primacy of private profit, market-pricing mechanisms and the commodity form. Indeed, ‘[h]omo *economicus* is always a rational, maximizing individual, without a history, an unconscious or a class identity, enjoying perfect information about prices and responding only to them’ (Rist 2011: 37).

But no matter how dogmatically it asserts itself in its desire to supplant *anarchia* (law’s disorder) with an *archia* (a foundation), economics cannot exempt itself from contingency. It is saturated with culture, both in terms of its specific language and as regards any particular use of that language by any economist, which suggests something like a double bind, that is, embeddedness *squared*. In effect, the enculturation of economics has always already begun – the Heideggerian temporal metaphor indicating that ultimately economics is simply unenvisageable otherwise than as culturally-informed discourse: indeed, the fact that even economic ‘truth’ varies with ideological affiliation shows how it is unsurpassably woven into the cultural fabric (ibid: 5). Structurally, so to speak, economics is therefore but a language, a theoretical matrix, an epistemological construct. Thus, a politics is always implied, and economics cannot exist as an independent test of value. In fact, each of the postulates I have outlined is inevitably predicated on hidden predispositions and predilections, including a specific conception of ‘the law’, of ‘understanding’, of ‘enunciation’, of ‘referentiality’, of ‘economics’, of ‘translation’ and of ‘comparison’.

These conceptualisations can aptly be termed ‘metaphysical’, at least in the sense that they entail surreptitious appeals to unsustained – and, in my view, unsustainable – assumptions: for instance, the possibility of the law’s being fully present at the graphical or scriptural level of the law-texts incorporating it; the possibility of the interpreter’s fully ascertaining the meaning of the law; the possibility of a referential language; the possibility of identifying a full correspondence between the languages of law and economics; the possibility of comparison between French ‘real estate’ (*bien immeuble* seems to come closest to the English designation) and English ‘real estate’, between a French ‘sale’ (or, rather, *vente*) and an English ‘sale’; and the possibility of reaching conclusions about law’s ‘efficiency’ that would be *sans* distortion.

In sum, there is no economic reading of the law that can materialise outside of the scholarly ‘discoveries’ that have punctuated technical advances in

mathematics.⁶ Nor can any economic reading of the law escape the specific institutional structures and social formations that have legitimated the articulation of an argument imbricating the rationalisation of society and the maximisation of wealth, whether in the Marquis de Condorcet's 18th century texts on social mathematics or in Baron Kelvin's later musings.⁷ As much as economics would have us forget about the conditions under which it necessarily engages in a compromising relationship with rhetoric – albeit in disguised, displaced or policed form – when it claims to be speaking authoritatively on behalf of 'what there is', it cannot occlude the *mise en scène* characteristic of every discourse, of every fiction. In economics too, '[m]odel-making is a creative activity' (Morgan 2012: 158).

To be sure, numbers assume significant performative value. Thus, '[n]umbers provide the comforting illusion that incommensurables can be weighted against each other, because arithmetic always "works". Given some numbers to start with, arithmetic yields answers. Numbers force a common denominator where there is none'. Also, 'numbers are symbols of precision, accuracy, and objectivity. They suggest mechanical selection, dictated by the nature of the objects, even though all counting involves judgment and discretion. [...] Numerals hide all the difficult choices that go into a count. And certain kinds of numbers – big ones, ones with decimal points, ones that are not multiples of ten – not only conceal the underlying choices but seemingly advertize the prowess of the measurer. To offer one of these numbers is by itself a gesture of authority' (Stone 1988: 136–37).⁸ However, epistemologically, economic thought remains caught in a network of irreducibly and structurally mediated intelligibility that is no more privileged or unconditioned (and no more stable) than any other network of mediated intelligibility (mathematical appearances notwithstanding).

