

Comparative Law's Shallows and Hollows: A Negative Critique on Ablepsy*

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'I found myself facing a phenomenal disorder of thought
[...] that [...] made me ashamed.'
— Duras¹

* A review of Sabrina Ragone and Guido Smorto. *Comparative Law: A Very Short Introduction*. Oxford, Oxford University Press, 2023. 145 pp. ISBN 978 0 19 289339 0.

** I teach comparative law at the Sorbonne. Having very generously agreed to read my essay, two comparatists-at-law offered numerous ameliorating observations, many of them consequential. They are aware how genuinely grateful I am to them for their critique of my negative critique. Moreover, two other comparatists-at-law most selflessly tendered specific assistance in answer to my substantive questions. I am in my colleagues' debt for their unstinting help, which in both cases extended well 'above and beyond'. One of my advisers, Geoffrey Samuel, who counselled me on the common-law tradition, agreed to be named and is therefore duly credited at the appropriate junctures. My further guide, who shared his expertise on Islamic law with me, chose anonymity. I welcome this opportunity to convey my heartfelt appreciation to Michael Palmer for his most gracious and unwavering scholarly mentorship over the many years. All along, I have also been fortunate to benefit from Brian Hill's thoroughly professional editorial guidance. For the record, the usual disclaimer applies. This text's documentation is current to 1 July 2025. Free-standing page references are to the book under consideration. I consistently mobilize primary works, reproduce original emphases, and supply my own translations unless I indicate otherwise. Throughout, I affirm my convictions as interpretations, not as objectivity or truth. Indeed, speculation is all that can legitimately be required of me — even as I hold that my assertions are effectively inescapable. Perhaps is it still worth adding to the obvious, however, and specify that my argument exclusively concerns words, concepts, ideas, theories, practices, or institutions. It does not in the least purport to impugn individual motivations, private character, or particular qualities. My focus, then, is squarely on comparative law — how it is constructed and how it is implemented — rather than on the moral intimations informing any specific comparing mind. (As it happens, I do not entertain the least acquaintance with the co-authors, whose very existence remained unknown to me until I came across their joint publication.) By contrast with the flow of a burst pipe, which simply spills and does not go anywhere helpful, my (immodest and possibly quixotic) aspirations as I generate the stream of words at hand are for these to tend the flame of foreign-law research, not least as it is flickering ever so precariously, and to steer the comparison of laws in a more creditable and illuminating epistemic direction. This writing is thus, resolutely, an exercise in *scholarship*: all that matters to me is the fate of comparative law, not personal considerations or sensitivities. In my interpretation, comparative law must be rescued from frivolity or superficiality, from shallowness and hollowness. It demands to be emancipated and empowered. Meanwhile, it will not escape my reader's eagle eye that I am unabashedly writing in the spirit of Edward Said — 'the whole point is to be embarrassing, contrary, even unpleasant': Said, EW (1994) *Representations of the Intellectual* Pantheon at 12. Or that I expound in line with George Steiner — '[t]here are questions we must be tactless and undiplomatic enough to raise if we are to stay honest with ourselves and our students': Steiner, G (1967) *Language and Silence* Faber & Faber at 61–62. Both learned and noteworthy exponents of comparative literature, Said and Steiner were bravely dissonant intellectuals of the kind that now appears in exceedingly rare supply.

¹ Duras, M (1985) *La Douleur* Gallimard at 12 ['Je me suis trouvé(e) devant un désordre phénoménal de la pensée (...) qu(i) (...) m'a fait honte'].

'There [a]re enough mistakes there to last several [comparatists] their lifetimes: perhaps one a page, and nothing trivial or debatable either — really solid, load-bearing, disfiguring, nonsensical, career-ending mistakes.'
— Hofmann²

'Whereof one cannot speak, thereof one ought to be silent.'
— Wittgenstein³

Indebted to Biblical Hebrew and Rabelaisian French, *tohu-bohu* means '[t]hat which is empty and formless; chaos; utter confusion', or so claims the electronic edition of the *Oxford English Dictionary* (OED) — a fitting sobriquet, I suggest, for the meretricious *Comparative Law: A Very Short Introduction* (VSI), a text easily assignable to 'comparative law's dark side'.⁴ A demonstrably anachronistic and trifling composition, this opusculum appears to me utterly remiss. Even as they purport to survey comparative law, the two co-authors are not responding to many of the field's key geo-epistemic quandaries, to a number of its salient writings, and to several of its noteworthy people — the combination of their omissions and inclusions straining credibility. It is as if the work had been produced through recurrent staring into a deforming glass. On the whole, the VSI stands as a repeatedly misleading and unreliable disquisition. I do not have in mind intermittent mishaps since one, of course, forgives the odd lapse as one expects one's own sporadic slip to be absolved (including *meare* typo). Instead, I envisage a comprehensive foundering — and I do mean *comprehensive* (as in total), and I do mean *foundering* (as in disaster).

The assumption that comparatists writing a book like the VSI would reveal exigent ambition and rousing exhilaration, something like electricity of spirit or even an irreverent vibrato; the presumption that comparatists writing a book like the VSI would embrace jaunty contrarianism and proceed to articulate an eloquent view of comparative law that would defeat lauded or sacred cows, unmask charlatans, and disclose impostures; the expectation that comparatists writing a book like the VSI would dare puncture the persistent epistemic bloating so as to make comparative law come alive — none of these postulates, I submit, animated the co-authors' comportments as they chose rather, at once drably and meekly, to confine their scope within the feerings having long delineated the field even as these are nowadays increasingly and persuasively regarded as unfertile. To lift a Joycean neologism from the incandescent *Ulysses*, the self-

² Hofmann, M (14 December 2017) 'Out of Babel' *London Review of Books* at 21. I have substituted 'comparatists' for Michael Hofmann's 'translators'. Hofmann was reviewing Bernhard, T (2017) *Collected Poems* Reidel, J (tr) University of Chicago Press.

³ Wittgenstein, L (1922) [1921] *Tractatus Logico-Philosophicus* Ogden, CK (tr) Routledge and Kegan Paul §7 at 188 ['Wovon man nicht sprechen kann, darüber muss man schweigen']. A stronger claim is Joseph Beuys's: 'Anyone who does not want to think takes himself out' ['Wer nicht denken will, fliegt sich selbst raus']. Beuys inscribed this stirring statement on a postcard — one of his many idiosyncratic 'canvasses' — that Heidelberg's Edition Staack initially printed in 1977. See generally Riegel, HP (2021) *Beuys* vol II Riverside at 151.

⁴ Frankenberg, G (2016) *Comparative Law as Critique* Elgar at 7.

indulgent VSI is 'arruginated' (from the Italian 'arrugginire', a term implying a condition of rustiness).⁵

It is striking — and, I think, most preoccupying — that the VSI's selected themes should be tracking so faithfully topics long familiar and soothing to Italian comparatists, no matter how arguably hackneyed and attestably devoid of intellectual interest, while path-breaking questions remain confined outside the stubbornly peninsular box. Nor do the narcissism and censorship that I feel able to detect apply only to the pick and treatment of issues. In the course of their disquieting study, I suggest that the co-authors deploy worrisome fidelity to their Italian clan.⁶ On account of its solipsistic propensities, the VSI thus parades minor if companionably Italianate comparatists while excluding significant names located beyond the vestrydom, individuals somehow deemed uncongenial.

Anyone cherishing the emancipatory promise of comparison, any jurist discerning in the comparison of laws the resources to foster an advantageously contrapuntal flourishing of the legal mind, any comparatist taking the theory and practice of comparative law at all seriously, is bound to regard the insolent and sectarian VSI — a poorly written piece also, often to the point of incomprehensibility — in terms of a calamitous arrival on the academic scene. Faced with the VSI's exhibition of active ignorance and epistemic injustice, the reader in search of an overview of comparative law that would treat the enterprise fairly instead of basking in parochialism and nationalism, matritism and patriotism, must be kept waiting. Comparatists-at-law are thus encountering yet another epistemic tragedy compounding the deeply entrenched philistinism that Günter Frankenberg pioneeringly, gallantly, and lonelily castigated all these years ago — yet a further script, then, regrettably draining the comparative experience of colour and light.⁷

To be sure, a decisive redeeming feature pertaining to the VSI is that it is, well, so very short that it cannot realistically establish itself as a governing comparative-law text. Yet, although it will not become any seasoned comparatist's lodestar, the VSI cannot be expected to languish in obscurity either, no matter how much it warrants oblivion. The VSI is so conveniently condensed, portable, and cheap (it contains images, too!) that it should rapidly be confirmed as optimally student-friendly (comparatists teaching in English law schools tell me that students are spontaneously resorting to the VSI). If one wants to abide by the principle of charitable interpretation, which I greatly value, I reckon that the very best one can say of the VSI is how it is a publication attuned to the social network ecosystem: while Gutenberg made it possible for everyone to become a reader, Zuckerberg has afforded everyone the opportunity to turn into a writer. The VSI thus heralds two individuals who assume they can write, and

⁵ Joyce, J (1986) [1922] *Ulysses* Gabler, HW; Steppe, W and Melchior, C (eds) Bodley Head at 577 (line 1215). The 1984 Gabler edition is widely regarded as authoritative.

⁶ In his 1620 *Novum Organum*, Francis Bacon mentions idolization of the tribe as one of the four illusions leading to error. See Bacon, F (2000) [1620] *The New Organon* Jardine, L and Silverthorne, M (eds) Cambridge University Press at 40–42 and 46.

⁷ I allude to Frankenberg, G (1985) 'Critical Comparisons: Re-thinking Comparative Law' (26) *Harvard International Law Journal* 411. For an overhaul of the thesis, see Frankenberg, G *Comparative Law as Critique* supra note 4. With Simone Glanert, I submitted a negative critique in Glanert, S and Legrand, P (2017) 'Law, Comparatism, Epistemic Governance: There Is Critique and Critique' (18) *German Law Journal* 701.

who consider they are able to do so in English, all the while blithely collecting snippets of unreferenced assertions drawn from highly selective sources located well within a narrow comfort zone and concentrated in a form inviting easy absorption, the entire assortment lacking the intellectual vitamins essential to basic mental nourishment, indeed disclosing astonishing levity replete with appalling misinformation yet boasting some images in order to smoothen accessibility, to enhance *storyability*. (Contrariwise, this review, an artefact of a vanishing civilization trailing its nimbus of ever-receding possibility, withstands trendyism and its abrupt brevities, determinedly shunning the contemporary's brisk cadences and secondary-school vocabulary.)

It must follow, in my view, that the dedicated comparatist — the comparatist pledged to the pursuit of rewardingly erudite, of edifying comparative legal studies — has *eagerly* to keep law graduates and postgraduates away from this publication in the students' own interest so that they do not have to unlearn the stunting flotsam they will elsewhere encounter. It is not, then, that the VSI cannot be recommended: it is more precisely that its use must be actively discouraged, nay prohibited, that this tract must be prevented from exerting a productivity. Or so I maintain on the basis of my repeated close readings of the text.

The output of two Italian law professors unencumbered by reputation and presumably bereft of institutional authority beyond their respective *campanili*, who remain sadly trapped in the terrible, suffocating hydra of discipleship and the tail-chasing self-regard to which such subordination is inevitably susceptible; two figures whose names have not been linked to any of the debates spurring the redressal of comparative law that a handful of comparatists have been dauntlessly pursuing over three decades or so; two persons whose writings have not had any ascertainable influence on the comparison of laws and whose publications cannot be connected to any specific word, expression, or concept that they would have added to the comparatist's equipment — or, to apply the 'Samuel Test', two academics whose articles do not appear on comparative law's reading lists (at one of our regular Paris Tuesday dinners *in illo tempore*, my colleague and friend Geoffrey Samuel preconized that a judicious approach to gauge a comparatist's impact is simply to ask where he is on the reading list); two characters whose authorial roles — even though it has long been shown that 'reading must not be content to duplicate', to '*protect*'⁸ — are ultimately reducible to those of recyclers of the orthodox and uninquisitive pieties that already exist and have long been the way they are; two ardent worshippers, a good girl and a good boy having docilely ingested and digested all their Sacco and now being content with the mystic reverence and drudgery that one associates with the hypnotized 'sheeping' of commentary;⁹ two 'chartered recountants' working for the state that fabricated them as civil servants according to the demands of the local institutional machinery (and therefore partaking of the state's

⁸ Derrida, J (1967) *De la grammatologie* Editions de Minuit at 227 ['la lecture ne doit pas se contenter de redoubler'; '*protéger*'].

⁹ Foucault, M (1971) *L'Ordre du discours* Gallimard at 27 ['moutonnement']. In trying to translate Michel Foucault's untranslatable French term, my neologism seeks to capture the imagery of a text whose writers have renounced *Selbstdenken* and that adheres, at once unwittingly and willingly, to a model deemed eminent and, in particular, to a specific *maestro's* template — not unlike how sheep attach to the flock. There is abdication, and it is wanted. An inadequate Italian corollary might be *gregarismo*.

disciplinary apparatus),¹⁰ this monograph warrants sinking without a trace (except as an example of how not to do comparative law and thus for contrarian, negative critiques to treat as a grand teachable moment through inspection and dissection), its referential echo — its power as a reference tool — most hopefully remaining on a par with that of a feather hitting the ground from the top of the Grand Canyon.¹¹

In my estimation, comparatists-at-law who remain politely placid and stolid in the face of the dissemblingly pallid and flaccid VSI — what would be an instance of deplorably misplaced tact (unless their retreat into quietism be about the safeguarding of a personal or professional investment in milquetoasting) — are effectively announcing their abdication from earnest epistemic standards and forswearing any willingness to jettison the pattern of satisficing that has been plaguing the field where they declare to be occupying themselves in a worthwhile manner. Comparatists for whom the VSI fails to register on the Richter scale of catastrophism, whom the VSI and its woefully etiolated account of comparative law does not shock out of their hardened accidie, cannot be paying attention. For my part, I forcefully contend that the dismaying character of the VSI properly makes it unignorable. What the tenured class within comparative law also ought to regard as unignorable is the upsetting waste of an auspicious editorial opportunity to register the kind of vigorous case for comparison that could have furnished a modest riposte, cogently epigrammatic, to the resurgent insanities of ethno-nationalism within the geopolitical mayhem — it is now midsummer 2025 — targeting, by way of the most archaistic postures, migrants, students, imports, and other deemed rogues.

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The shortest way out of the VSI is through it, but then the shortest way through the VSI is out of it. By choice, I shall therefore limit my negative critique to a circumscribed list of principal concerns only, a self-imposed restriction that I find justifiable in terms of everyone's sanity (not least my own). If the VSI could be analogized to a symphony, it might make sense for me to engage in the discussion of four main topics. Given what I observe to be the staggering interpretive immaturity of the enterprise I am addressing, however, the only musical affinity that comes to mind is the kazoo (apologies, I suppose, being due to kazooists). Still, I must set a limit to my negative retrieval — and why not... ten rubrics? In the process, I allow myself the liberty to re-arrange the VSI's contents around general themes that I regard as exemplary of the manner

¹⁰ Beckett, S (1984) [1936] 'An Imaginative Work!' in *Disjecta* Cohn, R (ed) Grove at 89. For compelling studies on the subjugation of the law teacher as civil servant, see Legendre, P (2005) *L'Amour du censeur: essai sur l'ordre dogmatique* (2nd ed) Editions du Seuil; Legendre, P (1976) *Jour du pouvoir: traité de la bureaucratie patriote* Editions de Minuit.

¹¹ Although I am not an aficionado of the *Very Short Introduction* library by any means, I notice that the series features Jonathan Barnes on Aristotle; Henry Chadwick on Augustine; Jonathan Culler on Barthes; Roger Scruton on Beauty; John Sutherland on Bestsellers; Hermione Lee on Biography; Mary Beard on Classics; Ben Hutchinson on Comparative Literature; and Susan Blackmore on Consciousness — to limit myself to the first twenty per cent or so of an alphabetical list of titles numbering approximately eight hundred entries at this writing. In other words, the contributors to a VSI are often distinguished writers drawing on the eminence or prestige they are held to have achieved within a given field so as to produce authoritative texts. For a conspicuous instance of analytical leverage and sophistication informing a synopsis that concerns a discipline evolving in the intellectual vicinity of comparative law, consider Hutchinson, B (2018) *Comparative Literature: A Very Short Introduction* Oxford University Press.

in which this book has disqualified itself as a worthy source of information concerning the theory and practice of comparative law. In other words, I eschew stichomythia in favour of a serendipity of sorts, and I maintain that the extensive compendium of exhibits I have arrayed justifies my fiery dismissal.

Before I turn to my negative critique in earnest, I require to insist on the fact that I consider one of the VSI's most damning deficits to be its forgoing of independent thought in favour of discipleship — a self-engulfment in the conventionality of craft that is typical of law's institutionalization in continental Europe and prevents the opening of spaces of critical contestation or political intervention thereby foreclosing structures of resistance vis-à-vis the established order (my observation about intellectual vassaldom being easily expendable to Europe's colonial offshoots). In this instance, the shaman is Rodolfo Sacco (as I think of Sacco, it occurs to me that shaman can be a long way of saying 'sham' — however, so the expression goes, this is another story). Of course, intemperate disciplinary allegiance is not expressly proffered anywhere in the book, for alienation works in far more subtle ways (thus discipleship permits to say something other than the master-teachings themselves on condition that it be the master-teachings themselves that be said). Yet, I claim that the unmistakable clues are present for anyone at all familiar with the *diritto comparato* scene.

The most significant hints, in my view, are that Sacco is the very first contemporary comparatist the VSI mentions (4) and the one the co-authors treat as comparative law's principal theoretician (73–76) — an excellent illustration of the all-Italian disfiguring perspective that informs the VSI (who meaningfully reads or applies Sacco outside of Italy except perhaps tethered Italian expatriates?), a *bel paese* outlook that is properly indefensible in light of the VSI's intended readership and that I proceed to corrigé throughout this essay. (As regards Sacco, I find the VSI's formulation 'methodologists like Rodolfo Sacco' [4] peculiar. Ignoring the fact that I have never seen this term being deployed in any comparative-law setting, that I have never come across anyone, then, being styled a 'methodologist', I think the word inappropriate. No matter what one thinks of Sacco's work, it is wrong to cabin him in the manner of the VSI.) For me, another incontrovertible indication of unbecoming discipleship is the inclusion in the *freakish* bibliography of the transcript of an interview that I conducted with Sacco in 1994 and 1995. I can adduce three compelling reasons at least why my Sacco question-and-answer session should never have been saluted in the VSI and why the only sensible interpretation arising from its commendation must pertain to an obnubilation with Sacco on the co-authors' part, what I parse as a striking implementation of disturbing discipular devotion (again, an institutional practice characteristic of continental Europe's academic-ways-in-the-law).

