

Comparative Legal Studies and the Matter of Authenticity

or that it is not. In other words, it is not that there is an 'unenculturated' law that can finally become 'enculturated' if only comparatists will allow it to realise its potential and purpose. It is rather that law has always been 'enculturated', but that comparatists have been unwilling to raise the cultural dimension to expression. It is in that sense that 'culture' can be envisaged as the 'dangerous supplement' that comparatists-at-law have not wanted to see.³²)

II CULTURE, THEN

The informing context of any single sentence in, say, Flaubert's *Madame Bovary*, is that of the immediate paragraph, of the surrounding chapter, of the entire novel. It is also that of the state of the French language at Flaubert's time and place, of the history of French society, and of the ideologies, politics, colloquial associations and terrain of implicit and explicit reference, which press on, which perhaps subvert or ironise, the words, the turns of phrase in that particular sentence. The stone strikes the water and concentric circles ripple outward to open-ended horizons.

George Steiner³³

The world is absolutely, completely legal[.]

Thomas Bernhard³⁴

*There is 'culture', of which one could say what has been said of philosophy: that it allows us 'to understand how things in the broadest possible sense of the term hang together in the broadest possible sense of the term'.³⁵ More specifically, I apprehend 'culture' as referring to frameworks of intangibles within which ascertainable interpretive communities operate and which have normative force for these communities, even though not coherently and completely instantiated. And there is 'law-as-culture', which I take to mean the framework of intangibles within which an ascertainable 'legal' community (understood here in the more specialised or technical sense) operates and which organises (not always seamlessly) the identity of such legal community as *legal community*. Bearing in mind that definitions are inevitably unsatisfactory (and that cavils about definitions are inherently endless and fruitless),³⁶ what is 'culture' and why must it matter to lawyers? *How does culture work?*³⁷*

³² Derrida, J (1967) *De la grammatologie* Editions de Minuit at 203 ['*dangereux supplément*'].

³³ Steiner, G (1997) *Errata* Weidenfeld and Nicolson at 19.

³⁴ Bernhard, T (2001) [1967] 'Ist es eine Komödie? Ist es eine Tragödie?' in *Erzählungen* Suhrkamp at 74 ['*Die Welt ist eine ganz und gar, durch und durch juristische*'].

³⁵ Sellars, W (1963) *Science, Perception and Reality* Routledge and Kegan Paul at 1.

³⁶ Definitions, in fact, abound, one of the ur-texts of contemporary anthropology thus referring to the 'webs of significance [in which man is suspended and which he himself has spun]': Geertz, C (1993) [1973] *The Interpretation of Cultures* Fontana at 5.

³⁷ Useful surveys of theoretical work on 'culture' include Smith, P (2001) *Cultural Theory* Blackwell; Harris, M (1999) *Theories of Culture in Postmodern Times* Sage; Münch, R and Smelser, NJ (eds) (1992) *Theory of Culture* University of California Press. For helpful introductions to the idea of 'culture', see Wagner, R (1981) *The Invention of Culture* University of Chicago Press; Bauman, Z (1999) *Culture as Praxis* (2nd ed) Sage; Mulhern, F (2000) *Culture/Metaculture* Routledge; Jenks, C (1993) *Culture* Routledge; Inglis, F (2004) *Culture* Polity; Schneider, MA (1993) *Culture and Enchantment* University of Chicago Press.

One of the most pervasive beliefs encountered in the humanities is the conviction that, in some meaningful way, the individual owes his existence to society, in other words, that personalities, needs, and wants are nurtured and sustained by the community in which human beings dwell. But the idea of the social nature of the individual is as elusive as it is ubiquitous, because it seems at once to be saying something so incontrovertible as to be devoid of methodological significance *and* to be advancing a thesis so radical as to be threatening the very possibility of human individuality and self-determination.

As he engages in social forms of activity, the individual ascribes significance and value to his environment. Objects, for instance, are endowed with social meaning beyond their materiality or strictly physical nature. This ascription of significance is a function of the purposes for which the object was created and of the uses to which it is put. When 'that thing' is called a 'pen', it acquires an additional form of existence at the level of meaning which was never part of its physical nature as such. It is through this ascriptive process that the world becomes an object of significance beyond its raw materiality and that it can therefore become an object of thought. This is to say that thought can only emerge in an environment of socially-constituted meanings, or that thought is only possible for an individual once he has been socialised into the practices of a community (for example, within the family or at school). It is the appropriation or internalisation of these practices which, literally, 'creates' the individual mind. Since the practices themselves inscribe various collective allegiances such as national, geographical, ethnic, religious, and linguistic affiliation, the individual mind can reasonably be said to be formed as it is inaugurated into the thought processes or beliefs of collectivities.³⁸ Rather than stand in opposition to society, the individual is thus 'one of its forms of existence'.³⁹ It is in this way that Karl Mannheim observes how the thinking that arises within a community is not the product of individuals, but rather that of a group having developed a particular 'style of thought' on account of continual responses to a range of situations which members of the group confront given the specific position in which the group finds itself.⁴⁰ Thought is, therefore, culturally constituted in a very significant way (which, it must be said at the outset, is emphatically not to suggest that the individual mind is somehow the 'mirror' of society). Otherwise, responses to events would be *ad hoc* springing not from a sense of meaning, but only from ideas called into being by the immediate circumstances or the current mental state of the individual.

Culture, of course, goes beyond the formalised practices operating in a group. Although it embraces conscious and formal beliefs, the constitution of identity is also accomplished through 'less conscious, less formulated attitudes, habits and feelings, or even unconscious assumptions, bearings and commitments'.⁴¹ Protean perceptions, inchoate awareness, or unconscious assumptions are, in fact, particularly significant elements of the relevant cultural 'data' (but what is ever *given?*), as has been underlined by anthropologists who

³⁸ I follow Bakhurst, D (1997) 'Activity, Consciousness, and Communication' in Cole, M, Engeström, Y and Vasquez, O (eds) *Mind, Culture, and Activity* Cambridge University Press at 147-63. See also Shweder, RA (2003) *Why Do Men Barbecue?* Harvard University Press at 136: 'culture thus consists of meanings, conceptions, and interpretive schemes that are activated, constructed, or brought alive through *participation* in normative social institutions and routine practices (including linguistic practices)' [my emphasis]. *Adde*: Strauss, C and Quinn, N (1997) *A Cognitive Theory of Cultural Meaning* Cambridge University Press.

³⁹ Bourdieu, P (1984) *Questions de sociologie* Editions de Minuit at 29 ['une de ses formes d'existence'].

⁴⁰ Mannheim, K (1936) [1929] *Ideology and Utopia* Wirth, I. and Shils, E (trans) Harcourt Brace Jovanovich at 3.

⁴¹ Williams, R (1981) *Culture* Fontana at 26.

note that 'what informants find difficult to verbalize is more important, more fundamental, in the cultural organization of ideas than what they can verbalize'.⁴² In sum, allowing for the complexity and ambiguity of individual perceptions of external realities, a *mentalité* – which suggests an array of predispositions, predilections, propensities, or inclinations – is the outcome of a process of transformation of often unconscious aspirations or expectations according to the concrete indices of what is probable, possible, or impossible for an identifiable community into relatively durable tendencies that are internalised intergenerationally through socialisation and that crystallise into patterns of action.

For comparative legal studies to apprehend law as culture thus attests to a commitment to a unit of analysis which includes individuals and their social milieu and which no longer regards the technical dimension of the posited law as a controlling centre of the action.⁴³ Culture is made to function as an omnibus category which allows the comparatist to point to the posited law not only in terms of its materiality (the rules, the precepts, and so forth), but, more importantly, at the level of its meaning which alone can reveal why the posited law was created in the way it was (and not otherwise) and which alone can disclose the goals sought by a community as it invests itself into its posited law. No formulation of the posited law can safely escape a cultural interpretation and all formulations of the posited law can therefore be helpfully envisaged as cultural expressions.

In significant ways, the posited law can also be apprehended as a manifestation of 'legal tradition', understood here to mean something like *culture-in-time*, that is, to refer to epistemological clusters that have fashioned themselves over the long term, or very long term, and that have shaped cognitive, intuitive, and emotional approaches to law at the level of local legal cultures, for example, 'a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about

⁴² LeVine, RA (1984) 'Properties of Culture: An Ethnographic View' in Shweder, RA and LeVine, RA (eds) *Culture Theory* Cambridge University Press at 76. Cf Spiro, ME (1987) [1982] 'Collective Representations and Mental Representations in Religious Symbol Systems' in Kilborne, B and Langness, J.J. (eds) *Culture and Human Nature: Theoretical Papers of Meljord E. Spiro* University of Chicago Press at 161-62: 'to attempt to understand culture by ignoring the human mind is like attempting to understand *Hamlet* by ignoring the Prince of Denmark'.