Where economic thought perhaps differs from many other interpretive frames is in its active and strenuous attempt to repress the general state of mediation that necessarily underlies it in order violently to promote a certain set of capitalistic values.⁹ Indeed, the way in which economics seeks to marginalise culture is neither innocent nor accidental. It is but the symptom of a much deeper prejudice in favour of (arithmetical) essentialism. In this respect, it is not unlike legal positivism, which apprehends law-texts as (quasi-) 'natural' entities and contents itself with a focus on definition and description, demarcation and classification, conceptualisation and formalisation, clarification and exemplification, exposition and summarisation. Like positivism too, economics displays conservative affinities (Teles 2008: 90–134, 181–219). It entails a glorification of empiricism, a kind of ascetic endorsement of reification, a brand of religiosity sacralising its object of study (lawyers revere texts, economists numbers) and the assertion of a will to power. There is more. Behind a veneer of disinterest and while purporting to move the debate to an out-of-culture in the name of intellectual hygiene,¹⁰ the quest for low transaction costs does, in fact, rotate the axis of our public conversation via the exaltation of numbers that it effectively propounds. As it instrumentalises values, economic analysis speaks to our conception of ourselves as moral beings. Along the way, it significantly impoverishes us (Golumbia 2009).

None of these observations, of course, is to suggest that when it comes to law one can somehow dispense with the question of cost (nor are my remarks meant to deny that markets can be credited with promoting economic growth, which, in turn, deserves to be ascribed various ‘goods’). Rather, my point is to accept that economics is not a referent, that it has *its* referents in the name of which it imposes large-scale technical reductionism on what it has made into its object of study, a proceeding that involves a *partial* process of selection, abstraction and naming. The ‘what there is’ whereof economics alleges to speak is not in fact ‘what there is’ but, rather, its conceptualisation of ‘what there is’ such that ultimately, the delusion of total explicability notwithstanding, economics is talking about *economic constructions*.

I am certainly not suggesting that this brand of disciplinary solipsism is unique to economics. My main argument, again, is that economics enjoys no particular competence to minimise the inevitable gap between ‘what there is’ and ‘what is being said about what there is’. Indeed, why should the frames embraced by economics be entitled to any epistemic privilege by virtue of embodying a message to the effect that (boundless?) consumption is the goal of life; that markets – as they collectively allocate resources, set prices and determine distribution of incomes – make society as prosperous as possible given the resources available; that markets are therefore good for people; that imperfections in a market can be overcome by the design of a new and improved market (the idea being that if the market for electricity fails to maximise wellbeing because a local utility enjoys a monopoly over price, monopoly can be replaced with competition); that individuals are to be understood as rational calculators of their self-interest – even while recognising a role for ‘behavioural’ elements in the relevant equations so that people who act irrationally can be said to have good reasons for doing it (Rist 2011: 49); and that a politics of individual aspiration in a minimally regulated, self-equilibrating market system is worthy of support?

As it makes these contentions, economics advances not only an epistemological argument but also an ontological claim. Having initially posited capitalistic rationality, economics determines that what does not meet the standard of efficiency *it* has set – for example, the hapless French law of ‘real estate’ transactions – must be challenged in its very being. It must cease to exist as it is and be turned into, for example, the English law of real estate transactions.¹¹ Efficiency thus becomes a programme. An objective and a necessity, it is the only foundation for modern law, complete with the attendant immunity pertaining to fundamentalist, dogmatic discourse: ‘Just as doctors are taught to value human life above other goals, economists are trained to value efficiency above other goods’ (Woods 2006: 54). Human life aside, what is, indeed, more worthy than to reach and maintain efficiency? What is worse than to be inefficient? So why blame economists for constructing a theory purporting to optimise efficiency? Is one not bound to prefer the efficient to the inefficient? Even the ‘ordinariness’ of the term, the way in which it is seen so readily to pertain to ‘common sense’, helps to make it acceptable. There is a process of ‘naturalization’ removing the concept from critical scrutiny: what

is stated is propounded as being eminently normative, and everyone behaves as if what is stated is, in effect, the case: *one must always be efficient*.

The incompatibility of 'better-law' economics with comparative legal studies can be further shown through the matter of references to foreign law in the context of adjudication – an illustration that I deploy here in an exemplary capacity. In brief, comparatists cannot refrain from wanting foreign decisions in a judicial opinion. However, the cycle of self-reinforcing activity characteristic of path-dependent processes – such as adjudication – suggests that, in line with the idea of increasing returns (or decreasing cost conditions), incremental change is heavily weighted in favour of decisions that are consistent with the existing institutional framework. In as much as it constitutes a derogation from settled judicial practice, '[i]ncluding extraneous statements in an opinion invites later reliance on those statements and thus multiplies the costs of a nonergodic common law system'. Path-dependence therefore 'counsels judges to include in an opinion no more than what is necessary to decide the case at hand thoroughly and completely' – a claim that clearly militates against reference to foreign materials as being inefficient.