First, my text is in French (Sacco insisted that the interview should take place in this language). As such, it scarcely deserves to be mentioned in a very short book written in English for an anglophone readership. In this specific context, a French reference is useless clutter. Secondly, the *Revue internationale de droit comparé*, where the exchange was published (again, at Sacco's exhortation), is a mediocre journal (I should know as I myself contributed early-career writings to the *Revue* on six occasions between 1992 and 1999). No article having ever appeared in this venue is worth being mentioned in a survey like the VSI's — a panorama where the brevity inherent to the project entails that every word must count, that every reference must matter. Under such circumstances, selectivity

demands to err on the side of intellectual intransigence, a motion that readily has to exclude the dismal *Revue*. (*Anecdotally*, I once met the editor as I was crossing *place de la Sorbonne* on my way to class. He informed me that he had recently received a submission from one DJ, and did I know the person? It so happened that I was acquainted with the author and felt able to vouch in the most general terms for the individual's decency. With evident relief, the article was declared accepted forthwith and duly printed accordingly. This peer-review process by-the-Sorbonne-fountain must rank as one of the fastest — and least confidential — not on record. I could add a more recent story from April 2025. But I think that my *place de la Sorbonne* report tells one all one needs to know about the *Revue*, and I therefore rest my case.¹²) Thirdly, my article is not nearly as luminous as it could have been if Sacco had not mostly supplied exiguous and flippant answers. As I peruse my 115 questions some thirty years later, I find that they very much stand their ground (if I may say so myself). I had done my homework. Alas, I experienced conceit, perhaps condescension also.¹³ (I well recall my disappointment as I repeatedly tried to elicit elaboration from my fellow comparatist. I had been an affable fan, but an indisputably underwhelming conversation along the lines of a gimlet without the gin permanently stultified my enthusiasm. Afterwards, I found myself reading Sacco perfunctorily and referring to him parcimoniously only.) Deservedly consigned to the ever-growing scrapheap of comparative-law publications inviting more or less unrestrained discardment, my text has now been rescued from justified oblivion and, phoenix-like, made to rise from its printed ashes. Again, I hold that the only plausible explication for this unseemly renaissance must have to do with the name of my interviewee, the sun that the co-authors have been orbiting whom the VSI was always-already set to adulate.

Not least if they were trained in the common-law tradition, comparatists may find it hard to fathom the far-reaching lengths that discipleship civil-law style may reach. And since I am incriminating the VSI for what I perceive as its intellectual servility, I am keen to underline the point about relinquishment of freedom of thought. Appropriately, my *anecdota* stages Sacco once more. It was early February 1995, and I had been summoned to preach to the masses assembled at the university of Torino. Whether by request or on my initiative,

¹² I have long learned to cherish the harnessing of anecdotes as a source of useful comparative information. And I steadfastly agree with Jacques Derrida as he writes that 'the *relation to the anecdote* is in itself what one must transform': Derrida, J (2022) [December 1976] [Personal Notebooks] in Peeters, B *Derrida* (2nd ed) Flammarion at 361 ['le rapport à l'anecdote est en lui-même ce qu'il faut transformer']. When one hears Holger Spamann taking advantage of a public platform to ridicule the normative value that I attach to anecdotes (I refer to his Harvard inaugural lecture of 29 September 2022), one readily appreciates what Derrida had in mind as he castigated an anecdotal demeanour that has traditionally been 'constricted, contorted, repressed' and as he argued that '[a]ll the "good reasons" for this repression must be doubted': *ibid* ['étranglé, crispé, réprimé'; '(t)outes les "bonnes raisons" de cette répression doivent être soupçonnées']. In terms of Derrida's 'good reasons' that someone would have to assault *anecdota* (and *anecdatalography*), two justifications making sense of Spamann's orthodox, censorial, and contemptuous anti-humanistic manner leap to mind, one having to do with his training as a German jurist in his native Germany all the way to the second state licensing examination ('zweites juristisches Staatsexamen'), the second, of course, concerning his 'arithmomani[a]': Beckett, S (2010) [1934] *More Pricks than Kicks* Nelson, C (ed) Faber & Faber at 60.

¹³ For the published transcript of my frustrating negotiation with Sacco, see Legrand, P (1995) 'Questions à Rodolfo Sacco' *Revue internationale de droit comparé* 943. In the course of my brief self-appointed examinant phase, I also launched an interview with John Merryman. A juxtaposition of the two conversations hardly works to Sacco's advantage. See Legrand, P (1999) 'John Henry Merryman and Comparative Legal Studies: A Dialogue' (47) *American Journal of Comparative Law* 3.

I cannot now tell, I allocated one of my presentations to comparative contract law — specifically to the question of judicial revision of contracts, the theme of my Oxford dissertation. (Back in the day, this topic had been nothing short of subversive, and I remember Barry Nicholas adamantly refusing to supervise me in the fall of 1983 unless I substituted ‘interpretation’ for ‘revision’ — judges certainly did *not* revise contracts — which I self-opiniatedly declined to do, hence Bernard Rudden and my subsequent life of exalting torment.) At the end of my Torino intervention, having impressed upon my audience the considerable and fascinating theoretical ramifications arising from judicial revision of contracts, I encouraged the students before me seriously to consider this subject-matter should they be in search of thesis or dissertation material. No sooner had I spoken my parting words that Silvia Ferreri, the mistress of ceremonies, proceeded expressly to countermand me.

In a febrile voice, Ferreri rescinded my entreaty to research judicial revision of contracts. She promptly advised the congregation to steer clear of judicial revision of contracts altogether because, would you believe, Sacco had lately *taken an interest* in the topic. Ferreri, a Sacco disciple *per eccellenza*,¹⁴ was actively carving a zone of scholarly exclusivity for her *maestro* — someone who had seemingly lapsed into terminal venerability. Whenever I have narrated this Italian moment to common-law lawyers, I have encountered unmitigated incredulity (I recall an esteemed Chicago colleague: ‘This is crazy.’) But I am not seeking to rehearse my epistemic claim about the impossibility of understanding across legal cultures. What I do want to foreground instead is how deep the sway of intellectual subjugation can prove to extend, not least in Italy (again, though, the problem is symptomatic of law teaching and research throughout continental Europe).

As it offers a particularly potent example of this striking (and strikingly unscholarly) phenomenon, the VSI stands to my mind as a paean to the induration of academic obsequiosity (at times evoking saphrophagy), a shopping-bag of attitudes and awarenesses plucked from readily available selves and shelves, from near-at-hand formulations of taste, all juvenily inscribed — ‘as Laura Nader has explained’ (11), ‘as Günter Frankenberg remarked’ (13), ‘as Ran Hirschl names them’ (16), ‘as [Konrad] Zweigert and [Hein] Kötz put it’ (27), ‘as William Twining termed it’ (27), ‘In [Patrick] Glenn’s account’ (27), ‘According to [Alan] Watson’ (31), ‘According to [Gunther] Teubner’ (35), ‘[as] narrated by Werner Menski’ (36), ‘as Günter Frankenberg terms it’ (37), ‘as John Henry Merryman would put it’ (38), ‘according to Harold J Berman’ (40), ‘as pointed out by Edward Goldsmith’ (41), ‘as Upendra Baxi underlines’ (42), ‘according to Harold J Berman’ (60), ‘According to [Ernst] Rabel’ (70), ‘As [Konrad] Zweigert and [Hein] Kötz posited’ (71), ‘According to [Rudolf] Schlesinger’ (72), ‘According to [Rodolfo] Sacco’ (75), ‘as Günter Frankenberg termed it’ (77), ‘as George Fletcher advocates’ (78), ‘as John Bell suggests’ (79), ‘According to [James] Whitman’ (82), ‘According to [Mirjan] Damaška’ (84), ‘as John Langbein advocated’ (85), ‘As William Twining declared’ (89), ‘as Jaakko Husa suggests’ (89), ‘according to Basil Markesinis’ (90), ‘as [Otto] Kahn-Freund concludes’ (91), ‘According to [Konrad] Zweigert and [Hein] Kötz’ (97), ‘As Geoffrey Samuels

¹⁴ Eg: Ferreri, S (2024) ‘The Language Issue in Law: A Recollection of Rodolfo Sacco’s Contribution to Interpretation’ (37) *International Journal for the Semiotics of Law* 1521. This article partakes of a special issue that a number of his disciples have posthumously dedicated to Sacco, the selected venue operating, in my estimation, at the apposite intellectual level.

[sic] suggests' (99), 'As Vivian Curran shows' (103), 'As Roscoe Pound recognizes' (103), 'According to [Alan] Watson' (104), 'as David Kennedy terms it' (106), 'as [...] underlined by Otto Kahn-Freund' (108), 'as David Law names them' (108), 'in the words of Daphne Barak-Erez' (109), 'as Albert Chen has recently shown' (114), as '[it] has been called by Michael Bogdan' (114), and 'As Tom Ginsburg once suggested' (129) — every attribution sans reference, if you please.

Quite apart from the vexing issue of fawning discipleship or ventriloquism, I must amplify the concern I have already raised regarding the exaggeratedly Italian focus that the VSI is bringing to bear on comparative law — an insistence reaching well beyond, then, the exorbitant relevance being bestowed on Rodolfo Sacco. I can only assume that a satisfactory peer-review system would have duly shaken the publishers into comparative wakefulness by reminding the commissioning editor how incongruous it is — how *inadmissible* it must be — that a comparative-law volume destined for no less than a planetary readership should be designed as the work of two law teachers who are both primarily trained in Italian law in Italy and who are both primarily teaching Italian law in Italy, who are both primarily teaching in Italian, and who are both primarily writing in Italian about Italian legal issues and primarily publishing in Italy — who are both products of Italian legal culture and instigators within Italian legal culture. In sum, the empirical facts of the matter are that, like everyone else, the VSI's co-authors come from somewhere specific, a location that in their case is Italy, and that they have always-already been thrown into a singular meaningful world that they have significantly absorbed, a configuration that in their case is Italian legal culture. And what the co-authors cannot do, any more than any other comparatist, is to deny that their enculturation matters (no thought is self-dependent, and no comparatist is the author of himself) or to rewrite the narrative of their upbringing into law and of their education into comparative law.

As they perform within an impassable Italian *horizon*,¹⁵ the co-authors writing the VSI could not start from anywhere else than where they had been and where they were, from their *thereness*: they could not erase their Italian socialization or their Italian institutionalization into law or comparative law, their Italocentrism-at-law.¹⁶ In his autoportrait, Giorgio Agamben, a leading Italian philosopher, forsakes the illusion of independent agency and succinctly

¹⁵ For an influential thematization of 'horizon', a concept of the utmost pertinence for comparative law, see Gadamer, H-G (1986) *Wahrheit und Methode* (5th ed) Mohr Siebeck at 250–52, 307–12, 442–94, and passim. However, I part ways with Hans-Georg Gadamer when he advocates for the desirability and feasibility of a 'fusion of horizons' ('*Horizontverschmelzung*', literally 'horizon-melting') across selfness and otherness. See generally Rosen, S (1997) 'Horizontverschmelzung' in Hahn, LE (ed) *The Philosophy of Hans-Georg Gadamer* Open Court at 207–18. For a thoughtful critique, see Vitkin, M (1995) 'The "Fusion of Horizons" on Knowledge and Alterity' (21) *Philosophy & Social Criticism* 57. For my demurral, see Legrand, P (2017) 'Derrida's Gadamer' in Glanert, S and Girard, F (eds) *Law's Hermeneutics: Other Investigations* Routledge at 151–55.

¹⁶ Cf Derrida, J *De la grammatologie* supra note 8 at 233: 'One must begin somewhere where we are' ['Il faut commencer quelque part où nous sommes']. Likewise, Martin Heidegger explains in his early correspondence that '[he] work[s] concretely[,] factically from [his] "I am" — from [his] spiritual and above all factual origin — [from his] environment — [from his] life connections, from what is, from there, accessible [to him] as living experience, from that within which [he] live[s]': Heidegger, M (1990) [19 August 1921] [Letter to K Löwith] in Papenfuss, D and Pöggeler, O (eds) *Zur philosophischen Aktualität Heideggers* vol II Klostermann at 29 ['Ich arbeite konkret faktisch aus meinem "ich bin" — aus meiner geistigen überhaupt faktischen Herkunft — Milieu — Lebenszusammenhängen, aus dem, was mir von da zugänglich ist als lebendige Erfahrung, worin ich lebe'].

formulates the apt epistemic position: '[W]e cannot tear ourselves from ourselves nor abjure ourselves.'¹⁷ Evidently, '[a]s comparatists, we are beholden to our own preconceptions',¹⁸ to our prejudicial fore-structure (etymologically, and not at all derogatorily, prejudices are pre-judgements, thus all manner of predilections and predispositions, furnishing one with one's interpretive equipment, constituting one as interpreter): there is the 'intrinsic prejudicialness of all understanding'.¹⁹ To say it with Samuel Beckett — a comparatist *à côté de la lettre* who ranged constantly across (European) literary, musical, and painterly traditions, not to mention languages — 'I'm in words, made of words, others' words, [...] I'm all these words, all these strangers, [...] I am they', the term 'words' here lending itself to the widest semantic extension so as to include formulations, pedagogies, impressions, profferings, lucubrations, practices, and other manifestations of culture's accoutrements.²⁰ No comparatist is *filius nullius*, of unknown intellectual parentage.

Because the Italian co-authors are 'contingent creatures of circumstance' who are 'always already compromised',²¹ everything potentially addressable within the emaciated and nebulous VSI — objectivity or truth, the Orient or the Global South, George Fletcher on comparison as epistemic subversion or Daniel Bonilla Maldonado on orthodox comparative law's age-old fabrication of legal barbarians — must *inevitably* be filtered through an Italian normative perspective: '[T]he national fact, the framework of a nation that you're in, is a collective part of your individual personality.'²² Once more, the problem that I confront is not limited to Italy and not proper to the VSI: there being no view from nowhere, '[c]omparing inevitably involves distorting.'²³ It is according to this particular meaning, in this hugely *meaningful* sense, that comparison is a prison, that there exists a *compaprisson* — an 'art of incarceration'²⁴ — a phenomenon whereby 'comparison narrows our horizons as much as it expands them.'²⁵ And

¹⁷ Agamben, G (2017) *Autoritratto nello studio* Nottetempo at 31 ['(N)on possiamo strapparci da noi né abiurarci']. Cf Noë, A (2023) *The Entanglement* Princeton University Press at xii: 'There is no way of delivering ourselves once and for all from the unfreedom that makes us what we are.'

¹⁸ Hutchinson, B (2022) 'Comparativism or What We Talk About When We Talk About Comparing' (6) *Journal of Foreign Languages and Cultures* 15 at 16.

¹⁹ Gadamer, H-G *Wahrheit und Methode* supra note 15 at 274 ['wesenhaft(e) Vorurteilshaftigkeit alles Verstehens']. I explore the prejudicial fore-structure at greater length in Legrand, P (2023) 'Negative Comparative Law: The Sanitization Enterprise' (10) *Revista de investigações constitucionais/Journal of Constitutional Research* 1 at 18–22.

²⁰ Beckett, S (2010) [1958] *The Unnamable* Connor, S (ed) Faber & Faber at 104.

²¹ Hutchinson, B 'Comparativism or What We Talk About When We Talk About Comparing' supra note 18 at 16.

²² Jameson, F (2024) *The Years of Theory* Verso at 15. My examples in the body text point to Fletcher, GP (1998) 'Comparative Law as a Subversive Discipline' (46) *American Journal of Comparative Law* 683; Bonilla Maldonado, D (2021) *Legal Barbarians: Identity, Modern Comparative Law and the Global South* Cambridge University Press.

²³ Hutchinson, B 'Comparativism or What We Talk About When We Talk About Comparing' supra note 18 at 23.

²⁴ Beckett, S (1994) [1948] 'Peintres de l'empêchement' in *Disjecta* Cohn, R (ed) Grove at 137 ['art d'incarcération'].

²⁵ Hutchinson, B 'Comparativism or What We Talk About When We Talk About Comparing' supra note 18 at 20. The motif of the 'prison-house' is well known. See Jameson, F (1972) *The Prison-House of Language* Princeton University Press. Cf Adorno, TW [1998] (1965) *Metaphysik*

the inescapable significance of place can hardly be effaced on the ground that the argument from situatedness would foster essentialism. One is addressing primordial facticity: the space where the individual dwells at the time of his edification into a jurist and, subsequently, into a comparatist — what Beckett insightfully names ‘a clot of prejudices’.²⁶ Yes. The junction of space and time in a particular location at a specific moment — a chronotopical anchoring — does a comparatist make. It should be obvious that there can be no epistemic alternative as no emptying of the self is possible.

Foregrounding the connection between space and time, thereby straining the (famously expandable) German language, Martin Heidegger proclaims: ‘I *am*-having-been.’²⁷ *One is indeed as one has been*: one is a mature Italian-language speaker (that is, the native Italian-language speaker that one has been); one is a mid-career Italian jurist (that is, the Italian law student that one has been); one is a trained Italian comparatist (that is, the Italian doctorand that one has been). And such *structuring* of the mind is precisely why ‘[u]nderstanding in itself is to be thought of not so much as an act of subjectivity, but as an insertion into an event of transmission.’²⁸ It matters, decisively, whether one is coming to the comparison of laws as an encultured Italian jurist/comparatist or, say, as an encultured Brazilian jurist/comparatist or as an encultured Australian jurist/comparatist. In fact, I am stating the epistemically evident.

Imagine the law of Miracabo, a hypothetical country in South-East Asia. And envisage further that Miracabo should boast a nineteenth-century civil code courtesy of a self-satisfied process of European colonialization. It must stand to reason that an English jurist/comparatist coming to the interpretation of the civil code of Miracabo in 2025 will bring to bear a different appreciation of codification than, say, a French jurist/comparatist simultaneously applying himself to this eliciting task. To take my claim one important step further, it seems undeniable that a (discerning) English jurist/comparatist will deploy a sensitivity to the *codification effect* that may well elude in significant respects his French counterpart — that an (informed) English jurist/comparatist’s understanding capitalizing on critical distance from the civil-law tradition may prove more desecrating than a French appreciation arising from within a codification culture.

And what information could an English jurist/comparatist unconceal that might escape his French counterpart? I have in mind, for instance, how ‘the cult of the text, the primacy of doctrine and of exegesis [...] go hand in hand [...] with a practical denial of the economic and social reality’, how there takes

Tiedemann, R (ed) Suhrkamp at 107, where Theodor Adorno refers to ‘the prison of language’ [‘(das) Gefängnis der Sprache’]. Note that the late Fredric Jameson’s attribution of the image to Nietzsche is erroneous. For an extensive discussion of Jameson’s mistake, see Legrand, P (2021) ‘Mind the Gap! Translation of Foreign Law Is Not What You Think’ (8) *Revista de investigações constitucionais/Journal of Constitutional Research* 601 at 629–31. For an investigation of the comparing mind as prison, see Legrand, P ‘Negative Comparative Law: The Sanitization Enterprise’ *supra* note 19 at 23–24.

²⁶ [Beckett, S] (2009) [31 January 1938] [Letter to T McGreevy] in *The Letters of Samuel Beckett* Fehsenfeld, MD and Overbeck, LM (eds) vol I Cambridge University Press at 600.