⁴³ The contours of the 'unit' will vary according to the nature of the comparative intervention. In other words, what constitutes a culture depends on the specific matter that the comparatist at-law is addressing. For example, the legal culture at issue might be that of the commercial courts in France, of labour lawyers in Poitiers, or of Corsica. It could also be – and, indeed, will often be – coterminous with the French legal community as a whole, that is, with the group of legal agents who have French citizenship in common (ie, who are 'French') – although even a notion like 'citizenship' can hardly claim impermeable intellectual borders. There is more. Any individual partakes in a seemingly infinite array of ascertainable cultural formations. One can be a labour lawyer in Poitiers while being a woman, a Belgian expatriate, a European, a militant of Amnesty International, a breeder of siamese cats regularly entering international competitions, and a long-standing member of the *Parti socialiste*. The decision by the comparatist to address one specific manifestation of culture cannot be taken to deny the legitimacy of cultural analysis. Any research endeavour must contend with the matter of boundedness. Nor can the decision to map one particular feature of the discursive sprawl that is culture be taken to suggest a lack of awareness of the composite character of cultural identity. If authority be needed to lend credence to my argument, I can offer a powerful statement by someone who can hardly stand accused of not having thought about thought: 'All knowledge originates from separation, delimitation, and restriction; there is no absolute knowledge of a whole'. The quotation is from Friedrich Nietzsche (1979) [1872] 'The Philosopher: Reflections on the Struggle Between Art and Knowledge' in Breazeale, D (ed and trans) *Philosophy and Truth* Humanities Press International at 39. For the original text, see id (1922) 'Der letzte Philosoph. Der Philosoph. Betrachtungen über den Kampf von Kunst und Erkenntnis' in *Friedrich Nietzsche Gesammelte Werke [Musanionausgabe]* vol VI Musarion at 43 ['Alles Wissen entsteht durch Separation, Abgrenzung, Beschränkung: kein absolutes Wissen eines Ganzen!'].

the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught'.⁴⁴ I do not intend tradition in the static, linear, totalising, permanent, and idealised sense, which detraditionalists justifiably condemn.⁴⁵ Nor am I subscribing to the doctrine of infant determinism that would have tradition reduced to a dogmatic force which eliminates the power of agency (let me emphasise that I take the view that individual reflection is not confined to the facticity of tradition and that prejudices, for instance, can be thematised through thought and their strength attenuated). Nor am I suggesting 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 (or structuring) force for legal communities (even though often 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 — a phenomenon which could be referred to as 'structure-in-agency'.⁴⁶ While not denying that culture is also the product of the activities of subjects who constantly reformulate experience within a symbolic order, the comparatist-at-law's assumption must be that 'there are historical structures operating over the long term [or very long term] which are the foundation of the collective identity of men and women who have lived together for a long time across generations'.⁴⁷ Fernand Braudel thus observes that a *mentalité*, 'which dictates attitudes, orients choices, roots prejudices', is 'the fruit of distant legacies, of beliefs, of fears, of ancient anxieties'.⁴⁸ In brief, the notion of 'legal tradition' is meant to embrace the idea of 'tacit knowledge' as it circumscribes *over time* 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 cosmology of patterns, 'always-already-in-being', within which one finds oneself 'always-already' ensconced (think of the way one is projected into language). 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 place

⁴⁴ Merryman, JH (1985) *The Civil Law Tradition* (2nd ed) Stanford University Press at 2. Two qualifications are in order. First, traditions can be of recent coinage. See, eg, Hobsbawm, E and Ranger, T (ed) (1983) *The Invention of Tradition* Cambridge University Press. Secondly, traditions feature anomalous or transitory phenomena, let us say, *incongruities*.

⁴⁵ See, eg, Heelas, P, Lash, S and Morris, P (eds) (1996) *Detraditionalization* Blackwell.

⁴⁶ The notion of 'tradition', to be captured in terms of 'antecedents' rather than 'causes', is most famously developed in Gadamer, H-G (1989) [1960] *Truth and Method* (2nd rev ed) Weinsheimer, J and Marshall, DG (trans) Sheed and Ward passim; and, through the idea of 'tradition of inquiry', in MacIntyre, A (1984) *After Virtue* (2nd ed) University of Notre Dame Press at 126-27, 130, and 204-25; id *Whose Justice? Which Rationality?* supra note 31, esp at 349-403; id (1990) *Three Rival Versions of Moral Enquiry* University of Notre Dame Press esp at 105-26 and 196-215. At this stage, my basic point is that 'one cannot be a self on one's own': Taylor, C (1989) *Sources of the Self* Harvard University Press at 36 — although I agree that '[t]he relational dimension of selfhood cannot be the sole source of the reflective one': Siegel, J (2005) *The Idea of the Self* Cambridge University Press at 25. The notion of 'structures of attitude and reference' to which I refer is a central motif in Said, EW (1993) *Culture and Imperialism* Knopf.

⁴⁷ Le Goff, J (1994) *La vieille Europe et la nôtre* Le Seuil at 67 ['il y a dans l'histoire des structures de longue durée qui sont le fondement de l'identité collective des hommes et des femmes qui ont vécu longtemps ensemble à travers les générations']. I have added the bracketed words in my English version of the quotation.

⁴⁸ Braudel, F (1993) [1963] *Grammaire des civilisations* Flammarion at 53 ['dècè les attitudes, oriente les choix, encadre les préjugés'] / 'le fruit d'héritages lointains, de croyances, de peurs, d'inquiétudes anciennes'.

assumed by legislation in society, the function of the judge, and so forth.⁴⁹ Put differently, my claim is that all law may be seen 'not as a response to the immediate circumstances or current mental state of an interlocutor or of oneself, but as part of an unfolding story'.⁵⁰ The comparatist-at-law's task thus becomes 'a venture into cultural hermeneutics'.⁵¹

⁴⁹ The idea of 'tradition', which takes us beyond national boundaries and the problematic language of 'legal system' and, even more importantly, shows at a meta-stable level how the connection of my present perception with past experience is part of a continuing life-history *along* with it (rather than being causally affected by it and therefore separated from it) and *against* the present, enclosed as it is in its own self-certainty. Tradition, then, is also emancipation from the present. In other words, what comes to one from the past can be a means of drawing one out of oneself, of constituting oneself as historical being – which, as far as law's subjects are concerned, entails the opportunity of escaping from a positivistic strategy of world-making predicated on the exclusion of the uncontainable. To reduce 'tradition' to a massive typological narrative or a vast programme of structural integration, to stress perpetuation over dissemination, as is commonly done, is, therefore, to miss the hermeneutical point. In an important essay offering a sensitive treatment of the idea of 'tradition' allowing for agency and reflexivity, of 'tradition' as a source of *enabling* knowledge, Gerald Bruns observes how 'tradition is not the persistence of the same'. Rather, 'it is the disruption of the same by that which cannot be repressed or subsumed into a familiar category'. He adds: 'The encounter with tradition [...] is always subversive of totalization or containment': Bruns, GL (1992) *Hermeneutics Ancient and Modern* Yale University Press at 201-02. For compelling treatments of law as tradition, see Krygier, M (1986) 'Law as Tradition' (5) *Law and Philosophy* 237; id (1988) 'The Traditionality of Statutes' (1) *Ratio Juris* 20.

⁵⁰ Carrithers, M (1992) *Why Humans Have Cultures* Oxford University Press at 82.

⁵¹ Glendon, MA (1987) *Abortion and Divorce in Western Law* Harvard University Press at 8. Observe that the presence of legal phenomena operating on the global level in relative insulation from the state does not mean a fundamental detraditionalisation of law. Although global legal processes may indicate a weakening of the state as a source of identity, that is, a measure of deterritorialisation, it is hard to see how a transnational corporation or the IMF, for instance, can offer a competing source of 'cultural resonance' to the national bond and its history and mythology. And even as the specialised and technical corporate legal discourse appears as the expression of an idiosyncratic, transnational culture (see, on point, Westbrook, D (2004) *City of Gold* Routledge), it remains the case that the global can be traced to local ties (I suggest that this is so even as regards McDonald's or Coca-Cola, no matter how standardised such transcultural icons may at first blush appear!). Culture and uniformity are words that simply do not belong together. If one wants to talk about, say, a globalised corporate culture, one must exclude the notion of 'uniformity'. Thus, the idea of a law that has allegedly escaped from all cultural grammar, an *acultural* law, whether global or regional, cannot be envisaged. Even transcultural legal phenomena are not above culture, if only because they arise from a cultural diversity that is already there; they are the outcome of cultural flow. Think of transnational corporations, which are invariably rooted in local (often US) culture. My point is that a legal meta-culture must not be taken to suggest a *tabula rasa*. Any purported *consensus gentium* – say, the distinctive cluster of meanings, symbols, and practices associated with transnational finance or international arbitration – finds its anchorage in the variations in meaning systems that individuals from different legal communities gather to assemble such that the finished product continues to reveal a dependence upon a certain kind of learning which sets limits to cultural variability. In other words, I argue that even the legal globalisers are, to an extent at least, constructed out of their own legal culture's materials of meaning and expression and, to that extent at least, remain possessed by their legal culture. Also, there is an irreducible element of autochthony constraining the epistemological receptivity to globalisation and fostering instead various forms of 'glocalization'. The word is in Robertson, R (1995) 'Glocalization. Time-Space and Homogeneity-Heterogeneity' in Featherstone, M Lash, S and Robertson, R (eds) *Global Modernities* Sage at 25-44. In the face of transnational administration and investment, local difference persists. (Indeed, at times, one has the distinct feeling that local difference finds itself exacerbated on account of globalisation as when culture is apprehended as a valuable resource to be used for various contestatory socioeconomic and political ends.) 'The point is that people in each place make their own uses even of the most global commodities', such that 'homogeneity [...] is still the local kind': Appiah, KA (2006) *Cosmopolitanism* Norton at 113 and 102, respectively. Alternatively, one can claim that '[t]here exists no place that can be said to be "non-local"': Latour, B (2005) *Reassembling the Social* Oxford University Press at 179. Unsurprisingly, therefore, it is shown that even as the legal notion of 'good faith' is being 'globalised', cultural embeddedness continues to be strong such that the German model cannot be transferred to the United Kingdom because it is linked to a specific production regime. See Teubner, G (1998) 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (61) *Modern Law Review* 11. In other words, 'culture [...] dissolve[s] globalization [...] into a wide variety of different mutations, as each manifestation of multinational economics reaches into and is absorbed by the customs, cognitions, committees, and significances which together make up the locations of culture': Inglis,

(Tradition and culture do not contradict one another. The question whether tradition is to be envisaged as a sub-set of culture or as comprehending culture seems in the final analysis to depend on the extent to which one wishes to stress the sovereignty of history over present experience – a decision turning on any comparatist-at-law's desire to insist or not on the burden of inherited institutional significance [consider how enormously powerful traditional claims made by or on behalf of Native Americans can prove to be]. Perhaps the most helpful way to approach the dialectic between the cultural and the traditional is to think of culture as being the contemporary instantiation of tradition and of tradition as being the historical valency of culture. There remains the matter of the choice between the two predilections. My preference appears from the text.)