Indeed, the bounded rationality within which any institution operates becomes particularly problematic in the context of reference to foreign law, for in this instance the imperfect or incomplete character of the information available to legal actors (say, judges) proves even more debilitating than usual (Hathaway 2001: 663).¹² Yet, in the name of the recognition and respect owed to other laws (let us say, on account of a politics *for alterity*), references to foreign law need to be included not only as being 'crucial to the formation of a critical consciousness and the improvement of knowledge production by giving an area of knowledge greater range and depth' (Cheah 2009: 523), but also because they hold normative value as persuasive authority. I claim that the dilemma between economics and comparative legal studies must likewise resolve itself in favour of comparison. *Homo oeconomicus*'s response would no doubt be at variance with mine.

* * *

I mentioned incommensurability. Note that incommensurability is not unintelligibility. The other law can be intelligible to me; but it can only ever be intelligible *to me* – that is, it can only ever be intelligible to me *on my terms* – no matter how mathematically that law is framed. In the end, all I have when it comes to an understanding of the other law is *my* reading, which can only be happening where *I* am and on the basis of who *I* am.¹³ The fact is that I am always already 'there' – so much so that I cannot imagine myself bereft of 'thereness'. I am situated-in-the-world, I am 'in place'. And the further fact is that the other law, which as a comparatist I make into the object of my study, is also located somewhere in the world, although, by definition (so to speak), elsewhere than where I am (comparatism operates across places). Because all I have is 'emplaced' reading,

that is, reading that is distant from the other law's 'emplacement', the only understanding I can ever have of the other law is but conjecture and hypothesis.¹⁴ No attempt at commensuration, no matter how sophisticated, can overcome the estrangement of spatial dislocation – whether one has in mind so-called 'legal transplants', international conventions, international law or economics. Any argument that one law is 'better' than another because it entails lower transaction costs (or for any other reason) is but a claim for someone's understanding of what makes law 'better', based on that person's understanding of the meaning and relevance of transaction costs (or whatever).

In sum, I defend the hospitable harkening to otherness-in-the-law that fosters recognition and respect for different perspectives and that ultimately allows one to test one's assumptions, one's angle on the law-world. Whatever disruption or anxiety otherness generates along the way thus fulfils edifying ends. And I claim that such charitable comparison ought not to be translated into a divisive configuration having so little to do with the ethical negotiations between self and other and so very much to do with the generalisation of conflict into a hierarchical economy of domination where difference is subjected to a calculative technology purporting to achieve an increase of resources, including enhancement of capital, through various indicators reducing human beings to the same lowest common denominator of (allegedly) computable basic needs and interests. To those who like economics with their dinner, then, I respond that economics can contribute little to our quest for a deep or thick understanding of law as long as it continues to suck life out of the law and persists in approaching the law at a level of abstraction detached from its life-world (Woods 2006: 54), as long as it lacks 'sufficient granularity' (Morgan 2012: 392).

* * *

At this stage, I am aware that some readers, perhaps not so attuned to economic analysis of law, might find my critique of the economic mindset and its utilitarian concoctions unduly harsh. Thus, I want not-to-close with a good example of how implausible the matter can rapidly become when it is assumed that law and economics can be tallied on a single scale and when a quantitative assessment, a matter of more or less, is substituted for an examination of the qualitative differences between self and other.

The relevant case is *Lindh v Surman*,¹⁵ in which the Supreme Court of Pennsylvania held that where an engagement ring has been offered by a man who subsequently breaks the engagement, the ring must be returned. As far as the Court was concerned, the particular circumstances surrounding the termination of the engagement ought not to matter as such. Reversing its earlier practice, the Court thus adopted a 'no-fault' approach. Consider the following case note subsequently published in the *Harvard Law Review*, which features a line of reasoning that, far from being unusual, typifies economic analyses of law:

Donors of engagement rings in no-fault states now have no financial disincentive to propose marriage casually. Moreover, the desire to enjoy the relational privileges of engagement may drive donors to devise schemes to reap those benefits – at no cost to themselves. Because it gives donors less incentive to take care, the [*Lindh*] rule will likely lead to an increase in broken engagements, with all their attendant emotional and economic harms. Such a result would counteract whatever policy goals a strict application of the no-fault rule advances’.