²⁷ Heidegger, M (2006) [1927] *Sein und Zeit* Niemeyer at 326 [‘(I)ch bin-gewesen’].

²⁸ Gadamer, H-G *Wahrheit und Methode* *supra* note 15 at 295 [‘(d)as Verstehen ist selber nicht so sehr als eine Handlung der Subjektivität zu denken, sondern als Einrücken in ein Überlieferungsgeschehen’] (emphasis omitted).

place 'a reinforcement of the closing upon itself of a body exclusively devoted to the internal reading of the sacred texts';²⁹ or how '[i]t is one of the great glories of codified law that it makes possible, if not exactly desirable, adequate law teaching at a very low level of competence.'³⁰ I repeat that English and French analyses of the basic epistemic tenets permeating codified law will typically differ since there is 'the independent structuring power of culture' as regards the comparatist-at-law and with respect to the comparatist-at-law's engagement (or non-engagement) in critical meaning-making.³¹

If the crux of the comparative intervention must centre around ascription of meaning to foreign law in a way that does justice to foreignness — and what other legitimate epistemic ambition could be at stake? — I hold that a thoughtful comparatist should be actively seeking to attenuate the predicament I am discussing as it pertains to the inevitably localized character of one's apprehension of the foreign. But how to do so? Fortunately, the answer stands readily at hand, and it revolves around the enabling idea of pluralism. In the smallest of nutshells, since neither Italian words nor Italian inclinations, neither Italian concepts nor Italian preconceptions, can tell the foreign other than through the prism of an Italian attunement, other than refractively, other than *italianely*, it would have been most advisable in the process of building the VSI to harness more than one set of words or inclinations, more than one set of concepts or preconceptions, rather than apply one ensemble only and deploy it twice, to boot. For example, consider how the intertwinement of an invigorating Australian or Irish input with the Italian standpoint would have mitigated the co-authors' sheltered tactics vis-à-vis the comparison of laws and contained the structural deficit limiting their capacity to gain creditable information about otherness. Think how the Italocentric character of an endeavour such as the VSI reproducing colonial stereotypes and perpetuating a neo-colonial division of labour between the knowing West and the (allegedly) known rest might have been lessened, say, through the inclusion of a Colombian or Indian perspective. To press the point, how can the VSI's wilful retrenchment within one epistemic comfort zone only — the co-authors' own, of course — prove in any way reconcilable with the ethos of comparative law? Is comparative law not intrinsically about diversity? Is comparative law not inherently preoccupied with the non-identical, with difference? Is comparative law not structurally concerned with legal/cultural destabilization of one's ways-in-the-law?

Crucially, the co-authors' resolve to produce a survey of comparative law from an only-Italian or all-Italian perspective — from an identitarian or non-differential standpoint — cannot be dismissed as innocent or accidental. Applying the principle of charitable interpretation once more, as is my wont, I contend

²⁹ Bourdieu, P (1986) 'La force du droit' (No 64) *Actes de la recherche en sciences sociales* 3 at 18 ['le culte du texte, le primat de la doctrine et de l'exégèse (...) vont de pair (...) avec une dénégation pratique de la réalité économique et sociale'; 'un renforcement de la fermeture sur soi d'un corps exclusivement dévoué à la lecture interne des textes sacrés'].

³⁰ Watson, A (1981) *The Making of the Civil Law* Harvard University Press at 173.

³¹ Alexander, JC (2003) *The Meanings of Social Life* Oxford University Press at 109. As I wish to spare my readership (and myself) an iteration of the workings of culture with specific reference to comparative law — of legal culture's emprise — I shall conveniently advert to Legrand, P (2023) 'Foreign Law, the Comparatist, and Culture: How It Is' in Cercel, C; Mercescu, A and Sadowski, M (eds) *Law, Culture and Identity in Central and Eastern Europe* Routledge at 15–42. There it is, how it is — in less than thirty pages, too.

that the VSI's dedication must rather have been deliberate, wanted, desired — if encultured — which means that, far from being disinterested, such ensnarement in an exclusively homey form of cultural mediation is bound to reveal the fostering of a certain scholarly disposition.³² Undoubtedly, this endogeneity discloses an adhesion to specific research values, and it shows an endorsement of definite intellectual preferences or allegiances — these values, preferences, or allegiances cardinally heralding 'precarious ipsissimosity'.³³ Yet, I am curious: how can the co-authors not have grasped the fact that their succumbence to the spell of Ethnos, their surrender to the temptation of a cultural *entre-soi*, their capitulation to the enticement of epistemic purity, ran athwart one of the key generative ideas having informed comparative law at the institutional outset, which is to overcome legal nationalism in its numerous declensions? How can the co-authors not have realized that the insistent reinforcement of the Italian perspective to the exclusion of any other risked surreptitiously projecting a local perspective into a text intrinsically meant to be non-local (and marketed as such) — a key disfiguring blemish? And how can the co-authors not have seen that the introduction of *Italianity squared* came at the expense of the very otherness that must serve as the indelible core of the comparative exertion?³⁴

Instead of the announced VSI, comparatists are effectively being treated to a VSII, a very short *Italian* introduction to comparative law — nay, to a VSVII, a very short and *very Italian* introduction to comparative law. In fairness to its readership, the copyright page should read 'Made in Italy.' Perhaps I can observe without further ado that nothing in the VSI seems to me to turn on the fact that the co-authors have divided the chapters amongst themselves. (If anything, I find that each co-author regularly discloses an almost masochistic yearning to make the other look good.) Ultimately, I regard the two individuals as being epistemically interchangeable and therefore as providing one epistemic vision only between the two of them — an astonishingly widthless range that qualifies as an important shortcoming marring the text, or so I contend.

For a divergent approach, compare, say, *Rethinking Comparative Law*, a book jointly written by German, Romanian, and British comparatists.³⁵ Perhaps I can also draw on my personal experience. I am based in Paris. To avoid the legal/cultural entrapment that I chastise, I have purposefully written my co-

³² Cf Hutchinson, B 'Comparativism or What We Talk About When We Talk About Comparing' supra note 18 at 16: "'Comparativism" [...] is anything but disinterested.' See also Gagné, R (2019) 'Regimes of Comparatism' in Gagné, R; Goldhill, S and Lloyd, G (eds) *Regimes of Comparatism* Brill at 12: 'Each manifestation of comparatism belongs to an epistemological horizon.'

³³ Beckett, S (2012) [1932] *Dream of Fair to Middling Women* O'Brien, E and Fournier, E (eds) Arcade at 113.

³⁴ While one could ascribe a parallel (and a parallelistically problematic) mindset to Konrad Zweigert and Hein Kötz, easily the predominant comparatists of the last half-century, I find it indispensable to foreground a distinction between the two situations. When Zweigert and Kötz first released their book in 1969, they had written it in German for German readers. It is therefore less surprising (and less rebarbative) that their comparative argument should have mobilized many of the salient tenets (and some of the jargon) of German legal epistemology. I refer to Zweigert, K and Kötz, H (1969) *Einführung in die Rechtsvergleichung* Mohr Siebeck. The puzzling matter lies elsewhere and has to do with the reason why this German-text-for-Germans was translated into English *an sich*. Once, late into the night, I asked Tony Weir, Zweigert and Kötz's distinguished English translator, this very question. He drew the distinction between translating and 're-authoring'. In my view, this delineation demands substantial theorization.

³⁵ See Glanert, S; Mercescu, A and Samuel, G (2021) *Rethinking Comparative Law* Elgar.

authored comparative books or book chapters with Brazilian, British, German, or Romanian colleagues — not with a French comparatist teaching in Lyon.³⁶ And I have deliberately produced my co-authored articles or shorter texts (not to mention my co-edited books) with British, German, Romanian, or Swiss colleagues — not with a French comparatist teaching in Strasbourg. As regards the VSI, the fact that one of the co-authors teaches public law in the north of Italy while the other teaches private law in the south of Italy evidently fails to inject the brand of epistemic diversity that would lead me to alleviate my complaint. Quite to the contrary, the VSI's felt need to bring together public-law and private-law jurists consolidates my grievance about the surfeit of *italianità* animating the book. (I shall not even dignify the view that there would be such significant legal/cultural differences between Italy's North and South as to justify the epistemic arrangement that I castigate.)

I assert that the two co-authors/one legal culture writing scenario is an affront to the very idea of the comparative. The co-authors' decision to tend their own (discipular and crepuscular) *orticello* rather than deploy attentiveness to the fact that, as one is exploring foreignness, one's culture limits one, *enframes* one, must be seen to challenge at a basic level their command of the comparative motion. Such provincialization of comparative law as the VSI's co-authors have elected to favour delegitimizes their surmisal that the book's Asian or North American readership, for example, should express confidence in their survey. If you will, the co-authors have overdrawn the trust account with their readers that the writing of a book like the VSI had prompted them to open. (Lest a tendentious interpreter should saddle me with the claim that Italians can only write about Italian law, this silly argument is not in the least what I am propounding. To repeat, then: I contend that a co-authored book on comparative law destined for a planetary readership should not have been written by two co-authors steeped in one legal culture only. Evidently, one wants a syzygy.)

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At a time when so many reviewers are performing bone-cracking feats of contortion in their attempts to cause zero offence, if not to engage in outright forsoothing, I aim to review the VSI as I see it, to write frankly. I was bestowed, I admit, with a generous helping of the critical gene — a crinanthropic disposition that ought actually to stand as a prerequisite to an academic career, if you ask me. In sum, gloved nuance is not the ambition of my account. Now, even through comparison or by way of critique of comparison, the comparatist-at-law's towardness remains first-personal. And I certainly do not exempt myself from this primordial epistemic predilection: on account of my negative critique, I, too, seek to accomplish my mineness.³⁷

³⁶ Eg: Legrand, P and Samuel, G (2008) *Introduction au common law* La Découverte; Glanert, S and Legrand, P (2013) 'Foreign Law in Translation: If Truth Be Told...' in Freeman, M and Smith, F (eds) *Law and Language* Oxford University Press 513–32; Glanert, S and Legrand, P 'Law, Comparatism, Epistemic Governance: There Is Critique and Critique' *supra* note 7; Legrand, P and Munday, R (eds) (2003) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press.

³⁷ Cf Hutchinson, B 'Comparativism or What We Talk About When We Talk About Comparing' *supra* note 18 at 24: 'What we talk about when we talk about comparing is mostly ourselves.' For a development of this argument with specific reference to comparative law, see Legrand, P (2017) 'Foreign Law as Self-Fashioning' (12/2) *Journal of Comparative Law* 7.

At this juncture, I like the idea of introducing four brief quotations from Beckett's that capture my Zoilian state of mind as I embark upon my detailed report regarding the VSI. These excerpts are as follows:

'I did not want to write, but I had to resign myself to it in the end.'³⁸ (While it would have been much easier simply to overlook the VSI, one must answer the summons of scholarly integrity. I refer, of course, to the specific way in which I was made to appreciate the matter of 'scholarly integrity', an issue to which I shall return.³⁹)

'[I]t is a game, I am going to play.'⁴⁰ (As I refer to play, I have in mind interpretation and the structural leeway — the drift — that the reading of the VSI's words allows and mandates.)

'A full programme. I shall not deviate from it.'⁴¹ (No indisCIPLINED detour — no foray outside of law's disciplinary borders — that keeps its focus firmly on the legal issue at hand and purports to enhance an understanding thereof can be properly deemed irrelevant.)

'Watch me closely.'⁴² (In the words and sentences that I am supplying in this expostulation on the VSI — and I do not dispute that these are being furnished in large quantity — there lurks ample opportunity for hasty reading and unjustifiable imputation of meaning to my aggrievedness. Please avoid.)

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Riding Worstward, Full Tilt
1900 And All That
Obsessing Over Ordering
Impudent Impunity
How to Get Transplants So Badly Wrong
Temptatious Totality (On Ridicule)
Indian Travesty
Civil Law as Fallacy (In Brief)
An Uncommonly Misleading Common Law
Last Words from Montmartre

Stirrings Still
Why Worry? (A Professedly Biographical Excursus)

³⁸ Beckett, S (2010) [1956] *Malone Dies* P Boxall (ed) Faber & Faber at 33.

³⁹ *Infra* at 390–92.

⁴⁰ Beckett, S *Malone Dies* *supra* note 38 at 4.

⁴¹ *Id* at 6.

⁴² Beckett, S (2009) [1955] *Molloy* Weller, S (ed) Faber & Faber at 72.

Enter Imogene (As She Would)

Sonorous Silences

Comparative Law's Shallows and Hollows...: A Very Short Parergon

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Riding Worstward, Full Tilt

First things first: the nod to Beckett in my heading is deliberate.⁴³

Out of the VSI's six main sections, the introductory chapter is one of the two shortest segments (I leave to one side the concluding part, which numbers four pages only). However, the introduction's brevity does not make this text any less problematic than the longer instalments. The co-authors begin their opening with a cursory historical prospect (much of the information irrelevant to comparative law and therefore a puzzling use of the scarce editorial room on offer), which I shall address independently in the next part of my review. The rest of the initial chapter proposes a synopsis of comparative law that I now want to consider. I assume that I do not have to avouch the significance of such an epitome, not least in a book like the VSI where, given the inordinate constraints of space, every word matters in an especial way. As I contemplate the VSI's prefatory conspectus, I purport to offer two sets of observations. First, I wish to suggest comments concerning certain formal traits. Actually, not only do these formal lineaments mark the initial chapter but they carry throughout the volume. Secondly, I seek to react to the chapter's contents.

My general reflections about form are two-fold: one concerns language, the other sources. On the matter of language, I find it distressing and distracting that readers are being treated to unidiomatic English, to a brand of faux English that offers a variation on the theme of *Itanglese* or *Italglish* (or whatever) and, to my mind, tarnishes the entire writerly endeavour. I contend that the difficulty runs deep. Most sentences read oddly, and many cannot be understood. An illustration of a weird statement is thus: '[Comparative law] had to focus on definitions, categories, and methods in order to find an appropriate vocabulary to identify this new approach to the study of law' (8). '[T]o identify this new approach to the study of law'? What is the VSI trying to say? Such awkward enunciation happens to be typical. For a brief selection of incomprehensible utterances gleaned at random across the short volume, consider the following: 'The achievement of legal convergence to aid trade and commercial purposes proves the point' (8); 'Comparable similarities equate Common Law systems that allot significant law-making power to judges' (10); 'Common Law embraced the logic of the existing society to avoid rejection and non-recognition' (54); 'No binding precedent existed, unlike in subsequent developments and the widespread concept of Common Law' (55); 'There was just a first instance' (55); 'The United States of America [...] has constructed its base [sic] with components which do not exist in the UK' (57); 'The Islamic legal tradition also shares the threat of other traditions' (66); 'In 1522 an ecclesiastical court in Bourgogne placed a mischief of rats on trial' (79); and 'Private law has traditionally been

⁴³ See Beckett, S (2009) [1983] *Worstward Ho in Company/Ill Seen Ill Said/Worstward Ho/Stirrings Still* Hulle, D Van (ed) Faber & Faber at 79–103.

more often compared' (108). Less significantly, but still exasperatingly, one gets formulations like 'the tides changed' (25).

I maintain that one can legitimately blame the co-authors for not having had their writing re-read by a native speaker (unless they did, in which case the native speaker in question served them very poorly). Ultimately, though, I contend that the publisher's renunciation of editorial responsibility is even more shocking. Clearly, the solecisms that the co-authors employ were deliberately left uncorrected by their publisher. While my position may strike one as out of touch with the social network era (or howsoever the latest age must be named), I hold that there is merit to idiomatic English and virtue in legibility. The fact that the VSI is riding roughshod over both benchmarks strikes me as most dissatisfying: at the very least, it sends the wrong message to the students it is hoping to attract as readers. Not only is one therefore being treated to an Englishing of comparative law (which is a problematic matter in its own right that might well warrant discussion), but this Englishing is manifesting itself at the level of pseudo-English, a decidedly objectionable editorial surrender. Needless to add, the idea seemingly never registered either on the co-authors' or the publisher's radar screen that, quite apart from being written in syntactically and grammatically sound English, the VSI could actually have been crafted in *elegant* prose. Although there may be a logic to the fact that a book by two Italian writers should actually *sound* Italian and while there may be a further logic to the further fact that the publisher is thereby acknowledging how many more people have English as a second language than as a first, the VSI reading experience is formally dispiriting, one constantly hankering after a thick red pen.

Still on the matter of the initial chapter's form, my second observation concerns sources. In this respect, the annoyance I want to highlight regards the systematic absence of pinpoint references — an omission that continues over the entire book. Consider a quotation from Günter Frankenberg's (13). The reader is presented with the Frankenberg text *simpliciter*: there is no footnote, no endnote, no parenthetical entry featuring the year of publication and the page — there is nothing, only the bare quotation. The (unfortunate) reader is expected to make his way to the *perfidious* bibliography, then to discover — behold! — that the list of entries for this particular chapter features *two* Frankenberg references, the first one consisting of a forty-five-page article and the other featuring a 360-page book. (Awkwardly, I find, the *unavailing* bibliography does not run consecutively but is separated in independent parts corresponding to the book's various chapters.) As incredible as it may seem, the reader is left to fend for himself and locate the quotation somewhere in these 400 pages of text or so — which in this particular case he might want to do in order to contextualize the analogy that Frankenberg is apparently drawing between comparative law and tourism (or between comparatists and travellers), a correlation that strikes me as implausible on its face but that could possibly be redeemed through adequate circumstantiation. That the VSI's 'referencing' model should prove so user-hostile is the very least I can say of it. While I accept how the publisher may again prove liable for this most regrettable state of affairs by way of editorial strictures applying to the *Very Short Introduction* series as a whole, the co-authors ought to have done a better job of adapting to this unusual and unappealing editorial framework, for example, by avoiding the cumulation of two consecutive Frankenberg references in the *wanting* bibliography. (Although I cannot probe the editorial dynamics any further, I feel bound to mention that I have personally encountered *Very*

Short Introduction texts featuring endnotes. This fact suggests that the decision to eschew all references might therefore have been the co-authors' rather than the publisher's, in which case the VSI's responsibility would stand untempered.)

After my remarks on the first chapter's form, I turn to consider the matter of contents, which demand a longer and more severe critique. It is striking how every other sentence is so poorly crafted that it entices the serious reader to engage a line-by-line reaction to the text and spontaneously tempts him into thorough rewriting. Despite the jejune hodge-podge on display, I shall nonetheless eschew this approach (if only because it would unduly tax my readership's patience). Instead, I propose to limit myself to a selected list of particularly detestable howlers, which I have drawn with a view to introducing the introduction's wide range of serious lacunae. Let me specify once more: I do not find that I have to follow the VSI's pagination.