Building on this reflection, I want to suggest some further thoughts pertaining to the study of law as a culturally-embedded discourse. 'Culture' is said to be 'one of the two or three most complicated words in the English language'.³² A key feature accounting for culture's elusive contours – its implicit or tacit character – can, it seems to me, usefully be seized by way of a metaphor and an anecdote. The figure of speech is Edward Hall's who, acknowledging the difficulty of offering a rigorous definition and insisting upon the fact that 'no constant elemental units of culture have as yet been satisfactorily established', refers to culture as 'the silent language'.³³ The following narrative captures the point. It is taken from an essay published in Russian in 1926, the title of which was translated into English as 'Discourse in Life and Discourse in Poetry':

Two people are sitting in a room. They are both silent. Then one of them says, 'Well!'. The other does not respond.

For us, as outsiders, this entire 'conversation' is utterly incomprehensible. Taken in isolation, the utterance 'Well!' is empty and unintelligible. Nevertheless, this

³² *F Culture* supra note 37 at 144. For studies insisting on the centrality of culture to globalisation and showing how cultural agency is negotiated within globalised contexts, see, eg, Tomlinson, J (1999) *Globalization and Culture* Polity; Pieterse, JN (2004) *Globalization and Culture* Rowman and Littlefield; Berger, PI. and Huntington, SP (eds) *Many Globalizations* Oxford University Press; Jameson, F and Miyoshi, M (eds) (1998) *The Cultures of Globalization* Duke University Press; Lowe, L and Lloyd, D (eds) (1997) *The Politics of Culture in the Shadow of Capital* Duke University Press; Ong, A and Collier, SJ (eds) (2005) *Global Assemblages* Blackwell; King, AD (ed) (1991) *Culture, Globalization and the World-System* Macmillan; Appadurai, A (1996) *Modernity at Large* University of Minnesota Press; Friedman, J (1994) *Cultural Identity and Global Process* Sage; Hannerz, U (1996) *Transnational Connections* Routledge; Yúdice, G (2003) *The Expediency of Culture* Duke University Press; D'Iribarne, P et al (1998) *Cultures et mondialisation* Le Seuil; Kraidy, M (2005) *Hybridity, or the Cultural Logic of Globalization* Temple University Press; Appiah, KA *Cosmopolitanism* supra; Niezen, R (2004) *A World Beyond Difference* Blackwell. Cf Dezalay, Y and Garth, BC (1996) *Dealing in Virtue* University of Chicago Press at 317, who, writing with specific reference to the field of transnational commercial dispute resolution and addressing the matter of its influence on national laws, observe that 'the impact of internationalization is not automatic or determined in advance'. Indeed, even an unabashed partisan of economic globalisation feels the need to address the matter of 'culture' and, specifically, the question of cultural homogenisation, by stressing adaptations to local cultures. See Bhagwati, J (2004) *In Defense of Globalization* Oxford University Press at 106-21. In sum, '[w]hatever globalization may turn out to be [...], it is refracted, rebutted, repelled and reconstituted by cultures': Inglis, F *Culture* supra note 37 at 74.

³³ Williams, R (1983) *Keywords* (2nd ed) Fontana at 87. Cf Herder, JG (1985) *Ideen zur Philosophie der Geschichte der Menschheit* Fourier at 39: 'Nothing is more indefinite than this word' [*Nichts ist unbestimmter als dieses Wort (Kultur)*] (1784). For a critical exploration of the meaning of 'culture' (including a useful array of references), see Hartman, GH (1997) *The Fateful Question of Culture* Columbia University Press at 21-59 and 205-24. According to Hartman, Herder is the first to use the word 'culture' to mean 'identity culture', that is, to employ it 'in the modern sense': id at 211 [emphasis original].

³⁴ Hall, ET (1959) *The Silent Language* Doubleday at 20 and 25, respectively.

peculiar colloquy of two persons, consisting of only one — although, to be sure, one expressively intoned — word [the word in Russian is *tak*], does make perfect sense, is fully meaningful and complete.

In order to disclose the sense and meaning of this colloquy, we must analyze it. But what is it exactly that we can subject to analysis? Whatever pains we take with the purely verbal part of the utterance, however subtly we define the phonetic, morphological, and semantic factors of the word *well*, we shall still not come a single step closer to an understanding of the whole sense of the colloquy.

Let us suppose that the intonation with which this word was pronounced is known to us: indignation and reproach moderated by a certain amount of humor. This intonation somewhat fills in the semantic void of the adverb *well*, but still does not reveal the meaning of the whole.

What is it we lack, then? We lack the 'extraverbal context' that made the word *well* a meaningful locution for the listener. This *extraverbal context* of the utterance is comprised of three factors: (1) the *common spatial purview* of the interlocutors (the unity of the visible — in this case, the room, a window, and so on), (2) the *interlocutors' common knowledge and understanding of the situation*, and (3) their *common evaluation* of that situation.

At the time the colloquy took place, both interlocutors *looked up* at the window and *saw* that it had begun to snow; *both knew* that it was already May and that it was high time for spring to come; finally, *both* were *sick and tired* of the protracted winter — *they were both looking forward* to spring and *both were bitterly disappointed* by the late snowfall. On this 'jointly seen' (snowflakes outside the window), 'jointly known' (the time of the year — May), and 'unanimously evaluated' (winter wearied of, spring looked forward to) — on all this the utterance *directly depends*, all this is seized in its actual, living import — is its very sustenance. And yet all this remains without verbal specification or articulation. The snowflakes remain outside the window; the date, on the page of a calendar; the evaluation, in the psyche of the speaker; and nevertheless, all this is assumed in the word *well*.⁵⁴

The elaborate reference to spatio-temporal embeddedness ascribing meaning to one word contributes to the intelligibilisation of culture as occupying a middle-ground between what is shared by all or most human beings — such commonalities might include an appreciation of the difference between 'to hit' and 'to be hit'⁵⁵ — and what is unique to each individual. As a term attempting to delineate identity, culture refers to features that are not universal, but that transcend the individual; it marks what Marc Augé calls a 'collective singularity'.⁵⁶ Culture helps us to realise that the individuals we encounter are (at some level, at least) part of a community. It thus forces us to escape the dichotomy whereby we see ways either as universal — especially when we focus on our own — or as idiosyncratic — when we meet someone with a different world-view from our own.

⁵⁴ Holquist, M (1990) *Dialogism* Routledge at 62-63 [emphasis original]. Although the paper is signed by Valentin Voloshinov, its authorship became contentious once Mikhail Bakhtin claimed that he had published some of his work under the names of friends, including Voloshinov; see id at 8 and 193-94.

⁵⁵ Bruner, J *The Culture of Education* supra note 25 at 36.

⁵⁶ Augé, M (1994) *Le sens des autres* Fayard at 90 ['singularité collective'].

The notion of 'culture', indeed, captures the idea of shared mental programmes that have formed, not on account of the fact that we live on this planet, nor because of our uniqueness, but as a function of the community to which we belong. Thus, '[w]hat one means by legal culture [...] is best illustrated by reference to [such commonalities as] legal language, legal reasoning, legal argument and legal justification' — all aspects of a culture's 'ostensivity', that is, of the signs of human action through which culture manifests itself.⁵⁷ Culture takes us beyond mere words and leads us into an unstated and assumed realm which itself operates in juxtaposition to words, qualifies them, and makes them meaningful.⁵⁸ Often, that entire realm finds itself located not only beyond words, but beyond awareness, that is, beyond the awareness of the observed and possibly beyond that of the observer (who still tends to act as if the word or, in law, the rule or precept was the whole).

Culture is, therefore, a different type of eloquence; it consists of an alternative, wider-ranging message system. It is concerned with 'collective consciousness', or what is imprecisely termed the 'history of collective ideas'. It purports to ascertain, for instance, the factors underlying the constitution of specific legal climates and the shaping of collective re-presentations within a given community. To argue that discrete patterns of reasoning or of discourse or of implicit beliefs can be inferred from the respective modes of behaviour followed by various legal communities is to accept that these characteristics, in order to qualify, need not only be distinctive but also recurrent and pervasive; they must, in other words, inform a substantial part of the ideas, beliefs, and assumptions of the legal group concerned. These remarks raise the difficult questions of uniformity and constraint.⁵⁹

First, culture is not uniform. Obviously, collectivities do not think, and the anthropomorphisation of a legal culture runs the risk of having individuals pictured as being somehow disembodied and entirely dependent upon a community. It also raises the equally serious trap of minimising intra-cultural dissonances, inconsistencies, and contradictions.⁶⁰ The point is not to claim that a *mentalité* is monolithic so that every individual within a community would act within precisely the same cognitive framework in response to typical objects and events (nor is it, incidentally, to propound that individual world-views are internally consistent). There is no question of 'disciplining' adherents to a legal culture, say, into a single and authentic identity. Such stereotypical inflexion suggesting the dominion of some principle of non-contradiction should be avoided for the shared meanings, attitudes, and values that form a *mentalité* are simply not experienced

⁵⁷ Wilson, G (1987) 'English Legal Scholarship' (50) *Modern Law Review* 818 at 845. The notion of 'ostensivity' is in Inglis, F *Culture* supra note 37 at 29. Cf Barkov, J (1989) *Dartoin, Sex, and Status: Biological Approaches to Mind and Culture* University of Toronto Press at 142: "To describe behaviour as "cultural" tells us only that the action and its meaning are shared and not a matter of individual idiosyncrasy".