(Note 2000: 1880–81)

Indeed!

Notes

- 1 For an extensive discussion of ‘striated space’ see Gilles Deleuze and Félix Guattari (1980: 592–625).
- 2 The suggestion that I would discard any economic analysis of law whatsoever – as in Ralf Michaels (2009: 783 n 87) – does not capture my stance.
- 3 The original text reads as follows: ‘*Tout ce qui m’est donné dans la lumière paraît m’être donné à moi-même par moi-même*’.
- 4 I have addressed such issues in Pierre Legrand (1997).
- 5 The original text reads as follows: ‘*Die Reduktion aller Qualitäten auf Quantitäten ist Unsinn*’.
- 6 Cf: ‘Economists’ models offer mathematical accounts of the world, but there is nothing even that guarantees that mathematics in its various forms offers accurate ways to describe the economic world’ (Morgan 2012: 408).
- 7 For a compilation of Condorcet’s writings on point, see Condorcet (1765–93). See generally Jacqueline Feldman (2005). The reference to Baron Kelvin is to William Thomson (1883: 73): ‘When you can measure what you are speaking about, and express it in numbers, you know something about it; but when you cannot measure it, when you cannot express it in numbers, your knowledge is of a meagre and unsatisfactory kind’.
- 8 For comprehensive arguments along these lines, see Janice Stein (2001); Stephen Marglin (2008).
- 9 For a compelling demonstration of economics’s resilience, see Gilbert Rist (2011).
- 10 For an attempt at an economic ‘displacement’ of the idea of ‘legal culture’ see Anthony Ogus (2002). While this article relieves us from the tedious banality of so-called ‘comparative-law-and-economics’, its contentions remain obscure, although they make evident the economist’s habitual obsession with rationalisation in general and with cost considerations in particular. But the fact remains, as has been helpfully underscored in an analysis of economic integration in North America in the wake of the 1993 North American Free Trade Agreement (NAFTA), that ‘[c]ultural practices do not always follow the structure of markets and incentives, which, however powerful, often fail to overcome countervailing pressures’: Dan Schiller and Vincent Mosco (2001: 29).
- 11 Observe that the identification of the common law tradition as the teleological framework by which to assess all other laws (and to find them all to be wanting) and the correlative elevation of the United States into the developmental

- benchmark towards which all other countries ought to aspire is spectacularly undermined in Dan Puchniak, Harald Baum and Michael Ewing-Chow (2012) – to refer to one illustration only. Aptly, some commentators thus hold that ‘legal origins turn out to have little power to explain the effectiveness of legal institutions’ (Milhaupt and Pistor 2008: 21). For another critique, see Daniel Klerman and others (2011).
- 12 This text offers persuasive remarks regarding the intricate relationship between path-dependence theory and common law adjudication.
- 13 For the purposes of this argument, I leave to one side any sustained investigation of the meaning of ‘I’. But I want to observe that I am in significant ways the recipient of an ascribed identity, not least as the result of the structuring process of incorporation of professional attitudes that I was made to undergo in law school while being taught to think ‘like a lawyer’ (that is, while being encouraged to obliterate ‘my’ moral or social frames of apprehension). In fulfilling a regulatory function by setting the limits of what was and was not acceptable, the power of discursive authority acted on me and subordinated me to it and to its domination. This authoritative discourse thus constituted me – and continues to constitute me – into the individual, the lawyer and the comparatist-at-law that I am, which means that, through it, I am actively (and incessantly) engaged in the fashioning of my ‘own’ identity. The history ‘I’ call ‘mine’ thus very much stands as the unfolding of circumstances that were given to me.
- 14 I explore this issue at greater length in Pierre Legrand (2012).
- 15 742 A.2d 643 (Pa. 1999).

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