According to the VSI, then, '[c]omparativists [...] ente[r] into the logic of the other studied systems without prejudices or preconceptions' (9). Otherwise said, 'comparativists must get rid of their previously acquired mindset' (9). It would be superfluous for me to restate my claim regarding the comparatist's inevitable incorporation or embodiment of an enculturation that will have intervened at some level of consciousness or other in the course of his upbringing and of his education into the law and of his tutelage into comparative law, to which he must be subservient, and that he finds himself unable to jettison at will so as to come to foreign law with a white page or clean slate.⁴⁴ Suffice it, then, to quote Hans-Georg Gadamer's exemplary enunciation of the principal epistemic implications arising from one's situatedness: 'Wanting to avoid one's own concepts in interpretation is not only impossible, but blatant absurdity [offenbarer Widersinn]. To interpret means precisely to bring one's own preconceptions into play so that the meaning of the text can really be made to speak for us.'⁴⁵ Contrary to the VSI's position, *no comparatist can come to foreign law with an open mind* — not even an Italian comparatist.

Leaving the substantive issue to one side, I find it most striking that the VSI should repeat the very ideas (if without attribution) that one can find expressed in the second English edition of Konrad Zweigert and Hein Kötz's textbook published in 1992, over thirty years before the VSI's own release. Through their distinguished English translator, the much regretted Tony Weir, Zweigert and Kötz argue that comparatists 'must cut themselves loose from their own doctrinal and juridical preconceptions', that they 'must eradicate the preconceptions of [their] native legal system'.⁴⁶ It is precisely both the mention of

⁴⁴ *Infra* at 395–97. For my exemplification of pre-understanding with reference to the encounter between José de Acosta, a sixteenth-century Spanish explorer, and a llama, see Legrand, P 'Foreign Law as Self-Fashioning' *supra* note 37 at 11–15. Cf Auyoung, E (2020) 'What We Mean by Reading' (51) *New Literary History* 93 at 102: '[A]ll readers rely on their existing background knowledge to make inferences about what a text tells them.' Aptly, the late Pierre Legendre, taking the measure of the rampaging id, observed how 'the unconscious, too, is a jurist': Legendre, P (1983) *L'Empire de la vérité* Fayard at 21 ['l'inconscient lui aussi est juriste'].

⁴⁵ Gadamer, H-G *Wahrheit und Methode* *supra* note 15 at 401 ['Die eigenen Begriffe bei der Auslegung vermeiden zu wollen, ist nicht nur unmöglich, sondern offenbarer Widersinn. Auslegen heißt gerade, die eigenen Vorbegriffe mit ins Spiel bringen, damit die Meinung des Textes für uns wirklich zum Sprechen gebracht wird']. Cf Fish, S (1989) *Doing What Comes Naturally* Duke University Press at 518: '[W]ere every preconception [...] removed from the mind, there would be nothing left with which to [...] decide.'

⁴⁶ Zweigert, K and Kötz, H (1987) *Introduction to Comparative Law* (2nd ed) Weir, T (tr) Oxford

prejudgements and the summation to detachment that the VSI is now reprising as if epistemic time had stood still over decades, as if no intellectual advance whatsoever had taken place regarding the understanding of cognition (of course, disciples are heavily invested in time being halted; indeed, the very idea of discipleship — which involves disciples conveying the thoughts that their masters were teaching them years earlier — depends upon an arrest of time). It is, for example, as if Frankenberg had not written his 1985 epistemic critique — a text that preceeded the VSI by nearly four decades. Envisage Frankenberg's critical claim: 'Suppressing emotions and striving to avoid value-judgments do not [...] make the comparatist a resident of a non-ethnocentric neutral territory, for such a land simply does not exist. On the contrary, the fictitious neutrality stabilizes the influence and authority of the comparatist's own perspective, and nurtures the good conscience with which comparatists deploy their self-imposed dichotomies, distinctions and systemizations'; in brief, 'any vision of the foreign laws is derived from and shaped by domestic assumptions and bias.'⁴⁷ The complete bracketing of one's epistemology that the VSI exalts pertains to illusion.

To my mind, the ensuing dichotomy appears inescapable: either the co-authors have read Frankenberg, or they have not. Let me be charitable, as is my usual inclination, and assume that the co-authors have pondered Frankenberg's article from beginning to end, that they have done so meticulously, that they have evaluated the main tenets of the critique being deployed, and that they have come to the considered conclusion that they disagree with Frankenberg's views (none of which, to be honest, I happen to believe). Is it, then, acceptable to proceed as if Frankenberg had never written, as if his article did not exist? Is his prominent contrarian standpoint not worth at least a half-sentence in the VSI? Can the co-authors pretend that there is a consensus within comparative law around the view that they themselves defend? In my opinion, the VSI's readership is being treated to high-order dissembling. No matter how short the book, its co-authors cannot act as if a fundamental epistemic contention of theirs reflects the uncontentious view of the field when it has in fact been earnestly challenged for thirty-eight years, the remonstrance in question being the sophisticated work of a high-profile comparatist writing in a high-profile journal. Either one is looking at irresponsibility (Frankenberg's text having remained obstinately unread) or expurgation (Frankenberg's text having been read and his contentions kept deliberately hidden) — two equally unappealing scholarly propositions. Be that as it may, comparative law must recognize that 'comparison-without-preconception' is an unsupported and unsupportable idea. An acknowledgement of this epistemic fact is long overdue. It is a great pity that the VSI misses the opportunity to make this elementary point drawing on Frankenberg (and others) for assistance.

Elsewhere in their introductory chapter, the co-authors write as follows: '[T]he World Trade Organization promotes free multilateral trade, reinforcing

University Press at 11 and 32 [hereinafter *Introduction to Comparative Law* (2nd ed)]. The identical wording appears in the third English edition: see Zweigert, K and Kötz, H (1998) *Introduction to Comparative Law* (3rd ed) Weir, T (tr) Oxford University Press at 10 and 35 [hereinafter *Introduction to Comparative Law* (3rd ed)]. The second passage that I quote, about eradication, also featured in the first English edition: Zweigert, K and Kötz, H (1977) *An Introduction to Comparative Law* Weir, T (tr) vol I North-Holland at 26.

⁴⁷ Frankenberg, G 'Critical Comparisons: Re-thinking Comparative Law' *supra* note 7 at 425 and 443.

principles such as transparency and fairness' (8). Howlers, I hold. Dismissing the thought that this formulation would have been intended ironically, I discern two major parts to this oh-so-very-cute assertion, one concerning 'free multilateral trade' and the other regarding 'transparency and fairness'. Consider the first clause of the sentence. Instead of expatiating on the regulation of trade in my own words, I propose to quote David Kennedy's: 'Th[e] textbook view of the "order from the top" encourages an overestimation of the orderliness of things. [...] You get simplifications like "the World Trade Organization (WTO) regulates world trade" when commerce is actually overwhelmingly "regulated" by local and national law, private ordering, business custom, political deals, informal networks, criminal gangs, and so on.'⁴⁸ So much, then, for the co-authors' ability to reach beyond the most clichéd of clichés. As for the argument that the WTO would be in the business of promoting 'transparency and fairness' — the second proposition within the sentence — I admit that I do not quite know where to begin my negative critique. After such a statement as the VSI's, what would there be not to like about the WTO (especially if one recalls how the WTO is also an active supporter of lactose-free chocolate milkshakes, organic Ronsard roses, and the Garamond typeface)?

In my opinion, it cannot be — *it simply cannot be* — that the co-authors actually know the WTO and its workings as they write such an extraordinarily deficient lourderie as graces the VSI. To frame the matter in unadorned fashion, if I may, the VSI on the WTO, cursory as it stands, is straight-up BS (it will therefore have happened in this essay: the first time I have allowed myself to inscribe this term, if anagrammatically, in forty-five years of publications).⁴⁹ One might as well defend the position that slaughterhouses are seeking to foster animal welfare or, if one wants to stick closely to the ideas of 'transparency and fairness', that these values lie at the heart of counter-espionage work. In my interpretation, it is nothing short of outrageous that the VSI's readers — the majority of whom, howsoever small the ultimate numbers, will be students — should be treated to such unguarded bromides, thus bereft of the merest critical inclination. Where on earth did the co-authors unearth such trite wording? Have they never heard of the infant industry argument? Are they not aware of the most favoured nation principle and its impact on local firms (WTO rules forbid preferences for local labour, producers, service providers, and traders)? What about the diversification needs of developing economies? Specifically, what of agriculture in developing economies? Is there not even basic awareness on the co-authors' part that the WTO's all-focussed concentration is GDP maximization irrespective, say, of cultural, social, and environmental factors? And is there not anything at all to indicate about the democratic deficit informing the WTO's governance structures? Have the co-authors never come across the work of commentators like David Schneiderman or Martin Khor,⁵⁰ James Bacchus or

⁴⁸ Kennedy, D and Koskeniemi, M (2023) *Of Law and the World* Harvard University Press at 243. The words are David Kennedy's.

⁴⁹ 'Anger le[ads] me sometimes to slight excesses of language': Beckett, S *Molloy* supra note 42 at 121.

⁵⁰ Eg: Schneiderman, D (2013) *Resisting Economic Globalization* Palgrave Macmillan; Khor, M (2001) *Rethinking Globalization* Zed Books.

Dani Rodrik,⁵¹ Dennis Patterson or Balakrishnan Rajagopal,⁵² to limit myself to six leading WTO critics only (including a friendly one like Bacchus)? Concerning once more the VSI's claim about the WTO and the furtherance of 'fairness', envisage this brief quotation on the WTO from leading internationalist Ian Hurd in his introductory text on international organizations (that I am deliberately indenting):

The key to understanding the pattern [...] is to look for the desires of powerful governments. [...] The trade rules need to be seen in political terms: they are designed with the interests of the strong in mind. It is easier for the strong than the weak to comply with the rules since the rules generally do not demand things of the strong that are politically very difficult.⁵³

Out of a 327-page book, Hurd devotes twenty-eight pages to the WTO or less than ten per cent of the whole. His survey therefore offers but an elementary overview. It purports to cover the basics only (incidentally, it achieves its goal to attrayant effect, I suggest). Yet, despite the brevity of his treatment of the WTO, Hurd is eager to enter the remark I am reproducing about the structurally political character of the WTO's rules. In other words, no matter how cursory a text about the WTO, the political dynamics are so fundamental that they must feature within the account, and they must do so prominently. Meanwhile, the VSI is contending that the WTO would be seeking to foster 'fairness'. *Fairness?* How *dupable* can one get? *No, the WTO does not concern fairness; rather, it is about power.*

And how can such sketchy — and, frankly, grievously deceptive — non-analysis come from two comparatists who expressly demand that 'interdisciplinarity' should inform the comparison of laws (12),⁵⁴ in particular

⁵¹ Eg: Bacchus, J (2022) *Trade Links* Cambridge University Press; Rodrik, D (2011) *The Globalization Paradox* Norton.

⁵² Eg: Patterson, D and Afilalo, A (2008) *The New Global Trading Order* Cambridge University Press; Rajagopal, B (2003) *International Law from Below* Cambridge University Press.

⁵³ Hurd, I (2024) *International Organizations* (5th ed) Cambridge University Press at 103. See also Posner, EA (2009) *The Perils of Global Legalism* University of Chicago Press at 34: '[T]he WTO's dispute mechanism can authorize a state to exercise a self-help remedy against the other state. If the prevailing state is weak, and the losing state is strong, this remedy amounts to very little.'

⁵⁴ Because of how disciplinary placement habitually manifests itself within comparative law, 'interdisciplinarity' is a misnomer. Interdisciplinarity assumes other disciplines intervening on a level playing field vis-à-vis law, the blending and recombination of ideas across the disciplinary divides proactively generating genuinely transformational or restructuring information, a process supposing the comparatist-at-law's mastery of another discipline (not least as regards prevalent epistemic assumptions). Now, the average civil-law jurist has not graduated in any discipline but law. Accordingly, the idea that such a civilian would be practising interdisciplinarity is unsustainable. At the minimum, my sceptical claim readily extends to all jurisdictions where legal education takes the form of an undergraduate degree. When a comparatist-at-law goes beyond the disciplinary boundaries of law (and there are few comparatists only who are willing to live so dangerously), he typically does so in order to collect highly selective information from other disciplines in the service of his legal argument, with a view to consolidating his legal stance. Through an indisciplined exercise in bricolage, other disciplines are being arrayed or instrumentalized while the degree of synthesis or integration of non-law information into law remains low. In an important sense, an indisciplined comparatist therefore always keeps law's territory in sight. Note that as legal argumentation profits from indisciplined forays, even the most minimal instantiation of indiscipline is presumably also beneficial for the other disciplines themselves as they are extirpated from their usual epistemic confines and applied to law — thereby receiving, if you will, an 'increase in being' ('Zuwachs an Sein'): Gadamer, H-G *Wahrheit und*

for 'politics' to have an impact on comparative work? (By my count, the VSI includes three express calls for politics to enter comparative law, two at 12 and a further one at 13.) Well, if politics will be brought into comparative law, the WTO does not seem like a bad place where to begin. Yet, the VSI treats its readership to semantic bleaching of the worst kind. I must highlight the profound contradiction on display: even as the VSI is suggesting that politics should permeate comparative law, it is upholding a view of the WTO that no self-respecting politist would ever maintain (or so I feel entitled to contend in advance of empirical study). In my estimation, what the VSI is offering, in most typical civil-law fashion, is an abysmally ill-informed understanding of politics. (The degree of credulity becomes even more uniquely incomprehensible and even more profoundly disturbing given that one of the co-authors is appointed to a political science department — if the Internet proves at all reliable.)

Recall how writing about French law — but he could have been addressing any civil-law system — sociologist Pierre Bourdieu remarked that '[t]he cult of the text, the primacy of doctrine and of exegesis [...] go hand in hand [...] with a practical denial of the economic and social reality.'⁵⁵ Note in particular Bourdieu's words about the civil law's 'practical denial of the economic and social reality'. The late John Merryman, one of the twentieth century's most astute comparatists, makes a converging point regarding the civil law's disconnection from worldliness: '[T]he data, insights, and theories of the social sciences [...] are excluded as nonlegal. Even history is excluded as nonlegal [...]. The result is a highly artificial body of doctrine that is deliberately insulated from what is going on outside, in the rest of the culture.'⁵⁶ I am minded also to recollect Alan Watson's contention regarding the 'very low level of competence' within the civil-law tradition as he wrote, most justifiably in my view, that 'codified law [...] makes possible [...] adequate law teaching at a very low level of competence.'⁵⁷ If you will, there you have it: a noxious amalgam of ivory-tower 'stuff' (it is not thought; it is not reflection) pitched at an unaspiring (and uninspiring) level of intellectual unsophistication. Welcome to the civil-law tradition as I know it! To return to the VSI, its co-authors, and the WTO, I find quite simply — I must repeat myself — no skilled apprehension of the matter, no 'hands-on' appreciation of the issues, no critical edge on display whatsoever. Rather, the VSI features a sentence that could have been lifted from the WTO's self-promotional materials (and who knows if, actually...).

Although I shall stop at the WTO, the VSI's initial chapter heralds analogous (and analogously impermissible) banalities regarding the European Union, a configuration that would be, most felicitously and thoroughly benignly, all

Method supra note 15 at 145. The most important exploration of indiscipline from the standpoint of comparative law is in Mercescu, A (2019) *Pour une comparaison des droits disciplinée* Helbing Lichtenhahn. I make the case in favour of an indisciplined comparative law in Legrand, P (2022) *Negative Comparative Law: A Strong Programme for Weak Thought* Cambridge University Press at 182–216. See generally eg Graff, HJ (2015) *Undisciplined Knowledge* Johns Hopkins University Press. I return presently to indiscipline: see infra at 347–50.

⁵⁵ Supra at 249–50.

⁵⁶ Merryman, JH (1985) *The Civil Law Tradition* (2nd ed) Stanford University Press at 65. I deliberately refer to the second edition of this book, the last that Merryman himself wrote. Meanwhile, in its *warped* bibliography, the VSI chooses to indicate the 1969 edition (135), a retrograde bibliographical move that hardly inspires confidence.

⁵⁷ Supra at 250.

about ‘the achievement of economic integration’ (8), ‘the realization of a common market and a customs union’ (8), and ‘[the] eliminat[ion] [of] [...] regulatory obstacles for the free movement of goods and services’ (8). One might as well be singing the praises of vilanelles, mountain walks, or opacarophilia. Predictably, the VSI has not the merest word to say on the role of EU law in ‘creating and sustaining’ the ‘various unequal dynamics between the financial and industrial centers and the regions at the peripheries’.⁵⁸ Then, there are further obvious questions that remain conveniently hidden from the readership’s view: ‘How is “free movement” legally designed and managed to encourage dynamics that enrich some regions and impoverish or deindustrialize others? How is a single currency legally constructed to enable some and constrain others?’⁵⁹ And, what is the reverse side of ordoliberalism? While such high-profile critics as Christian Joerges readily come to mind,⁶⁰ needless to add that Joerges does not succeed in making a single appearance in the VSI (although one gets Angelo Rinella at 132 and 136). On the topic of inanities, I would be negligent if I did not emphasize the supreme inanity, the mother of all inanities, to the effect that — you’d better believe it! — comparative law is about ‘maintaining peace’ (8). (Incidentally, it is also about ‘uncovering [...] [the] general features common to all humanity’ [29] — these, of course, being reputed to exist without further critical ado and certainly without the slightest need for any empirical evidence whatsoever. Oh, dear.)

In the course of the farrago that is the introductory chapter, and possibly in deference to voguish considerations,⁶¹ the VSI opines that ‘the rhetoric of liberation used by Napoleon when invading Egypt was deemed fake and self-serving by local scholars’ (11), the French imperial discourse an example of misplaced Western condescension towards the Orient that comparatists-at-law would be wise not to copy. However, no names are supplied in support of the VSI’s proposition regarding these reproving ‘local [Egyptian] scholars’ (where did the co-authors get their information? And did they not have any urge to verify it? On what basis did they deem the particulars they encountered to be trustworthy? How could they vouch for their references?). Quite apart from the fact that the co-authors’ readership is being treated to simplifications and exaggerations seemingly pertaining to the unmindful reprocessing of truisms, the omission of sources in the VSI hides a complex reality: that the writings in Arabic of such chroniclers of the 1798–1801 French occupation of Egypt as Abd al-Rahman al-Gabarti (1754–1822) and Niqula Yusuf al-Turk (1763–1828) show the views of contemporary ‘local scholars’ to have been far more nuanced vis-à-vis ‘Bonabarta’ (Bonaparte in Romanized Arabic) — and to continue to be so, more than two hundred years later — than the co-authors are suggesting.⁶²

⁵⁸ Kennedy, D and Koskeniemi, M *Of Law and the World* supra note 48 at 234. The words are David Kennedy’s.

⁵⁹ Ibid.

⁶⁰ Eg: Hien, J and Joerges, C (eds) (2017) *Ordoliberalism, Law and the Rule of Economics* Hart.

⁶¹ I hasten to add that there is nothing intrinsically wrong with voguish, especially if the substantive merits of the matter are undeniable. And, hey, I do voguish, too. See Legrand, P *Negative Comparative Law: A Strong Programme for Weak Thought* supra note 54 at 217–28.