⁵⁸ Hall, ET *The Silent Language* supra note 53 at xi.

⁵⁹ I have raised the matter of uniformity above, at note 51. As I elaborate upon these questions, I am mindful of the reactions to my work, eg in Joerges, C (1997) 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' (3) *European Law Journal* 378; Schäfer, B and Bankowski, Z (2000) 'Mistaken Identities: The Integrative Force of Private Law' in Van Hoeeke, M and Ost, F (eds) *The Harmonisation of European Private Law* Hart 21; Nelken, D (2003) 'Comparatists and Transferability' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press 437; Cotterrell, R (2003) 'Comparatists and Sociology' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press 131; Whitman, JQ (2003) 'The Neo-Romantic Turn' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press 312.

⁶⁰ See Lloyd, GER (1990) *Demystifying Mentalities* Cambridge University Press at 5.

by everyone; no two individuals cook pasta or play the violin (or think about the doctrine of precedent) in the same way. To suggest otherwise would be dangerous. It is essential to account for a measure of heterology within a culture at any particular time, since every culture is tested and contested by individuals who inhabit it and whom it inhabits, as a function of the way in which power manifests itself.⁶¹ Thus, a culture has to accommodate internal tensions and instabilities (which it will ignore, suppress as deviance, or strive to re-locate within the mainstream): 'the experience of cultural difference is *internal* to a culture'.⁶² In the words of Edward Said, 'all cultures are involved in one another; none is single and pure, all are hybrid, heterogeneous, extraordinarily differentiated, and unmonolithic'.⁶³ The comparatist-at-law must ensure that reference to the notions of 'culture' or 'tradition' does not, despite '[their] cosy invocation of consensus', 'serve to distract attention from social [...] contradictions, from the fractures and oppositions within the whole'.⁶⁴ Meanings are not reducible to common meanings. For instance, one can easily imagine divisions as to the merits of judicial activism taking place within a legal community. Arguably, then, there would be a lack of 'common meaning' as regards the limits of judicial activism. Yet, this failure of consensus occurs within the ambit of the practice of adjudication as it is experienced in that legal community. This 'common reference world' constitutes the web of intersubjective meaning 'which [is] constitutive of the social matrix in which individuals find themselves and act' or 'the background to social action'.⁶⁵ As comparative legal studies seeks to account for the intersubjectivity that captures the irreducibility of human interaction, it must continue to allow, therefore, for dissensus within a community.

Culture, being an integral part of the game of social control, social conflict, and social change, attests to relations of power which manifest themselves, for instance, through the distribution of knowledge amongst members of the group. Not all actors are equally situated to understand and act upon the world in similar terms. In fact, actors classify and construct their understanding of the social world from particular positions in a hierarchically structured social space. An understanding of legal culture must involve an appreciation of the distribution of knowledge across the interpretive (or sub-interpretive) communities within the culture. The distribution of knowledge and the perception of that distribution from within the legal culture affect the way the legal culture produces and reproduces meanings. Discursive formations (such as a civil code or a constitution) function

⁶¹ Dissent can even be internal to an individual as when there occurs a cleavage between thought and action.

⁶² Tully, J (1995) *Strange Multiplicity* Cambridge University Press at 13 [emphasis original]. For a detailed statement arguing against the notion that culture is always and everywhere a fully integrated phenomenon, see Archer, MS (1996) *Culture and Agency* (2nd ed) Cambridge University Press. See generally Gelder, K (ed) (2005) *The Subcultures Reader* (2nd ed) Routledge.

⁶³ Said, EW *Culture and Imperialism* supra note 46 at xxv. This important point has been taken, unhelpfully, to deny the very existence of localism. See Eagleton, T (2000) *The Idea of Culture* Blackwell at 48: 'there is no such thing as local peculiarities. All localities are porous and open-ended, overlap with other such contexts'. Cf Latour, *Reassembling the Social* supra note 51 at 183: "whenever anyone speaks of [...] a 'global feature', [...] a 'world economy' [...], the first [...] reflex should be to ask: 'In which building? In which bureau? Through which corridor is it accessible? Which colleagues has it been read to? How has it been compiled?' For a thorough consideration of 'hybridity' conferring a significant role to local knowledge, see Kraidy, M *Hybridity* supra note 51.

⁶⁴ Thompson, EP (1991) *Customs in Common* Penguin at 6.

⁶⁵ For the distinction between 'common' and 'intersubjective' meaning, see Taylor, C (1987) 'Interpretation and the Sciences of Man' in Rabinow, P and Sullivan, WM (eds) *Interpretive Social Science: A Second Look* University of California Press 57. The quotations are from id at 60, 57, and 57, respectively.

rhetorically through their narratological and tropological structures to prejudice judgment, elevating or protecting some elements in society by repressing others. They reveal certain hierarchies of power, of repressor and repressed, within the social fabric of the moment, whereby individuals feel the force of symbols and are led to behave according to them. Any comparative analysis of law, therefore, is also a cratology, that is, a study of power. But even the heterodox, antinomian, and rebellious orientations seeking to reconstitute from within the boundaries of collective identity do not detract from the existence of 'a system of cultural principles, a method of organizing and attributing meanings, a practice of cognitive mapping that is held, with little variability, by large numbers of people' within a given legal community.⁶⁶ Consider this well-known contribution to socio-psychological studies:

The political revolutionary does not refuse to cast his revolutionary songs in the modal structure and scale progressions of the culture he is in process of changing; his formations, if his organized forces are strong enough, will operate in terms of accepted patterns of military procedure. The one who rebels against the religious and moral system of his time will couch his appeals in the linguistic patterns of his people, use established affect symbols, and employ accepted aesthetic standards in heightening the responses of his followers.⁶⁷

Secondly, culture defines a realm of possibility. Relative to a given socio-historical situatedness, certain values and visions cannot but constitute the ultimate horizons for what can plausibly be considered rhetorically convincing and morally acceptable: 'all aspects of social life are pervaded by decidedly non-neutral assumptions whose acceptance by a member of the culture define what is "possible" for that person'.⁶⁸ This observation recalls

⁶⁶ Arditi, G (1994) 'Geertz, Kuhn and the Idea of a Cultural Paradigm' (45) *British Journal of Sociology* 597 at 614. The fact is that differentiated thought within a legal culture or tradition must assume a measure of epistemological commonality if it is to lay any claim to cognitive (or political) effectivity: how could opposite positions speak to one another — or against one another — unless they were situated within a homogeneous epistemological field? For this argument, see Foucault, M (1997) 'Il faut défendre la société' Bertani, M and Fontana, A (eds) Gallimard at 185 (delivered as a course of lectures in March 1976 and published posthumously).

⁶⁷ Herskovits, MJ (1951) 'On Cultural and Psychological Reality' in Rohrer, JH and Sherif, M (eds) *Social Psychology at the Crossroads* Harper at 153. For an argument to the effect that even famous and influential 16th-century figures like Copernicus and Vesalius used classical models throughout their work and remained committed as fervently to traditional concepts as to empirical data, see Grafton, A (1992) *New Worlds, Ancient Texts* Harvard University Press at 115, where the author observes that '[b]oth Copernicus and Vesalius expected that their innovations could coexist with — and even rest on — the very structures we now see them as attacking'.

⁶⁸ Levinson, S (1988) *Constitutional Faith* Princeton University Press at 156 [emphasis original]. See also Young, IM *Justice and the Politics of Difference* supra note 9 at 45-46. For arguments in favour of strong cultural determinism, see Berger, BM (1995) *An Essay on Culture* University of California Press; Fish, S (1989) *Doing What Comes Naturally* Duke University Press at 430, 459, and 246; Rosaldo, R *Culture and Truth* supra note 12 at 25. For an influential reflection on how the self is constituted in important ways by group affinities, see generally Bourdieu, P (1979) *La distinction* Editions de Minuit passim; id (1980) *Le sens pratique* Editions de Minuit passim; id *Questions de sociologie* supra note 39 passim, where the author develops the notion of 'habitus' which he seems to have derived from Erwin Panofsky's work and which he presents as an array of permanent, transferable, limiting, and explanatory dispositions underwriting practices and images as they arise within a lived environment. Indeed, Bourdieu translated into French Panofsky's celebrated challenge to positivism which draws arresting parallels in terms of 'habit-forming forces' between the building of cathedrals and Aquinas's *Summa Theologiae*: id (1967) *Architecture gothique et pensée scolastique*, Bourdieu, P (trans) Editions de Minuit. For an acknowledgement of Bourdieu's indebtedness to Panofsky, see id at 142. For a helpful discussion

the significance of historical analysis for comparative legal studies; 'it is only through history that one can discover the conditions of possibility of psychological structures'.⁶⁹ Pierre Legendre remarks, for instance, that 'French law cannot produce or take into account just anything since it is linked to the mythical structure of nationalist truth'.⁷⁰ In other words, 'every cultural tradition is finitely elastic'.⁷¹ I also claim that, even though cultural meanings are neither fixed nor static — '[c]ulture [...] is perpetually, unavoidably and unremediably *nach nicht geworden* (not-yet-accomplished)',⁷² and '*tradere*', the etymological source of 'tradition', connotes that which is in movement — the adaptive dimension of culture must, despite its undoubted significance, be apprehended as subservient to the theme of cultural reproduction. Because a legal culture functions as an ongoing integrative process, what one encounters by way of an alternative experience is incorporated into an existing whole within which it is readily intelligibilised against the background of the whole, if at the cost of a measure of dissonance reduction. Indeed, the power of a culture inheres in its capacity to assimilate data through a didactic of conflict resolution operating in its favour, so that a new experience appears to conform to existing structures of thought and belief. Resorting to powerful imagery, Algirdas Greimas thus highlights the matter of 'cultural persistence', or perhaps inertia, by equating 'legal culture' with "'good legal manners" (in the way there are table or conversation "manners", etc.)'.⁷³ But this idea emphatically fails to sustain the assumption that 'culture' encompasses some sort of reactionary doctrine embodying 'sentiment for place, nostalgia for tradition, preference for tribe, reverence for hierarchy'.⁷⁴

