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ECONOCENTRISM

The reduction of all qualities to quantities is nonsense. (Friedrich Nietzsche)[1]

For most comparatists-at-law, comparison resolves itself as a generalizing activity directed toward 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 radical 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 there is, is an abyss – an untranslatable 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 that 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*. For those who have

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1 Friedrich Nietzsche, *The Will to Power*, ed. Walter Kaufmann, trans. Walter Kaufmann & R.J. Hollingdale (New York: Vintage, 1968) at 304 §564 ('*Die Reduktion aller Qualitäten auf Quantitäten ist Unsinn*'). This text was first published posthumously in 1901.

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German, 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 assessment, 'flat.'[2]

Those who claim to have elicited a common denominator transcending laws and the places of laws, allowing for a mathematization of law, partaking in some sort of epistemological bilingualism, and permitting a rigorous Archimedean assessment (and ranking) of laws in terms of 'efficiency' are, in effect, positing a range of audacious postulates. They claim 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 socialization 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 remains 'true' to it and 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 *wertfrei* comparison and reach *wertfrei* conclusions with respect to the relative 'efficiency' of each law; and that economists can therefore ground their identification of the 'better' law on unassailable (economic) foundations. The general idea underwriting these various heuristic motions is an apprehension of comparatism as dialectical resolution favouring a progression, through immersion in a utility-maximizing framework of calculation, toward 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 more elevated 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,

2 Thomas L. Friedman, *The World Is Flat* (New York: Farrar, Straus & Giroux, 2005).

contract, torts, procedure, corporate law, bankruptcy, secured transactions, and criminal law, economists have come to consider that they can scientificize comparative legal studies by purporting to move it away from the legal pluralism and attendant relativism in which it has been (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.

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 in terms of any particular use of that language by any economist, which suggests something like a double bind – that is, embeddedness *squared.* Indeed, the enculturation of economics has always already begun (the Heideggerian temporal metaphor indicating that economics is simply unenvisageable otherwise than as culturally informed). Structurally, so to speak, economics is 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 outlined above 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,' of 'truth,' and of 'comparison.' These conceptualizations 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 'true.' In effect, there is no economic reading of the law that can materialize outside of the scholarly 'discoveries' that have punctuated technical advances in mathematics. 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 rationalization of society and the maximization of wealth, whether in the Marquis de Condorcet's 1793 texts on social mathematics or in Baron Kelvin's later musings.[3] As much as economics

3 For a compilation of Condorcet's writings on point see Condorcet, *Mathématique et société,* ed. Roshdi Rashed (Paris: Hermann, 1974); see generally Jacqueline Feldman,

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.

Numbers assume significant performative value:

> Numbers 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. ... [N]umbers 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 advertise the prowess of the measurer. To offer one of these numbers is by itself a gesture of authority.[4]

Yet, 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. Indeed, the way in which economics marginalizes 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, conceptualization and formalization, clarification and exemplification, exposition and summarization. Like positivism, too, economics displays conservative

'Condorcet et la mathématique sociale : enthousiasmes et bémols' (2005) 172 Mathématiques et sciences humaines 7. For the views of Kelvin see William Thomson (Baron Kelvin), *Popular Lectures and Addresses*, vol. 1 (London: Macmillan, 1891) at 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.' The quoted passage dates from 1883.

4 Deborah A. Stone, *Policy Paradox and Political Reason* (New York: HarperCollins, 1988) at 136–7. For a comprehensive argument along these lines see Janice G. Stein, *The Cult of Efficiency* (Toronto: House of Anansi Press, 2001); Stephen A. Marglin, *The Dismal Science: How Thinking Like an Economist Undermines Community* (Cambridge, MA: Harvard University Press, 2008).

affinities, a glorification of empiricism, a kind of ascetic endorsement of reification, a brand of religiosity sacralizing its object of study (lawyers revere texts, economists numbers), and the assertion of a will to power.[5]

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,[6] 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 instrumentalizes values, economic analysis speaks to our conception of ourselves as moral beings. Along the way, it significantly impoverishes us. None of this, of course, is to suggest that when it comes to law one can somehow dispense with the question of cost (nor is it to deny that markets can be credited with promoting economic growth, which in turn can be ascribed various 'goods'). Rather, the 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, a conceptualization of 'what there is,' such that, ultimately – the hubris 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 minimize 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 well off as possible given the resources available; that markets are therefore good for people; that

5 See generally Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton, NJ: Princeton University Press, 2008) at 90–134, 181–219.

6 For an attempt at an economic 'displacement' of the idea of 'legal culture' see Anthony Ogus, 'The Economic Basis of Legal Culture: Networks and Monopolization' (2002) 22 Oxford J.Legal Stud. 419. While this argument relieves us from the tedious banality of so-called 'comparative law and economics,' its claims remain obscure, other than to make evident the economist's habitual obsession with rationalization 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 & Vincent Mosco, 'Integrating a Continent for a Transnational World' in Vincent Mosco & Dan Schiller, eds., *Continental Order? Integrating North America for Cybercapitalism* (Lanham, MD: Rowman & Littlefield, 2001) 1 at 29.

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 maximize well-being 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 recognizing a role for 'behavioural' elements in the relevant equations); and that a politics of individual aspiration in a minimally regulated, self-equilibrating market system is worthy of support? As it makes these claims, economics advances not only an epistemological argument but also an ontological one. Having initially posited capitalistic rationality, economics determines that what does not meet the standard of efficiency *it* has set – for example, the French law of 'real estate' transactions – must be challenged in its very being. It must cease to exist as it is and become, for example, the English law of real estate transactions.

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-at-law cannot refrain from wanting foreign decisions in a judicial opinion. Yet 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'[7] – a claim that clearly militates against reference to foreign materials as 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 nature of the information available to legal actors (say, judges) proves even more debilitating than usual. In the name of the recognition and respect due to other laws (let us say, on account of a politics *for* alterity), I argue that the dilemma between economics and comparative legal studies must resolve itself in favour of comparison. The economists' response would no doubt be at variance with mine.

7 Oona A. Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' (2001) 86 Iowa L.Rev. 601 at 663. Hathaway offers a persuasive development of the intricate relationship between path-dependence theory and common-law adjudication.

I began with 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 the 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.[8] 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 conjecture and hypothesis. 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, economics, or whatever. 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 someone's understanding of the meaning and relevance of transaction costs (or whatever).

To those who like economics with their dinner, 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. For those who remain unfamiliar with the economic mindset, here is a good example of how implausible economic analysis can rapidly become when it insists that law and economics can be tallied on a single scale. The relevant case is *Lindh v. Surman*,[9] in which the Supreme Court of Pennsylvania held that where an engagement ring

8 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 the recipient of an ascribed identity, for example, 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' (*i.e.*, while being encouraged to obliterate moral or social frames of apprehension). In fulfilling a regulatory function by setting the limits of what is and is not acceptable, the power of discursive authority acts on me and subordinates me to it and to its domination. Yet this authoritative discourse also *constitutes* 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.

9 742 A.2d 643 (Pa. 1999).

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. Infirming 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 analysis 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.[10]

Indeed!

10 'Property Law. Pennsylvania Supreme Court Holds That Engagement Rings Must Be Returned Regardless of Who Broke the Engagement. *Lindh* v. *Surman*, 742 A.2d 643 (Pa. 1999),' Note, (2000) 113 Harv. L.Rev. 1876 at 1880–1.