⁶² See Youssef, A (2024) *Bonabarta* Passés composés at 33–92. Even as he discusses Bonaparte’s Arab contemporaries, Ahmed Youssef, an Egyptian historian, offers an illustration of the ongoing Egyptian fascination with French culture.

Indeed, the Egyptian accommodation with Bonaparte, then, and with France, now, is such that it can easily exasperate emerging Egyptian intellectuals earnestly trying to take the decolonial turn. I have in mind Passainte Ragab, for instance, who metaphorically (and insightfully) rebukes the unwillingness of Egypt's educated strata to espouse a stronger critical stance towards French colonization as an instance of the so-called 'Stockholm Syndrome'.⁶³ Ragab's standpoint is especially compelling since her work acknowledges how she herself is a product of the Egyptian milieu that is nowadays prepared to adopt such a benevolent attitude vis-à-vis France. The VSI's coarse claim that in Egypt 'local scholars' consider French liberation rhetoric to be 'fake' plainly cannot hold on its stated terms, and readers are being fooled. First, as Ragab underscores, 'there are reasons to believe that [Bonaparte's] fascination and admiration for the Islamic religion was genuine.'⁶⁴ And there is further cause to conclude that many Egyptians distinguish to this day between Bonaparte and the French state in its subsequent incarnations, the former being held in even higher esteem than the latter.⁶⁵ Secondly, writing with specific reference to law, Ragab observes that far from French rhetoric being rejected by 'local scholars', the situation is much more intricate than the VSI's blanket proposition allows. When it comes to law, 'mental colonization has proven to be extremely effective in Egypt, where the French influence became an unshakable shadow of Egyptian legal thought' so much so that 'assimilation to French norms remains highly prized.'⁶⁶ Specifically, 'the local national bourgeoisie [...] played an active and independent role in constructing and maintaining the French legal system in Egypt' — what Ragab styles a process of 'self-colonization'.⁶⁷

And suddenly, the VSI featured translation! I certainly do not mean to fault the co-authors for addressing this key matter, which I have argued Zweigert and Kötz were wrong to ignore. After all, given the introduction's waywardness, why not throw some thoughts on translation into the mix? But the comparatist seeking any guidance to orient his research enterprise will be sorely disheartened. To be sure, the VSI informs its readership over two consecutive pages that '[l]anguage and linguistics are paramount for the study and understanding of foreign norms' (12) and that 'language plays a paramount role' within the 'comparative endeavour' (13), both (repetitious) observations featuring within a more general call to 'interdisciplinary' arms (12) — in effect, an enjoinder to an *indisciplined* approach to the comparison of laws. What, then, are the VSI's specific claims with respect to translation? I can circumscribe three enunciations.

First, '[t]ranslations are not always available and reliable' (14). Secondly, there are cases when 'foreign legal terms do not have an exact translation into other languages' (14). Thirdly, '[i]deally, [scholars, judges, legislators, and lawyers

⁶³ See Ragab, P (2024) *Unveiling the Banned Abaya in the French Emperor's Wardrobe* unpublished master's thesis, *Ecole de droit de la Sorbonne* at 19 [on file]. I am pleased to record my gratitude to Passainte Ragab — at this writing a Research Associate (*Wissenschaftliche Assistentin*) at the MPI-Hamburg — for patiently educating me *in rebus Ægypti*.

⁶⁴ Id at 45.

⁶⁵ See Ragab, P (17 September 2024) electronic correspondence [on file].

⁶⁶ Ragab, P *Unveiling the Banned Abaya in the French Emperor's Wardrobe* supra note 63 at 28 and 48.

⁶⁷ Id at 61 and 48.

interested in other legal systems] should use [...] original documents written in th[e] [foreign] country's language. However, in some cases they can also rely on [...] official translations or studies on that system' (16). In all honesty, I find it hard to imagine statements on translation for comparatists that could prove more banal than this trio of trite assertions. The platitudinousness that these three predicates manage to convey is, I think, nothing short of intellectually stupefying. Still, I deem it important to engage in a cursory dissection of these three submissions, which I conduct in light of the VSI's umbrella argument that linguistics must inform comparative law (12).

I hold that it would be impossible to identify one linguist — one linguist only — who would subscribe to the view that there can ever be an 'exact' translation across languages. To state, as does the VSI, that there exist situations where 'foreign legal terms do not have an exact translation into other languages' is accordingly sharply to veer into Flagrancy, so much so that I want to suggest the idea of 'exactitude' to be quite simply out of place in any discussion of translation.⁶⁸ The sheer linguistic fact of the matter is that if one is dealing with more than one language, there cannot be the identity that exactness postulates: either the translation will reveal semantic surplus or else it will disclose semantic loss — *necessarily so*.⁶⁹ Then, there is the VSI's thoroughly superfluous pronouncement that translations are 'not always available or reliable'. Evidently, translations are 'not always available'. And just as evidently, translations are 'not always [...] reliable'. Who needed reminding? Meanwhile, what would have been helpful to the reader being introduced to comparative law is the formulation of a criterion of reliability. To repeat: even as the co-authors are stating the blindingly obvious, they are renouncing the challenge of assisting the comparatist in determining whether the translation he is considering is actually reliable or not (assuming it is available!). An analogous dissatisfaction can be expressed with respect to the co-authors' third argument regarding translation. As I read it, the VSI is declaring a preference in favour of original-language comparative law save 'in some cases'. But which cases fall within the exception? How is the comparatist to situate himself vis-à-vis this reservation? Yet again, the VSI's reader is left in the proverbial lurch.

Once more, one meets the profound contradiction that I have emphasized already: while the VSI is opining that linguistics should have an important role

⁶⁸ Beckett, soliciting a reaction to a draft translation of his, thus astutely observed: '[A]ccuracy obviously secondary consideration': [Beckett, S] (2009) [14 November 1959] [Letter to B Bray] in *The Letters of Samuel Beckett* Craig, G et al (eds) vol II Cambridge University Press at 255. Cf Searls, D (2024) *The Philosophy of Translation* Yale University Press at 108: 'The translator's task is not to find the right word for a specific foreign word'; Laplantine, F (2024) *Logoscopie* De l'incidence éditeur at 32: 'No language of the world has an exact equivalent in another' ['Aucune langue du monde n'a un équivalent exact dans une autre']. The list of declarations from translation studies specialists in line with Searls's and Laplantine's is endless. And the anti-identity argument is one reason, of course, why there are, say, many English translations of Albert Camus's *L'Étranger*. For a fascinating discussion of Camus's novel in English translation with specific reference to comparative law, see Glanert, S (2020) "'Aujourd'hui, maman est morte": traduction littéraire et droit comparé' (4) *Revue Droit & Littérature* 373. For a general exploration of translation variants and their critical implications, see Szymanska, K (2025) *Translation Multiples* (Princeton University Press).

⁶⁹ See Ortega y Gasset, J (1994) [1946] 'La reviviscencia de los cuadros' in *Obras completas* (2nd ed) vol VIII Alianza Editorial at 493. Ortega writes that the translation will be either 'deficient' ('deficiente') or 'exuberant' ('exuberante'). It is fair to say that Ortega's famed stance is representative of the position obtaining within contemporary translation studies. Eg: Venuti, L (2013) *Translation Changes Everything* Routledge. The title speaks for itself.

to play within comparative law, it is defending a view of linguistics possibly featuring 'exact' translation, on one hand, and propounding the most dilettantish instructions, on the other, the kind of thinking that I reckon no self-respecting linguist would ever accept. What the VSI is offering in most characteristic civil-law-faculty fashion, it seems to me, is a woefully misinformed understanding of the theoretical issues animating translation, the kind of simplistic appreciation that one readily associates with the lack of probing research into linguistics generally or translation studies specifically. And the co-authors' propensity towards skimming is also presumably the reason why the VSI addresses neither the doctrine of 'estrangement' ('Verfremdungseffekt') — whereby the translator operating in deference to otherness must ensure that his translation loyally tracks foreign-language idiosyncrasies in order to generate an alienation effect, a making-strange, causing his reader to recall how it is a foreign text that he is reading⁷⁰ — nor the tenet of untranslatability,⁷¹ two exigent motifs that must lie at the very heart of the comparatist's interaction with foreignness, two tropes that Beckett, himself an untiring translator and self-translator over five decades or so, captures with his usual perspicacity and no less habitual economy: 'Said is missaid.'⁷²

To move from omission to obsession, I find it nothing short of harrowing that the VSI's opening chapter should be tainted with the co-authors' (apparently unexamined) infatuation with method.⁷³ By my count, there are thirteen references to method over fourteen pages of text (4, thrice; 5, four times; 8, twice; 13; 16, twice; and 17) — seemingly without awareness that '*all* methodological terminology [is] potentially suspect.'⁷⁴ In fact, the co-authors appear so obnubilated with method that they identify as methodological a number of issues that, in my view, have nothing whatsoever to do with method, no matter how enamoured with method one happens to be. For example, the VSI writes that '[w]ith the evolution of methodology the need has been reinforced for comparativists to enter into the mentality of other systems, avoiding judgemental attitudes and prejudices' (16). I shall not restate how this claim is but 'blatant absurdity',⁷⁵ prejudice (in the etymological sense of 'anterior judgement') being inherent to selfness and selfness being structurally kept at a distance from otherness. What I do want to emphasize, however, is that notwithstanding the view that one takes of the self/other dynamics, this matter has nothing — nothing at all — to do with 'methodology'. Elsewhere, the VSI contends that

⁷⁰ 'Verfremdungseffekt' — the 'V-Effect' — is indebted to Bertolt Brecht: Brecht, B (1957) [1935] 'Verfremdungseffekt in der chinesischen Schauspielkunst' in *Schriften zum Theater* Unseld, S (ed) Suhrkamp 74–89. It is Fredric Jameson who suggests 'estrangement' by way of English translation: Jameson, F (1998) *Brecht and Method* Verso at 85n13–86.

⁷¹ See eg Apter, E (2013) *Against World Literature: On the Politics of Untranslatability* Verso; Levine, SJ and Lateef-Jan, K (eds) (2018) *Untranslatability Goes Global* Routledge. With specific reference to comparative law, see Glanert, S (2021) 'On the Untranslatability of Laws' in Glanert, S; Mercescu, A and G Samuel, *Rethinking Comparative Law* Elgar at 161–82. I return presently to untranslatability: see *infra* at 401–3.

⁷² Beckett, S *Worstward Ho* *supra* note 43 at 97.

⁷³ For my part, I contest the very relevance of method for comparative law in Legrand, P (2025) *The Negative Turn in Comparative Law* Routledge at 8–50.

⁷⁴ Hutchinson, B 'Comparativism or What We Talk About When We Talk About Comparing' *supra* note 18 at 15.

⁷⁵ *Supra* at 256.

'comparative law is characterized by methodological openness to other fields to achieve a greater understanding and contextualization of foreign rules' (13). Although I readily appreciate that one is dwelling in interpretation, I cannot see how it is even feasible to argue that comparative law is 'characterized' by openness to other fields. That there are some comparatists-at-law who have shown openness to other fields in their work, I fully accept and salute. But these individuals remain marginal figures within comparative law, which continues to be stubbornly subordinated to positivism or formalism — principally in civil-law jurisdictions, where jurists remain in thrall to the Kelsenian lure of the pure. (Admittedly, the positivism prevailing within comparative law is idiosyncratic — a neo-positivism, then — inasmuch as it proves willing to attach a measure of normative value to foreign posited laws.) In my opinion, the co-authors betray themselves as they mention the comparatist's focus on 'foreign rules' (13) — a reference that makes my positivist or formalist contention, my Kelsenian point, for me. If comparative law bears any foremost 'mainstream' characteristic, it is to be determinedly rules-oriented and just as resolutely anti-indisciplined. I simply cannot see how the VSI's interpretation regarding 'openness to other fields' can prove at all empirically sustainable. Yet, the question is not in the least 'methodological'. Whether a comparatist draws on history or linguistics with a view to elucidating the processes and recesses of his foreign-law research has nothing whatsoever to do with method.

Still on the matter of method, a further illustration of the co-authors' perplexing confusion — the kind of disorientation arising from fixation perhaps — concerns a passage where the VSI refers to the 'theoretical and methodological aspects of the discipline [of comparative law]' (8). How is this statement to be read? Is it suggesting that the 'methodological' is not 'theoretical'? If so, I beg to differ as I cannot see how 'method' would fail to pertain to 'theory'. I am aware of two excellent critiques of method within comparative law, one by Simone Glanert and the other by Günter Frankenberg,⁷⁶ both writers chastising method as 'false comfort'.⁷⁷ For my part, I have carefully read both texts, and I have found them both at once thoughtful and heartening. And both arguments have influenced my 'no-method' stance, my firm view that whatever one cares to name it, and irrespective of any craving one may harbour to have one's practice deemed scientific, the comparatist's work effectively unfolds as bricolage — an interpretive scaffolding — constructed with more or less flair.⁷⁸ (Quaere: how could there be an a priori approach, an anticipatory technique, a set criterion, when each encounter between a comparatist and foreignness manifests itself as a singular event?) Now, it would not occur to me for a moment that Glanert and Frankenberg's critiques of method's clockworky mode do not qualify as theoretical arguments. Evidently, these claims stand as fully-fledged theoretical statements — a fact showing, to my mind, that the VSI's parsing between the 'methodological' and the 'theoretical' is indefensible. Incidentally, neither Glanert nor Frankenberg's texts appear in the VSI, although the co-authors

⁷⁶ See Glanert, S (2012) 'Method?' in Monateri, PG (ed) *Methods of Comparative Law* Elgar at 61–81; Frankenberg, G (2014) 'The Innocence of Method — Unveiled: Comparison as an Ethical and Political Act' (9/2) *Journal of Comparative Law* 222.

⁷⁷ Rabinow, P and Stavrianakis, A (2013) *Demands of the Day* University of Chicago Press at 110.

⁷⁸ See Legrand, P *Negative Comparative Law: A Strong Programme for Weak Thought* supra note 54 at 182–216. For a further reference to flair, see *infra* at 266.

mention on three occasions the book where Glanert's chapter was published (137, 138, and 140), such referencing suggesting that they must be aware of her work. Yet, my bet is that the co-authors have not read her argument, and I am just as persuaded that they have not read Frankenberg's either. Why bother, indeed? Do Glanert and Frankenberg not think differently? Do they not defend views challenging what we, the VSI's co-authors, have been taught? Are we not above all loyal disciples? And, frankly, why should the VSI's readership be made aware that there are comparatists actually challenging method in a primordial way? Surely, readers need not know about these, well, *inconvenient* publications. They do not fit our argument, you see. It is very much preferable that readers should think that method is not contested in any basic way within comparative law. It is not that we are being dishonest. The VSI is a short book and, look, we need room in the (*impaired*) bibliography to refer to our Italian mentors, colleagues, and friends — no spikes in our wheel, please! And what a crazy view anyway: surely, one cannot reasonably argue against method. Or is my interpretation completely in error?

The premiss that something named 'method' could assist interpretation or understanding of foreignness — that it could contribute to the making-sense effort driving comparatists on the international stage — and the further assumption that 'method' could confer heightened credence to comparative readings of the legal on the international scene are two conjectures investing the term with a capability and a redemptive virtue that it simply does not muster and could never harness. To my knowledge, the most eloquent (and appositely brief) treatment of the subject-matter is TS Eliot's: '[T]here is no method except to be very intelligent.'⁷⁹ Consider also performance artist Joseph Beuys's valorization of intuition — as I choose to read him — which is precisely what oh-so-alexithymic method would obdurately exclude from the epistemic equation. I refer, in particular, to one of Beuys's famed postcards bearing the inscription 'Ich denke sowieso mit dem Knie' ('I think anyhow with the knee').⁸⁰ As for the suggestion that internationally-minded jurists like comparatists-at-law could summon a 'method' that would be 'scientific', a 'scientific method' — a method that would be ideologically neutral, too — the thought reminds me of what the renowned English philosopher claimed a propos of natural rights: the idea is but *nonsense upon stilts*.

In light of its humanist proclivity, law structurally differs from biochemistry, and what animates an investigation of the legal beyond borders has to be *flair* — if I may be allowed to restate the point.⁸¹ Leaving to one side the psychological disposition that propels science envy, the transposition I critique involves an 'improper extension of [scientism] to domains of cultural activity to which it does not and cannot apply'.⁸² There takes place an 'illicit' projection.⁸³ In any event, the assumption that science would lead to Gibraltar-firm immunization against

⁷⁹ Eliot, TS (23 July 1920) 'The Perfect Critic' (4708) *Athenæum* 102 at 103.

⁸⁰ Achberger Verlag initially printed the postcard in 1977. See generally Riegel, HP (2021) *Beuys* vol IV Riverside at 16.

⁸¹ The word is in Derrida, J *De la grammatologie* supra note 8 at 233 ['flair'].

⁸² Rodowick, DN (2015) *Philosophy's Artful Conversation* Harvard University Press at 55.

⁸³ Hacker, PMS (2001) 'Wittgenstein and the Autonomy of Humanistic Understanding' in Allen, R and Turvey, M (eds) *Wittgenstein, Theory and the Arts* Routledge at 42.

personalization and indeterminacy, that it would overcome obfuscating biases and befuddling proclivities, is belied by the fact that the territory of science is also a cultural space: '[A]ll science involves a hermeneutic component.'⁸⁴ (Do the VSI's co-authors not entertain this fact?) In sum, '[i]t is important to recognise that comparison is not a method.'⁸⁵

While comparatists reading the VSI's introduction will be hugely relieved to be informed that '[n]ot all comparative assessment needs to include the entire world' (16) — although they are also instructed how '[f]oreign law must be addressed in its entirety, not focusing exclusively on the specific issue at stake' (13) — those familiar with the common-law tradition (unlike the co-authors, it seems to me) will be baffled to read about 'the Anglo-Saxon contract of "trust"' (14).⁸⁶ Not only has trust become a 'contract', but it has turned 'Anglo-Saxon', too: the VSI at its performative best! According to the OED, the adjectival use of the compound 'Anglo-Saxon' features two meanings: 'Designating England and its English-speaking inhabitants before the Norman Conquest' and 'designating people of English (or British) heritage or descent, or (more generally) of Germanic origin; of or relating to such people. Hence also: white and English-speaking'. Which meaning is the VSI deploying as regards the trust? Do the co-authors think that the institution pertains to pre-Norman Conquest inhabitants or to white English-speakers? Since it is well known that the trust is a sixteenth-century development while the Conquest is a 1066 event, only the latter meaning could hold, a sense evidently wholly unsuitable.