This is not to say that the comparatist-at-law should suppress all traces of an intentional structure of practice and reduce practice exclusively to temporally non-emergent constraints, that is, to constraints that are stable over time (Andrew Pickering rightly mocks a notion of 'tacit knowledge' that would be 'hovering nonemergently in some special epistemic heaven and controlling practice from without').⁷⁵ Of course, the idea of a community being incarcerated in a place or in a mode of thought is a fiction of the anthropological imagination. Communities should not be unduly typified through a static and univocal notion of 'culture'. Even Edward Sapir's 'classic' perspective warned against this danger:

The so-called culture of a group of human beings [...] is essentially a systematic list of all the socially inherited patterns of behavior which may be illustrated in the actual behavior of all or most of the individuals of the group. The true locus,

of Bourdieu's idea of '*habitus*', see Swartz, D (1997) *Culture and Power* University of Chicago Press at 95-116. Interestingly, Bourdieu has observed that 'culture' would be 'a better term than *habitus*'. However, he thought that the notion was 'overdetermined': Bourdieu, P (1968) 'Structuralism and Theory of Sociological Knowledge' (35) *Social Research* 681 at 706, note 23.

⁶⁹ Foucault, M (1954) *Maladie mentale et psychologie* Presses Universitaires de France at 90 ['C'est dans l'histoire seulement que l'on peut découvrir les conditions de possibilité des structures psychologiques'].

⁷⁰ Legendre, P (1976) *Jour du pouvoir: traité de la bureaucratie patriote* Editions de Minuit at 72 ['Le droit français ne saurait produire ni prendre en compte n'importe quoi, car il est lié à la structure mythique de la vérité nationaliste'].

⁷¹ Bohannan, P (1995) *How Culture Works* Free Press at 167.

⁷² Bauman, A and Tester, K (2001) *Conversations with Zygmunt Bauman* Polity at 32. The words are Bauman's.

⁷³ Greimas, A] (1976) *Sémiotique et sciences sociales* Le Seuil at 111 ['de "bonnes manières juridiques" (comme il existe des "manières" de table, de conversation, etc.)'].

⁷⁴ Eagleton, T *The Idea of Culture* supra note 63 at 30.

⁷⁵ Pickering, A (1995) *The Mangle of Practice* University of Chicago Press at 200.

however, of these processes which, when abstracted into a totality, constitute culture is not in a theoretical community of human beings known as society, for the term 'society' is itself a cultural construct which is employed by individuals who stand in significant relations to each other in order to help them in the interpretation of certain aspects of their behavior. The true locus of culture is in the interactions of specific individuals and, on the subjective side, in the world of meanings which each one of these individuals may unconsciously abstract for himself from his participation in these interactions. [...] It is impossible to think of any cultural pattern or set of cultural patterns which can, in the literal sense of the word, be referred to society as such. There are no facts of political organization or family life or religious belief or magical procedure or technology or aesthetic endeavor which are coterminous with society or with any mechanically or sociologically defined segment of society.⁷⁶

In other words, the presence of socially differentiated knowledges, discourses, and meaning systems within a culture should be recognised, and the contestatory nature of discourses within communities ought to be acknowledged. And it is the case that, even as it reproduces itself, culture changes on account of the fact that the frameworks which it delineates and within which it operates are inevitably modified as they consider new empirical data. However, since present situations are addressed in terms of past experiences, only exceptionally will the new information effectively *challenge* the whole. As a leading naturalist reminds us, '[c]ulture conforms to an important principle of evolutionary biology: most change occurs to maintain the organism in its steady state'.⁷⁷ And if psychoanalysis is to be credited with any discoveries, one is surely that our psychological state, our past experience, and our memories curtail our field of action such that we only enjoy interstitial freedom.

In the end, therefore, while I am certainly not defending the view that the old dichotomy of structure and agency should be resolved in favour of a complete incapacitation of the power of choice, of a de-identification of self, I do maintain that there is an important sense in which individual identity is supervenient upon unchosen participation in common forms of life, that the life of a culture determines the resources of perception, that there exists at the very least something like 'cultural suggestibility'. Furthermore, such overdetermination increases over time as the sphere of elective choice progressively contracts itself.⁷⁸ Thus, Marc Galanter notes that 'legal cultures, like languages, can absorb huge amounts of foreign material while preserving a distinctive structure and flavor'.⁷⁹ In any event, there is simply no such thing as the unencumbered self creating itself by acts of will unmediated by any constitutive cultural inheritance.⁸⁰ Because individuality

⁷⁶ Sapir, E. (1949) [1932] 'Cultural Anthropology and Psychiatry' in Mandelbaum, DG (ed) *Selected Writings in Language, Culture, and Personality* University of California Press at 515.

⁷⁷ Wilson, EO (1997) *In Search of Nature* Allen Lane at 107. This quotation, which I find helpful, ought not to suggest adhesion to Wilson's cosmology.

⁷⁸ See Bohannan, P (1997) 'Ethnography and Comparison in Legal Anthropology' in Nader, I. (ed) *Law in Culture and Society* (2nd ed) University of California Press at 405: 'a cultural tradition has a character that becomes "more so" as it develops'. Ultimately, it cannot be denied, of course, that 'past endurance tells us nothing about what will happen tomorrow': Pickering, A *The Mangle of Practice* supra note 75 at 207.

⁷⁹ Galanter, M (1994) 'Predators and Parasites: Lawyer-Bashing and Civil Justice' (28) *Georgia Law Review* 633 at 680.

⁸⁰ In his blazing version of this assertion, Marx claims that '[t]he tradition of all the dead generations weighs

is produced through culture, personal style is never more than a deviation in relation to the style of a group, so that it always relates back to the common style either through its conformity with it or on account of its difference from it.

An additional cluster of observations is apposite as regards the matters of cultural uniformity and constraint, so as to emphasise that the individual mind, although shaped by culture, is itself the principal *agent* of dissemination of cultural models — an idea which the notion of '*mentalité*' is meant to sustain. The point is that culture, or units of cultural transmission, do not partake in some transcendent, supra-individual entity — an idea that would raise insuperable conceptual difficulties.⁸¹ To account for cultural understanding being regulated and maintained, it is important to grasp the idea of 'culture' as effect rather than cause. In other terms, culture exists as a *result* of there being a cognitive and affective apparatus within the individual, which is similar for a number of individuals who engage in sustained social interaction and communication amongst themselves. The process of cultural dissemination operates through units of transmission of information and know-how, which are diffused in human beings via social learning, that is, by way of observation, imitation, and communication. It is these 'memes' — as Richard Dawkins, playing on the Greek term '*mimesis*' and the word 'gene', has somewhat infelicitously named the relevant cognitive structuring mechanisms⁸² — which we inherit from individuals around us and which we transmit to individuals with whom we come into contact. Thus, 'what is cultural consists of widely spread and long-lasting memetic features of individual members of the culture [in which the memes possessed by the members of the present interpretive community can be seen as linked through a chain of communication and education with the memes of earlier members], just as the species consists of the widely spread and long-lasting genetic traits of individual members of the species'.⁸³ (The parallel with genetic units of inheritance is imperfect, for in principle an individual only gets genes from his parents and can transmit them only to his children.) The shared perspective amongst the members of a culture is the *result* of individuals being inhabited by populations of similar memes. The traditionary features that constitute individual autonomy and identity within a community are thus a *consequence* of the presence of infra-individual entities carried by biological vehicles deep inside the mind which, while they mutate and develop as they disseminate, ensure the preservation of culture.⁸⁴ In sum, the crucial role assumed by the individual within a culture can hardly be overstated, even as culture transforms him.

Once the embeddedness of the law is taken seriously, the explanatory model on offer from established comparative legal studies rapidly begins to look deeply unsatisfactory. In the realisation that conceptions of law-as-rules-or-precepts are impoverished, the comparatist

like a nightmare on the brain of the living': Marx, K (2000) [1852] *The Eighteenth Brumaire of Louis Bonaparte* in *Karl Marx: Selected Writings* (2nd ed) McLellan, D (ed) Oxford University Press at 329. For the original text, see *id* *Der achtzehnte Brumaire des Louis Bonaparte* in Marx, K and Engels, F (1985) *Gesamtausgabe* [MEGA] (I) vol 11 Dietz, at 97 ['Die Tradition aller toten Geschlechter lastet wie ein Alp auf dem Gehirne der Lebenden'].

⁸¹ See Balkin, JM (1998) *Cultural Software* Yale University Press at 8-10.

⁸² Dawkins, R (1989) *The Selfish Gene* (2nd ed) Oxford University Press at 192. The designation is unfortunate, because it may suggest that cultural transmission involves perfect replication, which it emphatically does not, if only on account of the fact that a process of memorisation is at work. For a critical observation along these lines, see Sperber, D (1996) *Explaining Culture* Blackwell at 105-06.

⁸³ Balkin, JM *Cultural Software* supra note 81 at 49-50.

⁸⁴ For a detailed introduction to memetic development, see *id* at 42-97. I am much indebted to this account for my own. *Adde*: Blackmore, S (1999) *The Meme Machine* Oxford University Press

is attracted to the explicatory power that an appreciation of the 'legal' as culturally (or traditionally) constituted may yield. Admittedly, neither culture nor tradition can ever be totally articulated on the basis of indubitable evidence. But the indeterminacy of culture (or tradition) or, if you will, the impossibility of distinguishing between culture and non-culture (or tradition and non-tradition) in a way that would allow the identification of empirically verifiable causal or ontic relationships through which control over social life could be effectively attained ought to be a handicap only for the positivist seeking the kind of clear and determinate guidance usually associated with computer programmes. Appreciating that '[understanding] is a notion far removed from the world of statistics and causal laws',⁸⁵ comparative legal studies wishes to subscribe to a very different cognitive project and wants to pursue a very different account of significance. The comparative enterprise does not purport to be serviceable in the sense of providing an instrumental programme oriented towards technical ends. In the way in which they seek to establish the other-in-the-law's views and the legitimacy of these views, comparatists-at-law aim to offer a diagnostic.⁸⁶ For comparatists-at-law, plausible explanations, then, can be more profitable, and hence preferable, to causal demonstrations.⁸⁷ In fact, comparative analysis of law is best apprehended as a hermeneutical investigation aiming to achieve understanding about the life of the law and life-in-the-law through the elucidation of meaning. To be sure, such understanding may then be used to encourage new forms of problem-solving. Yet, it remains the case that the primary role of comparative legal studies is to awaken assumptions, that is, to answer an 'emancipatory' interest.⁸⁸

⁸⁵ Winch, P (1990) *The Idea of a Social Science* (2nd ed) Routledge and Kegan Paul at 115. See generally Taylor, C 'Interpretation and the Sciences of Man' supra note 65 at 33-81. This claim has been made with specific reference to culture in Barkow, J *Darwin, Sex, and Status* supra note 57 at 142: 'Culture is not a "thing", not a concrete, tangible object. It isn't a cause of anything'. For a critique insisting upon the fact that the notion of 'legal culture', being devoid of causal significance, is maddeningly imprecise and arbitrary, so that it lacks 'sufficient analytical precision [...] to allow it to indicate a significant explanatory variable in empirical research', see Cotterrell, R (1997) 'The Concept of Legal Culture' in Nelken, D (ed) *Comparing Legal Cultures* Dartmouth 14 and passim. For recent re-formulations of this thesis, see id 'Comparatists and Sociology' supra note 59 at 147-51; id (2004) 'Law in Culture' (17) *Ratio Juris* 1. It is interesting to note, however, that the relevance of culture (or tradition) is not limited to 'soft' subjects, but is also regarded (by some analysts at least) as crucial for economic theory concerned as it is with predictability and quantifiable accuracy. See, eg, North, DC (1990) *Institutions, Institutional Change and Economic Performance* Cambridge University Press; Knight, J and North, D (1997) 'Explaining Economic Change: The Interplay Between Cognition and Institutions' (3) *Legal Theory* 211; David, PA (1985) 'Clio and the Economics of QWERTY' (75) *American Economic Review* 332, who argues that there are path-dependent sequences of economic changes, that is, 'non-ergodic' processes, that are inherently historical in character and where contingent elements rather than systematic forces play a dominant role. For an argument to the effect that the amorphous character of cultures makes them neither indecipherable nor insubstantial, see Rosen, I. (1991) 'The Integrity of Cultures' (34) *American Behavioral Scientist* 594.

⁸⁶ For an insightful argument in favour of a diagnostic approach to understanding, see Rose, N (1999) *Powers of Freedom* Cambridge University Press at 55-60. The idea draws inspiration from Nietzsche's 'philosopher as cultural physician': Nietzsche, F (1979) [1873] 'The Philosopher as Cultural Physician' in Breazeeale, D (ed and trans) *Philosophy and Truth* Humanities Press International at 67-76. For the original text, see id (1922) 'Der Philosoph als Arzt der Cultur' in *Friedrich Nietzsche Gesammelte Werke [Musarionausgabe]*, vol VI Musarion at 65-74.

⁸⁷ See Appendix I.

⁸⁸ Habermas, J (1971) [1968] *Knowledge and Human Interests* Shapiro, J (trans) Beacon Press at 302-17. The original expression reads as 'emanzipatorische[s] Erkenntnisinteresse': id (1971) *Technik und Wissenschaft als Ideologie* Suhrkamp at 155. Cf Fletcher, GP (1998) 'Comparative Law as a Subversive Discipline' (46) *American Journal of Comparative Law* 683.

Comparative analysis of law wishes to liberate individuals dwelling within the realm of intelligibility into which they have been socialised from confining and repressive forces regarded by them as natural rather than as socially constructed. It can do so by heightening awareness of the constraints imposed by a symbolic 'system' and by helping to overcome the closing of the mind otherwise generated by habit or socialisation. It is, ultimately, engaged in a phenomenological inquiry of what is *possible* for a legal community and the semiotic sub-groups it harbours, such as practitioners, judges, and academics. Indeed, one cannot afford to study legal experience without examining what kind of legal experience is possible, for culture (or tradition) limits possibilities of experience: *it constrains*. In this sense, culture (or tradition) is both a liminal and a finite space. At a more general level, comparative-legal-studies-as-hermeneutics intends to counteract (latent) ethnocentrism. A re-presentational strategy seeking critical enlightenment in this way hardly suffers from the notion of 'culture' (or 'tradition') not being ascribed a restricted and precise meaning *qua* mechanistic explication of experience. The malleability — or 'dereferentialization'⁸⁹ — surrounding the notion of 'culture' (or 'tradition') does not prevent the ascription of determinative efficacy and the articulation of various characteristics that can prove of direct relevance to the pursuit of deep or thick comparative legal studies.⁹⁰

Legal experience is immersed in a cultural context: it is modulated. It is indeed the legal culture — a notion that makes specific reference to the sub-culture that is constituted amongst law specialists, especially as regards the repository of those elements that partake in the stable, general, and unconscious — that provides the 'internal logic' of the law.⁹¹ Although groups and identities are necessarily fluid, the legal culture remains the cement that binds normality and normativity, that accounts, through the posited law, for a 'governmentalité' (a useful notion which connotes at once the ideas of government, governance, and *mentalité* — understood here against a background of non-mental coping that could be captured through the idea of the 'legal unconscious').⁹² The goal for the

⁸⁹ Readings, B (1996) *The University in Ruins* Harvard University Press at 178.

⁹⁰ In this sense, the stigmatisation of the 'flabbiness' of culture misses the point. The word is in Eagleton, T *The Idea of Culture* supra note 63 at 37. How is the fact that culture covers 'everything from hairstyles and drinking habits to how to address your husband's second cousin' or 'Igor Stravinsky' or 'the way of life of Turkish physiotherapists' — or, to use another array of illustrations, that it ranges effortlessly from 'pornography and Pop Tarts to papal encyclicals and *The Pirates of Penzance*' — problematic for comparatists-at-law if, within the sphere of comparative research, it allows 'to rescue the "said" of [legal] discourse from its perishing occasions and fix it in perusable terms'? The quoted sentence is in Geertz, C *The Interpretation of Cultures* supra note 36 at 20. As Inglis puts it, '[c]ulture, even when indiscriminate, retains moral force, aesthetic authority, practical usefulness': Inglis, F *Culture* supra note 37 at 135. The strings of examples are in Eagleton, T *The Idea of Culture* supra note 63 at 32, and LaCapra, D (2004) *History in Transit* Cornell University Press at 210, respectively.

⁹¹ Merryman, JH (1978) 'On the Convergence (and Divergence) of the Civil Law and the Common Law' in Cappelletti, M (ed) *New Perspectives for a Common Law of Europe* Sijthoff at 224. See also Örücu, F (1987) 'An Exercise on the Internal Logic of Legal Systems' (7) *Legal Studies* 310.