Common-law lawyers may also wonder at the references to 'norms' surfacing throughout the initial chapter (as in 'the study and understanding of foreign norms' [12]) — and later in the VSI, too, in the context of the few pages devoted to the common-law tradition as when the co-authors write that 'in Common Law [the judiciary] appl[ies] the norms' (60). This illustration of ethnocentrism or juricentrism evokes the epistemic travails necessarily visiting an all-Italian enterprise. Unthinkingly, in my view, the co-authors are projecting their civilian jargon planetwide even as the common-law tradition has not been thinking in terms of 'norms' at all (Kelsen does, not common-law lawyers). Sensitive comparatists would have retained an umbrella designation that did

⁸⁴ Gadamer, H-G (1986) [1972] 'Nachwort zur 3. Auflage' in *Gesammelte Werke* vol II Mohr Siebeck at 458 ['(A)lle Wissenschaft (schließt) eine hermeneutische Komponente ein']. For an argument on science as culture, see Chemla, K and Fox Keller, E (eds) (2017) *Cultures Without Culturalism: The Making of Scientific Knowledge* Duke University Press. For most distinguished ancestry, see Schrödinger, [E] (1952) 'Are There Quantum Jumps?' (3) *British Journal of Philosophy of Science* 109 at 109: '[S]cientific findings, even those which at the moment appear the most advanced and esoteric and difficult to grasp, are meaningless outside their cultural context.' The relevant scholarly output on point is plethoric.

⁸⁵ Anderson, B (21 January 2016) 'Frameworks of Comparison' *London Review of Books* 18 at 18.

⁸⁶ Cf Restatement (Second) of Trusts §197 cmt *b* (1959): 'The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract.' The restatements are the work of the American Law Institute, a US organization of judges, law professors, and practitioners established in 1923. They purport to cover all fields of law, are formulated over several years, and undergo successive editions. Featuring extensive input from a wide range of stakeholders, the restatements are meant to reflect the consensus within US legal circles as to how the 'black-letter' law stands and how it ought to develop. While not binding, the restatements carry significant authority. To return to the trust, it is this *sui generis* character of the institution that leads even John Langbein, who forcefully advocates for greater recognition of the contractarian basis of the trust, to write that '[t]he trust straddles our categories of property and contract': Langbein, JH (1995) 'The Contractarian Basis of the Law of Trusts' (105) *Yale Law Journal* 625 at 671.

not specifically hail from either the civil-law or common-law tradition and that spoke of both and that spoke to both. Given the intellectual level at which the VSI is operating, however, I must accept that I am pitching my standard at unsustainable heights. In passing, consider the development on positivism (10) as a further occurrence of ethnocentric or juricentric self-projection: the focus is exclusively on continental Europe. In this regard, French jurists at least — including first-year French law students — are bound to express surprise that 'custo[m]' does 'not amount to [an] official legal sourc[e] according to Western orthodoxy' (11).

Still on the subject of the orthodoxy, I am keen to react to the VSI's stance that 'no hierarchy among legal solutions is possible for comparativists' (10). This claim could operate as an important theoretical assertion, but the co-authors appear unaware of the subversive import of their own commitment and thus handle the matter poorly. As is exceedingly well known — surely the co-authors cannot ignore this fact — Zweigert and Kötz forcefully maintain how there are laws that are 'better' than others.⁸⁷ Zweigert and Kötz thus firmly believe in 'the superiority' of one law over another, and for them there is the 'best' law, one important task falling to the comparatist being to identify such law.⁸⁸ I have long argued that Zweigert and Kötz's position is epistemically flawed because it assumes objectivity and truth, such epistemic warrants being simply unavailable to the comparatist-at-law. There cannot be a 'better', a 'superior', or a 'best' law — unless, perhaps, one is framing the idea by reference to a specific criterion (this law is better than that law since it will do more to promote lower transaction costs or this law is superior to that law since it will do more to enhance environmental awareness), and then one is in effect talking the language of (encultured) preferences (one's reasoning about lower transaction costs or environmental awareness being in any event contestable). As I read the VSI, it is moving away in somewhat stark fashion from Zweigert and Kötz's 'better-law' approach. And it is a bold step for the VSI to be turning the established position on its head and abolish the very idea of 'hierarchy' amongst laws — something that a German comparatist such as Ralf Michaels, for instance, seems wholly unwilling to do. (Michaels is on record as stating the hyperbolic, colonial, and essentialist claim — in English, if you please — that 'German doctrinal scholarship will always be superior to that of other countries.'⁸⁹) Most strangely, though, the VSI's co-authors do not appear to harbour any realization of the mutinous character of their position and therefore fail to distinguish their oppositional slant from Zweigert and Kötz's pronouncements.

⁸⁷ Zweigert, K and Kötz, H (1996) *Einführung in die Rechtsvergleichung* (3rd ed) Mohr Siebeck at 8 ['besse(r)']. Zweigert and Kötz's theoretical model has been styled 'better solution comparative law': Hill, J (1989) 'Comparative Law, Law Reform and Legal Theory' (9) *Oxford Journal of Legal Studies* 101 at 102. Incidentally, and not insignificantly, Jonathan Hill concludes that '[b]etter-solution comparison [...] stumbles upon the broader theoretical issues only by accident, and randomly': id at 111. Hill goes so far as to refer to Zweigert and Kötz's work as 'atheoretical': id at 111 and 112. I agree with Hill's point concerning Zweigert and Kötz's theoretical randomness, which leaps to the eye. But even theoretical randomness qualifies as theory, if in a very watery, diluted way — a concoction perhaps more evocative of *thé au riz*.

⁸⁸ Zweigert, K and Kötz, H *Einführung in die Rechtsvergleichung* supra note 87 at 46 and 22 ['die Überlegenheit'; 'beste'].

⁸⁹ Michaels, R (19 February 2014) "'Law as the Study of Norms" — Foundational Subjects and Interdisciplinarity in Germany and the United States' *Verfassungsblog* <<https://verfassungsblog.de/law-as-the-study-of-norms-foundational-subjects-and-interdisciplinarity-in-germany-and-the-united-states-2/#.UwTr5v0zOrM>> [on file].

Now, the VSI's de-hierarchization argument is excessive, in my opinion, since the co-authors cannot cancel the comparatist's legitimate entitlement to express his (encultured and informed) preference, that is, to prioritize laws according to his favoured criteria. For example, Günter Frankenberg properly expresses the view that the French law on laicity in public schools is but a 'colonizing' strategy,⁹⁰ the work of 'apocalyptic crusaders'.⁹¹ And he does so by reference to a criterion that one could frame as 'female agency'.⁹² Not only is such preferential ranking allowable, in my judgement, but I regard it as thoroughly commendable. Is one of the *raison d'être* animating comparative law precisely not to bring to bear views from elsewhere on a given law so as to relativize its legislative, regulatory, or adjudicative commitments? If comparatists are prevented from expressing their preferences in favour of this legal model over that legal model, why engage foreign law at all — unless, of course, one envisages the comparison of laws as a strictly reportorial activity, which may be where the co-authors would locate their comparative allegiance if they were minded to address the issue. (Note that strictly speaking, however, there cannot exist an exclusively reportorial activity: every report, no matter how purportedly 'descriptive' only, is always-already critical.)

For the VSI, '[t]he first, foundational issue of comparative analysis concerns the identification of what "law" is in different legal systems and traditions' (9). I accept that a comparatist must evidently consider the meaning of law in foreign jurisdictions lest one should risk one's intellectual credibility,⁹³ and I wholeheartedly disagree with Ugo Mattei's provocation as he exclaims: 'I do not wish to enter into the largely sterile and boring discussion of what can be considered law.'⁹⁴ In my opinion, John Haley's infinitely wiser observation is apt: 'We have to take care what we call law. The lack of universally accepted definitions poses special problems for [...] comparative law.'⁹⁵ It remains that definitions are, by definition so to speak, at once overdetermined and underdetermined, which means that their usefulness must be severely limited. For my part, I would therefore be most reluctant to frame a matter of 'identification' or a definitional question (I am minded to write a *merely* definitional question) as a 'foundational issue' in the manner of the VSI. This prioritization invests the process of identification or definition with far too much significance. After all, every definition (even the OED's) is ultimately someone's definition and

⁹⁰ See Frankenberg, G *Comparative Law as Critique* supra note 4 at 135–44.

⁹¹ Id at 145–50.

⁹² Id at 161–64.

⁹³ Consider how Jacques Derrida's publications on law were promptly appropriated by anglophone translators without any apparent awareness that Derrida had always written in French and had therefore always inscribed either the word 'droit' or 'loi' in his work, two nomothetic concepts at substantial variance with the idiographic 'law'. Obviously, 'law' is not a translation of either 'droit' or 'loi' (how *could* 'law', which emerges in an idiographic legal culture such as England's, be a translation of 'droit' or 'loi', the products of a nomothetic legal culture like that governing in France?). I develop an argument around the irreducible hiatus between 'law' and 'droit'/'loi' with specific reference to Derrida's writings in Legrand, P (2019) 'Jacques Derrida Never Wrote About Law' in Goodrich, P and Rosenfeld, M (eds) *Administering Interpretation* Fordham University Press at 105–46.

⁹⁴ Mattei, U (1997) 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (45) *American Journal of Comparative Law* 5 at 13n37.

⁹⁵ Haley, JO (2016) *Law's Political Foundations* Elgar at 4.

therefore inherently defeasible. In other words, no definition, no matter how meticulous and rigorous, can provide comparatists-at-law with the certitude that the VSI's co-authors are seemingly coveting. What the co-authors are doing, in my view, is to engage in yet another ethnocentric or juricentric self-projection to generalize the civil-law tradition's characteristic belief in the possibility of fixity of meaning. As John Merryman observes with unerring lucidity, in the civil law there is 'a great deal of interest in definitions' and '[m]uch scholarly effort has gone into the development and refinement of definitions', these commitments heralding the civilian's unalloyed dedication to the advisability and achievability of the strictest legal certainty, 'a kind of supreme value, an unquestioned dogma, a fundamental goal'.⁹⁶ I repeat that the VSI's copyright page should read 'Made in Italy.'

Also in the decidedly capacious first chapter, I observe the VSI's reference to Montesquieu as some sort of tutelary figurehead for comparatists-at-law. I am moved to ask why Montesquieu and why not, say, Pascal, Montaigne, or Jean Bodin — who all came before Montesquieu and who all have a legitimate claim, most importantly in the case of Bodin, to being genuine precursors regarding the practice of comparative law?⁹⁷ And then, there is the issue of Montesquieu's political or moral allegiances. Although the co-authors indicate Daniel Bonilla Maldonado's insightful and courageous *Legal Barbarians* in their *flawed* bibliography, they do not appear to have read the twenty-four-page chapter on Montesquieu (which might mean yet another unread text, then).⁹⁸ In the course of his scrupulous analysis, Bonilla Maldonado shows Montesquieu's 'philosophical and political theses [to have been] formed in a binary manner: European and Asian, the northern man and the southern man, the civilized man and the savage, the civilized man and the barbarian'.⁹⁹ For Montesquieu, '[t]he northern man is masculine, valiant, enterprising, daring, active, and not very sensitive, and he values his individual autonomy positively'.¹⁰⁰ By contrast, '[t]he southern man is weak, effeminate, cowardly, not very enterprising, timid, lazy, and sensitive, and he does not value his individual autonomy very much'.¹⁰¹ In sum, '[t]he narrative constructed by Montesquieu [...] is structured around the conceptual opposition "subject of law/legal barbarian"'.¹⁰² Referring to the 'barbaric peoples' ('peuples barbares') that have been able, 'like impetuous torrents', 'to spread themselves on Earth', Montesquieu thus remarks how '[t]here are still peoples on Earth where a passably educated monkey could live

⁹⁶ Merryman, JH *The Civil Law Tradition* supra note 56 at 63, 63, and 48, respectively. Cf Rosen, L (2024) *The Rights of Groups* New York University Press at 115: 'The force of a concept, a symbol, an idiom, may lie in its imprecision.' I cannot see how a civil-law jurist would think Lawrence Rosen's insight worthy of endorsement.

⁹⁷ For an examination of Bodin's work, see Legrand, P (2023) *Comparative Law and the Task of Negative Critique* Routledge 42–57. For a brief excursus on Montaigne, see id at 60–61.

⁹⁸ Bonilla Maldonado, D *Legal Barbarians: Identity, Modern Comparative Law and the Global South* supra note 22 at 46–69.

⁹⁹ Id at 65.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Id at 47.

with honour: it would be more or less at the level of the other inhabitants.’¹⁰³ I ask again: have the co-authors read this critique before uncritically hailing ‘Montesquieu’s contributions in the 18th century’ (4)? And I repeat: in my view, the answer has to be that they did not — which incidentally goes to show that the co-authors may have organized their *vacant* bibliography very much in the way many of my students tend to frame theirs, the driving idea the *accumulation* of references (including what would be a few *cool* ones of the disruptive type). I suggest that the co-authors identify Montesquieu not on account of personal reflection or critical input, but simply because it is the name they have heard, the name they have seen in circulation. To my mind, there appears to be taking place a process of automatic reprise. Or is my interpretation completely in error?

The VSI’s introduction treats difference as a ‘proble[m]’ to be managed (7). That difference across laws must be ‘managed’, if only on account of its irreducibility, I unhesitatingly allow.¹⁰⁴ But why envisage the matter as a ‘problem’ rather than a summons or a challenge, perhaps an opportunity or a promise? Why has difference to be problematized — and therefore discredited — in order to be managed? Other than that, and contrary to what the VSI asserts, for ‘due consideration’ finally to be granted to ‘judgements’ [sic] on the comparative scene, it has not been necessary for comparatists to move ‘further away from the West’ (11): they only had to turn to England or the United States. Moreover, the intimation that ‘France, Italy, and many other Western systems’, such as ‘Common Law systems’ (specifically ‘Canadian or Australian law’), feature ‘legal norms [that] ca[n] be separated from ethics, morals, and religion’, contrary to other (nameless) ‘foreign law’, baffles me (10). To return to *Legal Barbarians*, Bonilla Maldonado rightly castigates the self-satisfied mindset that would see ‘our’ law as ‘pure’, as ‘true’ law, while ‘their’ law could be rebuked as miscegenatedly ‘religious’.¹⁰⁵ But recall that the co-authors have seemingly not read *Legal Barbarians* (the book looks trendy in the *unserviceable* bibliography, though). What is particularly striking is that Bonilla Maldonado is addressing his critique to eighteenth-century, *Ancien régime* comparatists-at-law. Sadly, the VSI shows that the time-honoured comparative conceit — we have law, they have religion — is alive, and well, and living in Italy. Meanwhile, let me ask whether any serious jurist can maintain that Roman Catholicism does not colour extant French law (or Italian law, for that matter).

When the VSI observes — still in the preliminary chapter — that ‘[o]riginally comparative law was mainly based on Western standards’ (11), one assumes that the co-authors mean ‘Western comparative law’. If ‘[i]n medieval times [...] “Asia was the world”’ (11), presumably there would have been ‘origina[l]’ Chinese comparative law or ‘origina[l]’ Korean comparative law. However, contrary to what the VSI maintains, these could obviously not have been ‘based on Western standards’. Incidentally, ‘West’ and ‘Western’ are terms that the VSI copiously mobilizes throughout the initial segment of the book without ever attempting to

¹⁰³ Montesquieu (2019) [1721] *Lettres persanes* Versini, L (ed) Flammarion letter CVI at 245 [‘comme des torrents impétueux’; ‘se répandre sur la terre’; ‘(i)l y a encore des peuples sur la terre chez lesquels un singe passablement instruit pourrait vivre avec honneur: il s’y trouverait à peu près à la portée des autres habitants’].

¹⁰⁴ See Geertz, C (1983) *Local Knowledge* Basic Books at 215–16.

¹⁰⁵ Bonilla Maldonado, D *Legal Barbarians: Identity, Modern Comparative Law and the Global South* supra note 22 at 23–24.

circumscribe them. Geography notwithstanding, Australia seems to be in, but not Mexico. What of South Africa and Israel? While I advert to geography, I might interject that, unlike 'Belgium, Germany, Spain, and Switzerland', and differently from 'Japan' also, 'Latin America' is not a country (3). (Would a *draft* of the chapter have been published by mistake?)

Perhaps I can complete my reaction to the VSI's introductory chapter by emphasizing its tiresome array of unsuitably vague expressions. I have just indicated my unease with 'West' and 'Western'. But there is also a reference to 'most societies' (9), and there is further mention of 'some indigenous groups' (9). And then, it is asserted that 'experts in religious traditions struggle to embrace the secular conception of the law' (9). '[T]he secular conception of the law' as in... the one and only that there is? And who are these 'struggl[ing]', valorous '[religious] experts' anyway? Elsewhere, the VSI claims that '[m]any of the masters of comparative law were prominent figures in the fight against legal positivism and formalism' (7). How so very interesting! And how I would have loved for the co-authors to name one or two of these '[m]any [...]' masters' of an anti-positivist and anti-formalist disposition.

Again on the vexing theme of vagueness, it is regrettable that the VSI does not appear to have a firm understanding of the many concepts it deploys, a fact that leads to repeated enumerations failing to make sense. For instance, the co-authors refer to the 'impalpable aspects' of the law as comprising 'underlying theories and conceptions, tacit assumptions, legal culture, and the language of a foreign legal system' (11). If the co-authors had a sound appreciation of legal culture, they would have realized that 'underlying theories and conceptions, tacit assumptions, [...] and the language of a foreign legal system' all pertain to 'legal culture', which therefore has no place in the enumeration I am quoting. Rather, the list on offer can be regarded as a (rambling and incomplete) tally of some of a legal culture's main 'contents' or 'facets', if you will. In short order, one is also treated to a catalogue consisting in part of 'cultural legitimacy, rhetorical elements, shared beliefs, and ways of thinking' (12), a mishmash analogous to the one I just highlighted — culture being once more misapprehended. And matters can get very philosophically intricate. Thus, the VSI enumerates 'time, space, and context' (9). Little did Einstein know that it was not all about time and space. Still on looseness, albeit from a different angle, I think it is wrong repeatedly and innocently (or is it insidiously?) to deploy expressions like 'transplants' (4 and 16) or 'globalization' (7 and 15) — 'those little phrases that seem so innocuous and, once you let them in, pollute the whole of speech'¹⁰⁶ — as if these terms heralded settled, uncontested terminology within comparative law, which is demonstrably not the case.

The co-authors' inscription of their staunch allegiance to classification — 'One of the major analytical aims of comparative law has been, and is, to group legal data into different categories, providing a systematic ordering of legal knowledge through classifications' (17) — would segue neatly into the VSI's next two chapters (for the VSI devotes two full-length sections to categorical thinking). Before I leave the introduction, however, I must address the early part of it, the scene that precedes the panorama I have now denounced, the paragraphs that propose a concise history of comparative law over six pages.

¹⁰⁶ Beckett, S *Malone Dies* supra note 38 at 17. Cf Jameson, F *The Years of Theory* supra note 22 at 250: 'Words are baggage. They carry ideology around in them.'