⁹² See Foucault, M (1994) [1978] 'La "gouvernementalité"' in *Dits et écrits, 1954-1988* vol III Defert, D and Ewald, F (eds) Gallimard at 635-57. For a thoughtful study of 'governmentality', see Dean, M (1999) *Governmentality* Sage. The idea of the 'legal unconscious' emerges throughout the work of Pierre Legendre as he purports to assert its impact on the conditions of possibility of French legal thought — no doubt one of the reasons why his publications continue to be ignored by French academics while they are translated and published abroad. For example, see Legendre, P (1983) *L'empire de la vérité* Fayard at 21: 'the unconscious is a lawyer too' [*L'inconscient lui aussi est juriste*']. For salient illustrations of Legendre's thought, see Legendre, P (2005) *L'amour du censeur* (2nd ed) Le Seuil, id *Jour du pouvoir* supra note 70; id (1992) *Les enfants du texte* Fayard. For an excellent introduction in English to Legendre, see Goodrich, P (1997) (ed and trans) *Law and the Unconscious: A Legendre Reader* Macmillan. For a general reflection on the necessary and constitutive role of the unconscious in

comparatist is to re-present a legal culture in ways that have greater interpretive power than is offered by the traditional rule-based model. In other words, the idea is to refuse to take rules or precepts as a given and to try to see how they are conditioned and shaped by contingent (ie, non-necessary, rather than stochastic) epistemic patterns directed to practices and values — and, perhaps, how they sustain and amplify these in their turn. The comparatist's range of options in the pursuit of his task is vast since there is nothing for the observer of a legal culture that is quintessentially 'legal' (or that is quintessentially outside the 'legal'): *il n'y a pas de hors-droit*.⁹³ Rather, the quality of 'legality' (if this be the apposite word) is conferred to the 'object' of observation — the *comparandum* — on the basis of what the comparatist understands that the observed culture understands as 'legal' and, also, in the light of what he himself understands as 'legal'. The perception of law as cultural phenomenon thus moves comparative legal studies away from the appropriation by the comparatist of a seemingly autarkic body of knowledge (the legal rules or precepts) which has no concern for the practices giving rise to it — these practices themselves being the product of a pre-formulated cultural network of understandings. The expansive approach to comparison that I advocate, which harnesses culture as 'a theoretical tool for developing sensitivity for differentiation, inconsistency, confusion, conflict, and contradiction', is therefore significantly more exacting than the ones that depend merely on neatly circumscribable rule-based explanations.⁹⁴ Indeed, '[a] cultural study of law's rule warns us *not to take any comparisons for granted*'.⁹⁵

Critics of culture claim that the idea suggests autarky, holism, homogeneity, stability, coherence, and boundedness in a context where social interaction is characterised by relationality, fragmentation, conflict, change, discontinuity, equivocality, and porosity. Not unlike the notion of 'race', culture would tend to 'freeze' difference.⁹⁶ There is no doubt that culture is a construct or an abstraction in the sense that the word does not refer to any concrete 'reality': one cannot see a culture. It is the comparatist who must *effectuate* the cultural, which is assumed to be present, if he is going to be able to use it as an interpretive device to convey the 'situational rootedness' of meaning,⁹⁷ that is, to deploy

the fashioning of political identity and destiny, see Rose, J (1996) *States of Fantasy* Oxford University Press. Adde: Minsky, R (2005) *Psychoanalysis and Culture* Polity; Belsey, C (2005) *Culture and the Real* Routledge.

⁹³ I adopt and adapt Derrida, J *De la grammatologie* supra note 32 at 227 ['*il n'y a pas de hors-texte*']. Derrida's words could be translated as '[t]here is no out-of-text'. This becomes, here, 'there is no out-of-law'. See, eg, Wilson, G 'English Legal Scholarship' supra note 57 at 831: 'It would be unwise for example to regard anything in Japanese society as *prima facie* irrelevant to the understanding of Japanese law on first setting out to get to grips with it. The links between law and language, law and the political or social and economic order, law and the history and traditions of the country, its codes of morality, its senses of justice and the relationship between the legal profession and other professions and between legal scholarship and other forms of scholarship, the relative standing of different actors in and around the legal system, all have their impact on law and its administration and the definition of law and legal scholarship'.

⁹⁴ Alvesson, M (1993) *Cultural Perspectives on Organizations* Cambridge University Press at 120.

⁹⁵ Kahn, PW (2003) 'Freedom, Autonomy, and the Cultural Study of Law' in Sarat, A and Simon, J (eds) *Cultural Analysis, Cultural Studies, and the Law* Duke University Press at 176 [my emphasis].

⁹⁶ Abu-Lughod, L (1991) 'Writing against Culture' in Fox, RG (ed) *Recapturing Anthropology* School of American Research Press at 144. See also Kuper, A (1999) *Culture* Harvard University Press; Brightman, R (1995) 'Forget Culture: Replacement, Transcendence, Relexification' (10) *Cultural Anthropology* 509; Fox, RG and King, BJ (eds) *Anthropology Beyond Culture* Berg; Crehan, K (2002) *Gramsci, Culture and Anthropology* University of California Press; Bayart, J-F (2005) *The Illusion of Cultural Identity* Rendall, S et al (trans) University of Chicago Press. Other prominent critiques include Clifford, J (1988) *The Predicament of Culture* Harvard University Press; id (1997) *Routes* Harvard University Press.

⁹⁷ Hannerz, U (1992) *Cultural Complexity* Columbia University Press at 22.

it as 'information'.⁹⁸ This intervention involves a dimension of reification: *the comparison realises a legal culture*, that is, it crystallises culture through the acts of apprehension and production.⁹⁹ It does so by labelling as 'cultural' a lived constellation of meanings and values which is actively created and constituted within the situated context of the lifeworld of the community under observation. This means, of course, that the identification of certain features of the lifeworld as 'cultural' can only be more or less persuasive and can never be 'true'.¹⁰⁰ It is precisely this artificial and, therefore, contestable aspect of culture that its detractors use as a target. To reject culture, however, is to accept that identifiable ways of feeling, thinking, and acting are randomly distributed across individuals, or that they are strictly determined by biological heredity — both hypotheses having been disproved by anthropological research. 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?¹⁰¹ Despite the dangers associated with simplification and reification, I argue that, just as one can usefully speak of 'the Gothic style', '[t]here are many situations in which "Japanese culture" is a convenient shorthand for designating something like "that which many or most Japanese irrespective of gender, class, and other differences regularly think, feel, and do by virtue of having been in continuous social contact with other Japanese"'.¹⁰² Referring to 'culture' in this way does not automatically privilege coherence, does not imply stultification, does not entail essentialism, does not exaggerate distinctness, does not preclude temporal variation, does not efface individual variations or contestations that can take the form of participation in a range of sub-cultures, does not fetishise identity such that it would lay beyond critique, and certainly does not cast its advocates as some reactionary minority.¹⁰³ Let me insist that culture need not be understood as positing a number of discrete heritages organically tied to specific homelands and considered best kept separate (like the laboratory specimens in petri dishes we also call 'cultures'). Nor does culture need deny their cosmopolitanism to the people being studied. In other words, culture allows for a transnational public sphere and need not connote nationalism or isolationism, that is, something like 'cultural fundamentalism'. Nor does culture require to be linked to ethnicity or race or gender. Again, the point is simply to acknowledge that '[e]verywhere we find sets of certain learned features that are shared more extensively by people who interact with each other than between these people and others with whom

⁹⁸ Lotman, J (12 October 1973) 'Different Cultures, Different Codes' *The Times Literary Supplement* 1214.

⁹⁹ Berger, PI. and Luckmann, T (1966) *The Social Construction of Reality* Penguin at 173. For a reflection advocating the necessity and value of reification as an analytical instrument, see Berger, BM *An Essay on Culture* supra note 68 at 69-72.

¹⁰⁰ See Clifford, J (12 January 1997) 'The Truth is a Moving Target' *The New York Times Book Review* 13: 'Cultural knowledge, both local and comparative, is a moving target, the product of continuing and open-ended dialogues'. Accordingly, '[n]o one gets the last word'.

¹⁰¹ An argument has indeed been introduced linking the uneasiness vis-à-vis culture to the fact that it would be seen as replacing liberal theory and the view of individuals as autonomous and self-interested rationalists and thus as challenging the idea of unfettered individual identity and agency. See Boggs, JP (2004) 'The Culture Concept as Theory, in Context' (45) *Current Anthropology* 187.

¹⁰² Brumann, C (1999) 'Writing for Culture' (40) *Current Anthropology* 51 at 57. My summary owes much to this paper.

¹⁰³ For various aspects of the well-taken, and well-rehearsed, case against the essentialisation of culture, see, eg, Fuchs, S (2001) *Against Essentialism: A Theory of Culture and Society* Harvard University Press; Tully, J *Strange Multiplicity* supra note 62 at 7-17; Parekh, B (2000) *Rethinking Multiculturalism* Harvard University Press at 76-79; Benhabib, S (2002) *The Claims of Culture* Princeton University Press at 1-23; Appiah, KA (2005) *The Ethics of Identity* Princeton University Press at 107 and passim.

they do not interact or among those others'.¹⁰⁴ And the further point is to appreciate that French culture, for example, does not exist separately from other cultures as if fashioned through some inner essence. Rather, it exists *characteristically* in *relation* to other cultures. The fact that the notion of 'culture' can be abused by those who caricature the patterning and uniformity of human action, the fact even that such an extreme event as the Holocaust can be regarded as a form of culture-consciousness is no reason to jettison culture. Who would consider no longer resorting to the word 'democracy' because the Soviet regime abused it for much of the 20th century?

There are two more sets of observations that I want to present to lawyers.

In no way does the programme that I defend in support of differential analysis of juriscultures propose to dispense with the usual legal artifacts such as statutes and judicial decisions. Indeed, my claim is precisely that cultures are to be found at work, so to speak, in statutes and judicial decisions, which must therefore remain one of the principal foci of study for comparative legal studies. What I argue is that the posited law can no longer stand as the point of arrival for comparatists-at-law. Rather, comparative interventions must be transformed, so that the posited law is regarded as a point of departure leading to the questions 'how' and 'why?' and, later, to insightful elucidation. The posited law must not be something at which comparison stops, but something from which comparison begins its *presencing*.¹⁰⁵

But perhaps the key issue for individuals socialised in the law is that '[they] have long been accustomed to think of law as something apart': '[t]he grand ideals of justice, of impartiality and fairness, have seemed to remove law from the ordinary, disordered paths of life'.¹⁰⁶ The assumption is that if one has culture, one cannot have justice (or reason). In other words, the claim is that justice cannot emerge from localism, which is deemed to be prejudiced or biased — 'prejudice', of course, being considered a bad thing. The first order of business for comparatists trained as lawyers must therefore be to appreciate that '[t]o say that the law is cultural does not by itself dismantle the force of the idea of justice'.¹⁰⁷ Rather, culture comes as 'a kind of epistemological corrective to the plethora of problems posed for postrealist legal studies by the crises of the social liberal state and its allied forms of knowledge'.¹⁰⁸ For lawyers, to turn to culture is to embrace the late modern era's turn from a 'social' to a 'cultural' logic of governance.¹⁰⁹ More importantly,

¹⁰⁴ Brumann, C 'Writing for Culture' supra note 102 at 59.

¹⁰⁵ For a recent argument to the effect that comparatists, even as they embark upon cultural analyses, must not abandon the examination of the technicalities of the law, see Riles, A (2005) 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (53) *Buffalo Law Review* 973.

¹⁰⁶ Post, R (1991) 'The Relatively Autonomous Discourse of Law' in id (ed) *Law and the Order of Culture* University of California Press at vii.

¹⁰⁷ Greenhouse, CJ (1989) 'Just in Time: Temporality and the Cultural Legitimation of Law' (98) *Yale Law Journal* 1650 at 1650.

¹⁰⁸ Sarat, A and Simon, J (2003) 'Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship' in id (ed) *Cultural Analysis, Cultural Studies, and the Law* Duke University Press at 4. For a particularly prominent argument on the death of the social, see Baudrillard, J (1983) *In the Shadow of the Silent Majorities... or the End of the Social* Foss, P, Patton, P and Johnston, J (trans) Semiotext(e). But these claims are not uncontroversial. Already, in their introduction to Bonnell, VE and Hunt, I. (eds) (1999) *Beyond the Cultural Turn* University of California Press, the editors acknowledge how '[m]ore and more often, [social historians and historical sociologists] devised research topics that foregrounded symbols, rituals, discourse, and cultural practices rather than social structure or social class' (at 8). But they lament the threat 'to efface all reference to social context or causes' and the lack of 'foundations' of cultural methods (at 9-10) while pleading for a reassertion of the social (at 14).

¹⁰⁹ Sarat, A and Simon, J 'Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship' supra

it is to acknowledge that *recognition of local specificity is the condition for justice*. In Derrida's arresting formulation, '[i]l y va d'un certain pas'.¹¹⁰ These words can refer to at least three ideas. Not only do they mean to say that one is walking at a certain pace (suggesting, for example, forward movement), but they also intimate the taking of a step. Most significantly (and most enigmatically), though, they convey that negation is at stake ('pas' in French also means 'not').

For comparatists-at-law to turn to culture (or tradition) is indeed to engage in an exercise in negative dialectics (in the sense at least of an anti-Hegelian or anti-*Aufhebung* dialectics) since it is to develop a cultural argument meant to negate clearly and emphatically the positivistic, scientific, and propositionally methodological enterprise that (establishment-minded) comparative legal studies has wanted to be. Negativity, far from suggesting a 'mood' — one need not be a negative person in order to foster negative dialectics — is a de-position or a dis-position, a distrust of positing, positivity, positivists, and the positivistic *Zeitgeist*, which must be *ex-posed* as the most important factor suppressing the cultural dimension of meaningful experience within comparative analysis. In this sense, negativity epitomises the transformative role of theory as counter-discourse. It effectuates a politics of resistance. It is transgressive (not strictly in a cathartic sense, although it would be unwise to obfuscate the constructive value that the purgative dimension may hold) but in an ecstatic mode, in other terms, in the way it is 'critically promot[ing] progressive social transformation'.¹¹¹ It is, literally, an *undisciplined gesture*.¹¹² It is *contrarian* — which is precisely how, in Jacques Derrida's words, 'negativity is a resource'.¹¹³

(As I advance an argument in favour of a comparative legal studies, I do not wish to minimise the challenge associated with the 'escape' from 'small thinking', from the 'small frame' within which lawyers-as-comparatists — for whom culture means suffocation of legal discourse under a blob of holism — have been 'spend[ing] their time

note 108 at 1-34. For other noteworthy arguments defending the centrality of 'culturalism' within the logic of late capitalism, see, eg, Balibar, E (1991) 'Is There a "Neo-Racism"?' in Balibar, E and Wallerstein, I (eds) *Race, Nation, Class* Turner, C (trans) Verso at 17-28; Touraine, A (2005) *Un nouveau paradigme* Fayard. For recent claims making specific reference to legal discourse, see Kahn, PW (1999) *The Cultural Study of Law* University of Chicago Press; Rosen, I. (2006) *Law as Culture: An Invitation* Princeton University Press; Chase, CG (2005) *Law, Culture, and Ritual* New York University Press.

¹¹⁰ Derrida, J (1996) *Apories* Galilée at 23 [emphasis original].

¹¹¹ Huntington, PJ (1998) *Ecstatic Subjects, Utopia, and Recognition* SUNY Press at 10-11 and *passim*. See Fabian, J (2001) *Anthropology with an Attitude* Stanford University Press at 7, 100, and 93. Negative dialectics, in the expression made famous by Theodor Adorno, refers to a critical mode of reflection which at crucial moments — those moments in the production of knowledge that call upon one to take positions that determine how one gets from one step to the next, from one statement to the next, from one sentence to the next — negates what a discipline affirms. See generally Adorno, TW (1973) *Negative Dialectics* Ashton, FB (trans) Routledge. *Add:* Buck-Morss, S (1977) *The Origin of Negative Dialectics* Free Press; O'Connor, B (2004) *Adorno's Negative Dialectic* MIT Press. It is worth emphasising that 'negativity' has nothing whatsoever to do with narratives of decline associated with the idea of 'cultural pessimism'. For an exploration of the rhetoric of pessimism, see Bennett, O (2001) *Cultural Pessimism* Edinburgh University Press.

¹¹² According to Adorno, such intervention will be 'punish[ed]': Adorno, TW *Negative Dialectics* supra note 111 at 56. For the original text, see id (1966) *Negative Dialektik* Suhrkamp at 65 [*'abnden'*]. For a narrative vindicating Adorno's insight, see Legrand, P (2005) 'Comparative Contraventions' (50) *McGill Law Journal* 669.

¹¹³ Derrida, J (1967) *L'écriture et la différence* Le Seuil at 381 [*'la négativité est une ressource'*] (emphasis original). Cf Keats, J in (1958) *The Letters of John Keats* vol I Rollins, HE (ed) Harvard University Press at 193: 'at once it struck me, what quality went to form a Man of Achievement [...] — I mean *Negative Capability*, that is when man is capable of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact and reason' [emphasis original] (letter to his brothers, George and Tom Keats, dated 21 or 27 December 1817).

recovering endless bits of legal data so as to integrate them into extremely massive and intricate, but ephemeral and unenlightening, compendiums and commentaries stating what the law is', here or elsewhere. After all, '[t]o [have been] legally trained is to [have undergone] a serious reduction of one's cognitive possibilities' — not something which the habitual preoccupations with secure professional identity and boundary maintenance make readily remediable.¹¹⁴ Nor do I wish to belittle the challenge attendant upon a de-transcendentalisation or 'secularisation' of comparative orthodox discourse (I have in mind, specifically, the difficulties surrounding any demise of the tenacious claim to universalism and to its valued corollary, truth.)

III SELECTED ASPECTS OF COMPARATIVE ORTHODOXY (SUCH AS TRUTH)

One believes or wants the text to mean what one wants or believes. This search for non-difference is the strongest censorship.

Jean Bollack¹¹⁵

[T]he adequate language in which we can understand another society is not our language of understanding.

Charles Taylor¹¹⁶

Consider the orthodox approach to comparative legal studies, that which is familiar to readers of specialised journals and books in the field; that which focuses on state-sponsored expressions of what is apprehended as the characteristically 'legal' (primarily, legislative enactments and reported appellate judicial decisions); that which engages in the juxtaposition of substantive and adjectival posited law; that which ascribes significance to the placement of the 'legal' within formalised classificatory schemes; that which relegates all traces of the enculturation (or traditionality) of law to some place *beyond* (or is it *beneath*?) the 'legal'; that which makes no attempt to discern the complications associated with the act of comparison and with the modes of alienation of the comparatist; that which assumes foreign law to be unproblematically 'out there', a stable referent, its meanings uniformly present for any self-styled 'comparatist', waiting to be discovered from a fixed transcendental vantage point; that which, ultimately, seems to advocate how *easy* it is to pursue comparative work about law, for, after all, one only has to compare; that which, as it struggles to harness elusive if obstinate misprisions, evidences a field compromised by endemic problems of intellectual credibility (although, we are told, 'comparatists all over the world are perfectly unembarrassed about their methodology').¹¹⁷

¹¹⁴ The quotations are from Schlag, P *The Enchantment of Reason* supra note 29 at 144, with the exception of the last one, which is at id at 143-44.

¹¹⁵ Bollack, J (2000) *Sens contre sens* La passe du vent at 179-80 ['On croit ou l'on veut que le texte signifie ce que l'on veut ou croit. C'est la censure la plus forte que cette recherche de la non-différence'].

¹¹⁶ Taylor, C. (1985) *Philosophy and the Human Sciences: Philosophical Papers 2* Cambridge University Press at 125.

¹¹⁷ Zweigert, K and Kötz, H (1998) *An Introduction to Comparative Law* (3rd rev ed) Weir, T (trans) Oxford University Press at 33. For the original text, see id (1996) *Einführung in die Rechtsvergleichung* (3rd ed) JCB Mohr at 31 ['die Rechtsvergleicher in aller Welt (stehen) ihren Methoden durchaus unbefangen (...) gegenüber'].