1900 And All That

I propose to begin my response to the VSI's concoction of an aberrant historical narrative — yes, aberrant! — by foregrounding what the co-authors themselves fail to do, which is that the story on offer is exclusively concerned with Europe and the United States. Since the United States is addressed over one paragraph only, let me first turn my attention to the few lines where the co-authors observe that 'the founding act of comparative law in the United States' (3) was the Universal Congress of Lawyers and Jurists that took place in St Louis in 1904. The difficulty with a formulation such as 'the founding act' is that readers, especially poorly informed ones, are liable to think that nothing of significance happened in the United States before 1904 as regards comparative law. After all, the OED explains how 'founding' means '[t]o set up or establish for the first time (an institution, etc) [...]; to originate, create, initiate.' But it is quite simply wrong — empirically wrong — to suggest that, in the United States, comparative law, whether institutionally or otherwise, was occurring 'for the first time' in 1904 Missouri. The VSI's error is particularly strange given that one of the book's six illustrations is from John Wigmore's *A Kaleidoscope of Justice* (20). To be sure, Wigmore's title appeared in 1941 only,¹⁰⁷ but Wigmore (the 'identical' Wigmore) had already released throughout the 1890s (well before 1904, then) numerous comparative writings based on his full-time teaching in Japan from 1889 to 1892 and featuring Japanese law.¹⁰⁸ Would the co-authors have showcased Wigmore without being aware of Wigmore's work?

Quite apart from Wigmore's prolific output, and even leaving to one side publications styling themselves bulletins, reporters, recorders, digests, gazettes, repositories, proceedings, news, chronicles, or surveys, in order to focus strictly on US 'law reviews' — and, within these parameters, even ignoring editorials, case comments, book notices, book reviews, accounts of statute-law reform, abstracts of all kinds, and miscellany in general, so as to focus on 'articles' only — the year 1904 does not at all play the inaugural role that the VSI is claiming for it. Consider, for example, publications in the *Harvard Law Review* in 1895;¹⁰⁹ in the *American Law Review* in 1884;¹¹⁰ in the *Southern Law Review* in 1876;¹¹¹ and in the *Carolina Law Journal* in 1831.¹¹² While I deliberately confine myself (without any pretence at completeness) to original research in English, nineteenth-century US law reviews also released English translations of foreign work, specifically of

¹⁰⁷ Wigmore, JH (1941) *A Kaleidoscope of Justice* Washington Law Book.

¹⁰⁸ Eg: Wigmore, JH (1897) 'The Administration of Justice in Japan' (45) *American Law Register and Review* 437, 491, 571, and 628; Wigmore, JH (1897) 'The Pledge-Idea: A Study in Comparative Legal Ideas' (10) *Harvard Law Review* 321 and (11) *Harvard Law Review* 18; Wigmore, JH (1892) 'The Legal System of Old Japan' (4) *The Green Bag* 403 and 478; Wigmore, JH (29 October 1892, 19 November 1892, 26 November 1892, 10 December 1892, and 17 December 1892) 'New Codes and Old Customs' *The Japan Weekly Mail* 530, 617, 655, 722, and 759. This list of Wigmore's 1890s publications is not exhaustive. I largely draw on Riles, A (1999) 'Wigmore's Treasure Box: Comparative Law in the Era of Information' (40) *Harvard International Law Journal* 264. I have corrected and supplemented Riles's bibliographical references.

¹⁰⁹ Gray, JC (1895) 'Judicial Precedents — A Short Study in Comparative Jurisprudence' (9) *Harvard Law Review* 27.

¹¹⁰ Foster, R (1884) 'Peculiarities of Manx Law' (18) *American Law Review* 53.

¹¹¹ Schmidt, G (1876) 'The Federal Courts' (2) *Southern Law Review (New Series)* 140.

¹¹² Meyer, JD (1831) 'On the Judicial Institutions of the Principal Countries of Europe' (1) *Carolina Law Journal* 242.

German legal scholarship, once more well before 1904.¹¹³ It is Jacques Derrida who helpfully reminds one that '[e]verything begins before it begins.'¹¹⁴ With reference to the VSI's 'history' of comparative law in the United States, one could advantageously modify Derrida's insight as follows: 'Everything begins before *it is said* to begin.' Presumably, the 1904 St Louis gathering materialized precisely because of such earlier developments as I mention — thus much more of an advancement than a commencement.

The VSI's other and longer historical perspective attends to Europe. Over the three relevant pages or so, the co-authors' discussion revolves exclusively around the *Congrès international de droit comparé* (International Congress of Comparative Law) that took place in Paris in the summer of 1900. Like rots,¹¹⁵ '1900' belongs to comparative law's fairy tales — and Günter Frankenberg is therefore right to refer to the *Congrès* as the field's 'mythical moment' (the fantasy extends to the very name since the self-styled *Congrès international* was actually French, barring a few exceptions only).¹¹⁶ As regards the 1900 meeting, then, the VSI's account must be faulted in three major respects. First, the Paris conference was not inaugural with respect to the institutional development of comparative law in Europe. Secondly, the meeting did not herald a brand of comparative-law research that would promote the composition of commonalities across laws. Thirdly, the circumstances under which the Paris congress unfolded were not nearly as progressive as the VSI would have its readers believe. There is in fact a thick sinister layer to the event that the co-authors confoundingly choose to omit from the narrative they have designed.

The first issue, then, concerns the matter of inauguration. It is not difficult to understand why the co-authors, lacking the capacity for critical appraisal that typically eludes disciples, would slavishly repeat the commonplace that comparative law's institutional beginnings should be traced to Paris in early August 1900. Within the field of comparative law, this folkloric recital has long become habitual.¹¹⁷ The trouble, however, is that any examination of the relevant chronology reveals that the 1900 symposium, far from consisting in a pioneering moment, was a consequence or an extension — a consolidation — of

¹¹³ Eg: Mittermaier, [K] (1842) 'On the Progress of Penitentiary Improvement in Europe and North America' (BR tr) (28) *American Jurist & Law Magazine* 110 and (1843) (28) *American Jurist & Law Magazine* 340; Jhering, R von (1880) 'The Value of the Roman Law to the Modern World' (BTC tr) (4) *Virginia Law Review* 453.

¹¹⁴ Derrida, J (1993) *Spectres de Marx* Galilée at 255–56 ['(t)out commence avant de commencer'].

¹¹⁵ For my critique of rots, see *infra* at 407–12. A more extensive argument is in Legrand, P 'Negative Comparative Law: The Sanitization Enterprise' *supra* note 19.

¹¹⁶ Frankenberg, G *Comparative Law as Critique* *supra* note 4 at 5. For two illustrations of the overwhelmingly French character of the event, see *Congrès international de droit comparé* (1905) [1900], *Procès-verbaux des séances et documents*, vol I LGD] at 2–4 and 20, where one finds a list of the sixty-five members of the 'comité d'organisation' ('organizing committee') and a further list (with one instance of overlap) of 'rapporteurs généraux' ('general reporters') corresponding to the six sections of the programme. These seventy individuals were all French. Edouard Lambert, a leading convenor, acknowledged this incongruity many years later when he admitted that the 1900 *Congrès* had brought together 'hardly only the members or the friends of the French *Société de législation comparée*': Lambert, E (1929) *Le Rôle d'un congrès international de droit comparé en l'an 1931* Giard at 7 ['guère que les membres ou les amis de la Société de législation comparée française'] (emphasis supplied in English).

¹¹⁷ Eg: Zweigert, K and Kötz, H *Einführung in die Rechtsvergleichung* *supra* note 87 at 1–4 and 57–58.

the numerous initiatives that had preceded it in the course of the nineteenth century.¹¹⁸ Without these precursive steps, it is hard to see what would have justified comparatists-at-law meeting in Paris in 1900. Consider a ‘Top Twenty’ of the key pre-1900 institutional facts that I have in mind.

1. On 21 March 1804, the French civil code came into force thereby marking a two-pronged nationalization at variance with the pan-European academic framework that had obtained for many centuries: a localization of law (away from the Roman model) and of language (away from Latin). French law faculties would henceforth teach French-law-in-French in French, and French doctrinal writers would now write on French-law-in-French in French, too. What was perceived as an intellectual retrenchment in many academic circles would soon spur various institutional attempts to overcome this inward motion, both in France and elsewhere in Europe.
2. In 1804, immediately after the enactment of the French civil code, Armand-Gaston Camus, a prominent Revolutionary politician and French lawyer, resolutely and conspicuously opined that knowledge of foreign law still mattered for a competent French jurist.¹¹⁹
3. In 1808, Karl Zachariä, a German law professor then recently elected at the university of Heidelberg (where he would remain until his death in 1843), released the first part of a two-volume German-language handbook on French civil law, which he would promptly turn into a four-volume work.¹²⁰
4. In 1810, evidently impelled by the then recent publication of Georges Cuvier’s *Leçons d’anatomie comparée* (Lessons in Comparative Anatomy) — the celebrated French palaeontologist’s effort to relate the structure of fossil creatures to that of living animals — Anselm von Feuerbach (1775–1833), a leading German criminal-law scholar of Kantian faith, exclaimed: ‘Why has anatomy its comparative anatomy? And why has legal science

¹¹⁸ It is therefore understandable that Léontin-Jean Constantinesco should have devoted nearly sixty detailed pages to a historical overview of the 1800–1900 period. See Constantinesco, L-J (1972) *Traité de droit comparé* vol I LGDJ at 68–126. Although Constantinesco initially released this book in German (Constantinesco, L-J [1971] *Rechtsvergleichung* Heymanns), he promptly translated it into French, and it is the French text that is systematically mentioned on the rare occasions when Constantinesco’s work is nowadays marshalled. See also Zweigert, K and Kötz, H *Einführung in die Rechtsvergleichung* supra note 87 at 47–61.

¹¹⁹ Camus, [A-G] (1805) *Lettres sur la profession d’avocat* (3rd ed) vol I Gilbert at 141: ‘A jurisconsult who reserves for himself, even in the midst of great tasks, time to learn, since the most bountiful treasures exhaust themselves when one always draws on them without pouring anything into them, will willingly engage in the reading of a few codes or writings from a few foreign jurisconsults. It is a means of expanding one’s views, of catching sight of the rules under different lights, of enriching oneself with new reflections’ [‘Un jurisconsulte qui se réserve, même au milieu de grandes occupations, du temps pour apprendre, parce que les trésors les plus abondants s’épuisent lorsque l’on en tire toujours sans y rien verser, se livrera volontiers à la lecture de quelques codes ou des écrits de quelques jurisconsultes étrangers. C’est un moyen d’étendre ses vues, d’apercevoir les règles sous différents jours, de s’enrichir de nouvelles réflexions’]. Camus having died on 2 November 1804, the third edition of his book appeared posthumously. Interestingly, the earlier editions, dating from 1772 and 1777 (that is, from pre-codification days), had been silent on the matter of foreign law.

¹²⁰ Zachariä, KS (1808–1809) *Handbuch des Französischen Civilrechts* 2 vols Mohr & Zimmer. The second edition featuring four volumes was soon released with the identical publisher, volumes 1 to 3 appearing in 1811 and volume 4 in 1812.

- not any comparative jurisprudence?'¹²¹ Even though inserted in the modest setting of a book preface, this *cri de cœur* would be heard.
5. In 1814, having complained that the conception of legal history prevailing in Germany was unacceptably narrow, Anton Thibaut, quite apart from pursuing his arch-positivist crusade in favour of the codification of German civil laws, was soon leading the assault on the salient Pandectist programme and attacking its inimicality to comparative legal studies. Somewhat provocatively, he declared: 'Ten spiritfult lectures on the constitutional law of the Persians and the Chinese would awaken in our students more real legal understanding than a hundred on the miserable bungles to which intestate successions from Augustus to Justinian have been subjected.'¹²²
 6. In 1824, largely under the influence of Feuerbach and Thibaut, Berlin-based Eduard Gans, a noted Hegelian scholar, issued his massive and purportedly 'universal' history of inheritance law, a brand of historico-philosophical comparative analysis.¹²³ (Interestingly, Gans, who had been Thibaut's law student in Heidelberg, used his teacher's exalted summons to the virtues of Persian and Chinese law by way of epigraph.)
 7. In 1829, Karl Zachariä and his colleague Karl Mittermaier launched the *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes* (Critical Journal for Foreign Legal Science and Legislation) at the university of Heidelberg.
 8. In 1831, the *Collège de France* — an institution located outside of the province and jurisdiction of the *Université de Paris* (the Sorbonne) and of its *Faculté de droit* and, despite its prestige, therefore very much on the margins of the French legal academy — instituted the first chair in comparative legal studies, which it styled 'Chaire d'histoire générale

¹²¹ Feuerbach, A von (1966) [1810] 'Blick auf die deutsche Rechtswissenschaft' in *Kleine Schriften* Zeller at 163 ['Warum hat der Anatom seine vergleichende Anatomie? und warum hat der Rechtsgelehrte noch keine vergleichende Jurisprudenz?']. For Georges Cuvier's work, see [Cuvier, G] (1805) *Leçons d'anatomie comparée de G Cuvier* Duméril, [C] and Duvernoy, G-L (eds) 5 vols Crochard. On account of his anti-evolutionism, Cuvier largely fell into oblivion after his death in 1832. Yet, he had been a considerable scientist and public figure in his lifetime, and it is hardly surprising that a prominent contemporary German scholar such as Feuerbach would have been aware of his work. See generally Outram, D (1984) *Georges Cuvier: Vocation, Science and Authority in Post-Revolutionary France* Manchester University Press. A brief sketch of Cuvier's contribution to the founding of palaeontology is easily accessible in Gould, SJ (1990) *Hen's Teeth and Horse's Toes* Penguin at 94–106.

¹²² Thibaut, AFJ (1814) 'Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland' in *Civilistische Abhandlungen* Mohr Siebeck at 433 ['Zehn geistvolle Vorlesungen über die Rechtsverfassung der Perser und Chinesen würden in unseren Studierenden mehr wahren juristischen Sinn wecken, als hundert über die jämmerlichen Pfschereien, denen die Intestaterbfolge von Augustus bis Justinianus unterlag'], being a re-issue of Thibaut, AFJ (1814) *Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* Mohr & Zimmer. Because the relevant passage does not appear in the earlier Mohr & Zimmer text, one ought to approach the Mohr Siebeck version as a second edition even though Thibaut does not explicitly present it as such. The forewords to Thibaut's two versions show close chronological proximity: the Mohr & Zimmer preface is dated '19 June 1814' (at 3 ['19. Junius 1814']) and the subsequent one 'August 1814' (at [iv]). Needless to recall, Thibaut's pamphlet actuated Savigny's famous essay in favour of the codification of Germany's civil laws.

¹²³ Gans, E (1963) [1824] *Das Erbrecht in weltgeschichtlicher Entwicklung*, vol 1 Scientia. Gans's commitment to universalism features prominently in his sub-title, 'Eine Abhandlung der Universalrechtsgeschichte' (A Treatise of Universal Legal History).

et philosophique des législations comparées' (Chair of General and Philosophical History of Comparative Legislations). Eugène Lerminier, a disciple of Gans, held the post from its inception until 1849.

9. In 1834, Jacques Foelix founded the *Revue étrangère de législation et d'économie politique* (Foreign Journal of Legislation and Political Economy), the first French journal specifically addressing comparative legal studies — albeit, strictly speaking, legislation.
10. In 1846, the Sorbonne inaugurated its first chair devoted to comparative analysis of law, a 'Chaire de droit criminel et de législation comparée' (Chair of Criminal Law and of Comparative Legislation). Elzéar Ortolan was the initial holder of the position and dedicated his teaching to comparative legislation although aiming to investigate legislated texts philosophically and historically.¹²⁴
11. In 1856, Anthoine de Saint-Joseph unveiled his 2,000-page variation on the Leibnizian theme of the *Theatrum Legale* correlating by way of grid charts the legislative provisions of some sixty jurisdictions with those of the 1804 French civil code.¹²⁵
12. In 1857, Emerico Amari, a professor of law in the university of Palermo and later a professor of philosophy in the university of Florence, published his *Critica di una scienza delle legislazioni comparate* (Critique of a Science of Comparative Legislations), a theoretical excursus numbering over 500 pages.¹²⁶
13. In 1862, the Belgian *Association internationale pour le progrès des sciences sociales* (International Association for the Progress of the Social Sciences) held its first annual meeting in Brussels, an international conference that allocated its first session to 'législation comparée' ('comparative legislation').¹²⁷
14. In 1869, a group of French jurists launched the *Société de législation comparée* (Society of Comparative Legislation). The positivist postulates

¹²⁴ Ortolan's early series of lectures had been published as Ortolan, E (1839) *Cours de législation pénale comparée: introduction philosophique* Joubert; Ortolan, E (1841) *Cours de législation pénale comparée: introduction historique* Narjot, G (ed) Joubert. These titles and sub-titles immediately remind one of Lerminier's chair at the *Collège de France*, and it is hard to believe that Ortolan would not have received inspiration from around the corner, so to speak.

¹²⁵ Saint-Joseph, A de (1856) *Concordance entre les codes civils étrangers et le Code Napoléon* 4 vols Cotillon. For an illustration of the praise lavished on Saint-Joseph, see Moulin, E (1865) *Unité de législation civile en Europe* Dentu at vi, where Ernest Moulin argued that the author had shown 'the perfect concordance that exists between the various modern legislations' ['la parfaite concordance qui existe entre les différentes législations modernes']. For Leibniz's programme, see Leibniz, GW (1990) [1667] *Nova Methodus discendae docendaeque Jurisprudentiae* in *Sämtliche Schriften und Briefe Akademie der Wissenschaften der DDR* (ed) vol 6(1) Akademie-Verlag at 293–364. See generally Berkowitz, R (2005) *The Gift of Science: Leibniz and the Modern Legal Tradition* Harvard University Press at 54–70.

¹²⁶ See Amari, E (1969) [1857] *Critica di una scienza delle legislazioni comparate*, 2 vols RI de' Sordo-Muti (Genoa).

¹²⁷ Association internationale pour le progrès des sciences sociales (1863) *Annales de l'Association internationale pour le progrès des sciences sociales: première session — Congrès de Bruxelles* Lacroix at 53–66. The gathering, which took place from 22 to 25 September 1862, was genuinely international, the ten speakers hailing from Belgium (twice), Denmark, France (five times), the Netherlands, and Sweden. See *id* at 53. The topics ranged widely and concerned codification, freedom of the press, the mentally ill, and foreign corporations.

- of the *Société* were clearly stated in its constitutive charter, which defined its enterprise as 'the study of the statutes of the different countries and the search for the practical means to ameliorate the diverse branches of legislation'.¹²⁸
15. In 1869, the University of Oxford inaugurated a chair in 'Historical and Comparative Jurisprudence'. Its first holder was the famous legal anthropologist, Henry Sumner Maine, who remained in post until 1877.
 16. In 1869, a group of Belgian jurists released the *Revue de droit international et de législation comparée* (Review of International Law and of Comparative Legislation).
 17. In 1874, Gumersindo de Azcárate, then chair of political economy at the university of Madrid, published his 200-page *Ensayo de una introduccion al estudio de la legislacion comparada* (Essay on an Introduction to the Study of Comparative Legislation).¹²⁹
 18. In 1889, the French *Société de législation comparée* organized an international congress on comparative law in Paris featuring a strong foreign presence to coincide with the *Exposition universelle* (Universal Exhibition), the centrepiece of which was Gustave Eiffel's then newly-built iron structure.¹³⁰
 19. In 1894, a cluster of British jurists started the Society of Comparative Legislation.¹³¹ The idea was 'to meet a specific and practical need — a need the existence of which had obtained general recognition: the need of obtaining better, fuller, more accurate information about the course of legislation in different parts of the world. It was this need which it was [the Society's] immediate and primary object to supply'.¹³²
 20. In 1898, a circle of Italian jurists inaugurated the *Rivista di diritto internazionale e di legislazione comparata* (Review of International Law and of Comparative Legislation).

Against the background of this non-exhaustive list of nineteenth-century institutional initiatives pertaining to comparative law — I ignore non-institutional events such as Tocqueville's *De la démocratie en Amérique*, a Sorbonne law graduate's famous comparative study of French and US constitutional law

¹²⁸ 'Statuts' (1869) *Bulletin de la Société de législation comparée* 11 ['l'étude des lois des différents pays et la recherche des moyens pratiques d'améliorer les diverses branches de la législation']. The relevant provision is no 1, art II.

¹²⁹ See Azcárate, G de (1874) *Ensayo de una introduccion al estudio de la legislacion comparada y programa de esta asignatura* *Revista de Legislación*.

¹³⁰ For the proceedings, see *Société de législation comparée* (1889) *Session extraordinaire de 1889: célébration du vingtième anniversaire de la fondation de la Société* Pichon at 3–245. The event took place on 29 and 30 July 1889 around two topics: the role of upper legislative chambers with respect to 'budgetary laws' ('lois de finances') and 'paternal authority' ('puissance paternelle'). Out of the more than forty interventions, two-thirds were from foreign speakers. Also, the list of the 128 diners at the closing banquet shows twenty-five foreigners: see id at 247–51. Out of the 101 additional names that were recorded as not having been able to join the dinner, sixty were foreigners, over half of non-attendees: see id at 251–54. In sum, from whatever angle one broaches the matter, the foreign presence at the conference was significant.

¹³¹ The name of the British society duplicated the French organization's. See Ilbert, C (1908) 'The Work and Prospects of the Society' (9) *Journal of the Society for Comparative Legislation* 14 at 15.

¹³² Id at 15.

(conducted on the basis of fieldwork, no less)¹³³ — how can any reasonable comparatist *having done his historical homework* possibly sustain the claim that the 1900 Paris *Congrès* afforded any meaningful institutional inaugurality, if only given the earlier 1889 Paris gathering and the even anterior 1862 Brussels meeting (both of a much more international fabric than the 1900 garnering)? It is not, of course, that the VSI had to indicate all the dates I list, not even a handful of them. It is rather that it definitely ought to have refrained from opting for mere discipular psittacism and indolent yielding to the fetishization of a fable — that the 1900 conference should stand as ‘the conventional establishment of comparative law as a discipline’ (2) and would have ‘set the theoretical foundations of comparative scholarship’ (3) — instead of seizing the opportunity of the platform on offer to array key facts and thereby correct the misleading historical narrative that has been plaguing comparative law as far back as anyone can seem to remember, a well-rehearsed vignette typical of the old epistemic ways that ought to have died long ago. *Why* reprise yet one more time the bizarrely incantatory fascination with a purportedly inaugural 1900 Paris *Congrès* that hardly inaugurated anything at all?¹³⁴

After my discussion of the matter of inaugurality, it is indispensable, I find, to dwell on the fact that the VSI addresses the Paris *Congrès* in a conspicuously partisan way. This critique is the second important objection that I announced in response to the unsustainable version of ‘1900’ that the VSI opts to sketch. Not only do the co-authors mention one speaker only, Sorbonne law professor Raymond Saleilles (1855–1912), but they choose to associate this individual with one idea only, that of a ‘common law for the civilized world’ (2). Since the original French text reads ‘droit commun de l’humanité civilisée’, a more just English translation than the VSI’s, I suggest, would be ‘common law of civilized humankind’.¹³⁵ Now, Saleilles’s comparative interest was always incidental to his primary scholarly endeavour, which firmly concerned French legal issues. In terms of his national concerns, he wanted above all to fight the dominant textualist school then prevailing in France that he regarded as unduly exegetical. Foreign law was one of the tools he sought to marshal in order to foster the amelioration of French law in a more rewarding manner than literalism could ever allow in his view — hence his famous 1890 monograph, *Essai d’une théorie générale de l’obligation d’après le projet de code civil allemand* (Essay on a General Theory of Obligation According to the Draft German Civil Code). Not only, then, was Saleilles’s main preoccupation unabashedly local — a fact that must, at the very least, qualify his authority on the theorization of comparative law —

¹³³ Tocqueville, [A de] (1992) [1835 and 1840] *De la démocratie en Amérique* in *Œuvres* Jardin, A (ed) vol II Gallimard at 1–1191. I discuss Tocqueville (and salvage him from political incorrectness) in Legrand, P *Comparative Law and the Task of Negative Critique* supra note 97 at 241–49. See also Gärtner, JTD (2021) ‘Tocqueville’s Compass’ in Rohland, E et al (eds) *Contact, Conquest and Colonization: How Practices of Comparing Shaped Empires and Colonialism Around the World* Routledge at 268–88.

¹³⁴ In his important discussion, Balázs Fekete emphasizes the influence of the ‘1900’ model within European comparative law (an impact that I do not dispute). Yet, he eschews the weighty issue of mythology. See Fekete, B (2021) *Paradigms in Modern European Comparative Law* Hart at 67–70. Fekete casts his assessment as ‘neutral’: id at 70. I like to think that on further reflection he would easily withdraw this term. Cf Steiner, G (1978) *On Difficulty* Oxford University Press at 158: ‘No reading is neutral.’ I am in Steiner’s camp. (I am not neutral.)

¹³⁵ Saleilles, [R] (1905) [1900] ‘Conception et objet de la science du droit comparé’ in *Congrès international de droit comparé* (ed) *Procès-verbaux des séances et documents* vol I LGDJ 175 at 181.

but the Paris *Congrès* featured so many other speakers holding different views from his as regards law and humankind that he clearly cannot in any reasonable manner be held to have spoken in a representative capacity, contrary to what the VSI would have its readership believe. For example, there were two celebrated interveners, whose names do not appear in the VSI, who flatly impugned Saleilles's advocacy for a planetary commonality of laws.

One of the most eminent intellectual figures of late-nineteenth-century France, jurist, judge, sociologist (Emile Durkheim's famous contradictor), psychologist, and philosopher Gabriel Tarde (1843–1904), holder of a chair at the *Collège de France* and author of such influential texts as *La Criminologie comparée* (Comparative Criminology), *Les Lois de l'imitation* (The Laws of Imitation), and *Les Transformations du droit* (The Transformations of the Law),¹³⁶ all addressing theoretical issues of direct relevance to comparative law, thus spoke at the Paris *Congrès* and expressly advised against the danger 'to misknow the importance of a lot of differences' that one encountered as one moved from one law to another.¹³⁷ Tarde specifically warned comparatists not to 'exaggerate' the salience of commonalities across laws, observing that even seemingly equivalent or apparently common customs would not necessarily herald equivalent or common social conditions and remarking that even when a country adopted the constitution of its neighbour it would imprint a singular character to the text and subject it to an adaptation fit for its own usage.¹³⁸ Meanwhile, an esteemed Sorbonne legal historian and professor of constitutional law, Adhémar Esmein (1848–1913), drew on his extensive experience of comparative research to remind his audience of the primordial differend between English and French law.¹³⁹ In particular, Esmein reprimanded his fellow French jurists for spontaneously translating into the language and the forms of French law the information they derived from their study of the English legal model. In his words, comparative law, when practised in this way, only served to 'distort the institutions instead of making appear their genuine character'.¹⁴⁰

It is therefore fallacious for the VSI to intimate that the advocacy for a common law of humankind would have been the pith and substance of the Paris *Congrès*: such was empirically not the case. And when the VSI's co-authors write, elsewhere in their book, that 'the many scholars who gathered at the Paris Congress in 1900 unanimously concluded that comparative legal studies should be primarily aimed at discovering uniformities among various national laws, and at erecting a common law out of local particularities' (99), they are inscribing a verifiable falsehood: the unanimity that they proclaim never even came close

¹³⁶ See Tarde, G (1886) *La Criminologie comparée* Alcan; Tarde, G (1890) *Les Lois de l'imitation* Alcan; Tarde, G (1893) *Les Transformations du droit* Alcan.

¹³⁷ Tarde, [G] (1905) [1900] 'Le droit comparé et la sociologie' in *Congrès international de droit comparé* (ed) *Procès-verbaux des séances et documents* vol 1 LGDJ at 439 ['méconnaître l'importance de bien des différences'].

¹³⁸ Ibid ['exagérer'].

¹³⁹ For a detailed investigation of Esmein's academic status and scholarship, see Halpérin, J-L (1997) 'Adhémar Esmein et les ambitions de l'histoire du droit' (75) *Revue historique de droit français et étranger* 415.

¹⁴⁰ Esmein, [A] (1905) [1900] 'Le droit comparé et l'enseignement du droit' in *Congrès international de droit comparé* (ed) *Procès-verbaux des séances et documents* vol I LGDJ at 452 ['dénature les institutions au lieu d'en faire apparaître le véritable caractère'].

to materializing. Indeed, along with Tarde and Esmein, many other participants also deployed strong language in the defence of each law's singularity.¹⁴¹ (As I write, I am consulting the proceedings of the *Congrès*, which I have in front of me.¹⁴² How about the VSI's co-authors? Did they envisage the published account before asserting their 'unanimity' claim, or did they languidly rely on what marmoraceous information they had read or heard around them without engaging in any corroboration of their own?) Surely the VSI's preference for the old reliable (a self-satisfyingly simple, even cartoonish account of 'reality') rather than the handling of the (frustrating?) complexity introduced by conflicting evidence, surely the substitution of a pleasing fiction in lieu of (annoying?) facts, cannot be permitted to hold scholarly sway.

Apart from the conclusions that the Paris meeting is manifestly not initiatory with respect to the institutional development of comparative law in Europe and the further determinations that the gathering was affirmably not a general call for comparative-law research to prioritize the construction of commonalities across laws, I indicated a third striking flaw regarding the VSI's crude 'history' that I find hugely troublesome and wish to canvass at this point, a shortcoming having to do with the deplorable exercise in whitewashing on offer whereby the VSI attempts to paint the 1900 Paris *Congrès* as part and parcel of a joyous festival — the 1900 Paris *Exposition universelle* (Universal Exhibition) — steeped in proud and unalloyed progressivism. To this deceptive end, the co-authors mobilize both text and images (specifically, they harness two illustrations, one third of the VSI's entire iconography).

As I understand it, the thrust of the VSI's argument is that the 1900 *Congrès* and the *Exposition universelle* (wherein the *Congrès* lodged its institutional self, although none of the *Congrès*'s meetings actually took place on exhibition grounds¹⁴³) were benign happenings animated by benevolent ideals, both happy configurations revealing 'openness to other cultures' (1), 'faith in progress' (1), and 'countries [...] shar[ing] their culture and accomplishments' (1) such as '[a]rtistic innovations' (1), 'new means of transportation' (1), and 'architectural masterpieces' (1) — specifically, 'electricity' (1) and 'the new cinematograph' (1).¹⁴⁴ Why, there was even '[a]n important world chess tournament' (1) and

¹⁴¹ Eg: Lyon-Caen, C (1905) [1900] 'Rôle, fonction et méthode du droit comparé dans le domaine du droit commercial' in *Congrès international de droit comparé* (ed) *Procès-verbaux des séances et documents* vol I LGDJ at 344 and 346; Weiss, A (1905) [1900] 'Rôle, fonction et méthode du droit comparé dans le domaine du droit civil' in *Congrès international de droit comparé* (ed) *Procès-verbaux des séances et documents* vol I LGDJ at 350–51; Deslandres, M (1905) [1900] 'Observations sur la fonction de la science du droit comparé par rapport au droit public' in *Congrès international de droit comparé* (ed) *Procès-verbaux des séances et documents* vol I LGDJ at 358–59 and 363–64; Larnaude, F (1905) [1900] 'Législation comparée et droit public' in *Congrès international de droit comparé* (ed) *Procès-verbaux des séances et documents* vol I LGDJ at 375–77.

¹⁴² The LGDJ (or Librairie générale de droit et de jurisprudence), a leading French law publisher, issued the *Procès-verbaux des séances et documents* (Transcripts of Sessions and Documents) as two anonymously edited volumes in 1905 and 1907. Most of the transcripts have become readily accessible through their 2020 reprint in a one-volume facsimile edition. See Société de législation comparée (ed) (2020) *Actes du Congrès de Paris de 1900* Société de législation comparée.

¹⁴³ For the location of the sessions, see 'Règlement du Congrès' (1905) [1900] *Congrès international de droit comparé* (ed) *Procès-verbaux des séances et documents* vol I LGDJ at 5. The relevant provision is art 3.

¹⁴⁴ International congresses wanting to draw on the aura of the *Exposition universelle* had to be sanctioned by the French state. See Ministère du commerce, de l'industrie, des postes et des télégraphes, Ministerial Order of 11 June 1898 Instituting Congresses at the *Exposition universelle*

there took place 'the second modern Summer Olympic Games' (1). In effect, everything was about 'inclusiveness' (2) and 'openness towards foreign cultures and traditions' (2). There was even timely 'openness' from the French 'legal professions', Olga Petit and Jeanne Chauvin [being] the first women in France to take their oath as lawyers' late in 1900 (3), the year when everything seemingly took a pertinaciously modernist turn. The impression that the VSI wants to convey to its readership, or so goes my reading of the co-authors' work, is of '1900' as nothing less than an episode at once unmistakably halcyon and undeniably momentous in the history of humanity. Somehow, though, I find myself being unaccountably reminded of the WTO and of the co-authors' stunningly gullible claim that this international body is concerned with 'transparency and fairness' (8).¹⁴⁵

In support of the VSI's irenic (or is it Edenic?) discourse, readers are treated to a portrait photograph of Madame Chauvin billed as 'the first French female lawyer' (4). Perhaps at this juncture my patient reader — I mean the comparatist-at-law who has paid attention to my argument from the beginning — will not be unduly surprised to learn that the VSI's information is flatly wrong, for it is Madame Petit who first swore her oath on 5 December 1900 fully fourteen days before Madame Chauvin.¹⁴⁶ On 19 December 1900, Madame Chauvin thus became the *second* female French lawyer. If any French female lawyer ought to be gracing the VSI (and it is, to my mind, very unclear why this should be the case), it is thus Madame Petit who deserved the honour.¹⁴⁷ (As Monsieur Legrand, I am particularly chagrined that the co-authors should have given Madame Petit such short shrift.) Incidentally, Madame Petit was not at all 'Olga', contrary to what the VSI claims (3). She had been Scheïna before renaming herself Sophie and was also known as Sonia.¹⁴⁸

of 1900' (Arrêté [of 11 June 1898] instituant les congrès à l'Exposition universelle de 1900) in *Journal officiel* (1 July 1898) at 4020, art 3: 'International congresses of the 1900 exhibition shall be placed under the patronage of the French government' ['Les congrès internationaux de l'exposition de 1900 sont placés sous le patronage du gouvernement français']. In the published proceedings, the organizers of the *Congrès international de droit comparé* claim that the state recognized their conference on 27 November 1899. See 'Préliminaires et organisation du Congrès' (1905) [1900] in *Congrès international de droit comparé* (ed) *Procès-verbaux des séances et documents* vol I LGD] at 1. Extensive research notwithstanding, I have been unable to locate the publication of the relevant 'ministerial order' ('arrêté'). Be my investigation as it may, there is evidence that the comparative-law *Congrès* was officially approved. See Chasseloup-Laubat, G de (1906) *Rapport général sur les Congrès de l'Exposition [universelle internationale de 1900]* Imprimerie nationale at 480–84. Over 810 pages, Gaston de Chasseloup-Laubat (1867–1903), one of the 1900 *Exposition universelle*'s commissioners, offers a compilation of the official reports that were filed concerning 123 officially-approved congresses having taken place under the auspices of the *Exposition* including the comparative-law conference's. Incidentally, the gatherings covered such diverse topics as 'Sunday rest' ('le repos du dimanche'), 'numismatics' ('numismatique'), and 'low-cost housing' ('habitations à bon marché'). For a general enquiry on the way in which congresses attached themselves to various Paris international exhibitions, see Rasmussen, A (1989) 'Les Congrès internationaux liés aux Expositions universelles de Paris (1867–1900)' (7) *Mil neuf cent* 23.

¹⁴⁵ Supra at 257–60.

¹⁴⁶ Access to the legal profession had become possible for women on 1 December 1900 by virtue of 'Statute [no 1900–1201] Having as Its Object to Permit Women Holding Diplomas of Graduate in Law to Swear the Lawyer's Oath and to Practise That Profession' ('Loi ayant pour objet de permettre aux femmes munies des diplômes de licencié en droit de prêter le serment d'avocat et d'exercer cette profession') in *Journal officiel* (4 December 1900) at 8021.

¹⁴⁷ See generally Pierrat, E (2016) *Les Femmes et la justice* La Martinière at 15–17.

¹⁴⁸ Emmanuel Pierrat insists that Madame Petit never used 'Olga': see id at 15. Née Scheïna Léa Balachowsky, Sophie Petit was born in Russia (now Ukraine) on 16 March 1870.

In passing, I wish to address the other photograph that the VSI musters to fortify its surrealistic discourse about '1900' — its implausible divagations — which is of the *Exposition's* main entrance as it gives pride of place to Eiffel's tower (2). Overlooking the fact that the metallic structure is much more an 1889 than a 1900 monument, I find it mystifying that the VSI on comparative law, what ought to be a scholarly pursuit whose very *raison d'être* should be to operate as an intrinsically anti-nationalist venture, elected to retain as one of its few images what is possibly the most immediately recognizable *hyper-nationalistic* symbol on the face of the dying planet (just above Big Ben, the Rialto Bridge, and the Sydney Opera House, perhaps), certainly the most obvious marker of French *national* culture.

Quite apart from this perplexing contradiction, however, the most contentious issue to emerge from the VSI's brief treatment of '1900' indisputably remains the moral freight being smuggled into the culture of comparative law even as '1900' is profoundly anchored in ethno-racial discrimination. In order to shatter the romance that both the 1900 *Exposition universelle* and the 1900 *Congrès* would have taken place under the auspices of the most fervent planetary concord and communion, let me simply (and on the whole succinctly) direct attention to the question of colonialism.

In substitution for the VSI's embarrassingly contented exercise in intellectual stagnation, I propose a cursory archaeological investigation unearthing what I regard as the incontestable state-sponsored violence that informed the very heart of the 1900 *Exposition* and that, in my opinion, the most amateurish analyst ought to find to be hiding in plain view. It is not even that colonialism is haunting the *Exposition*: its presence is not spectral but as tangible as presence can get in the form of living human beings and bricks-and-mortar structures. Having apparently forsaken any research worthy of the name in favour of seemingly inviolable adhesion to the received view (in line with proper discipular behaviour, then), the co-authors do not register the fact that they are paving over French colonial history even as the Saleilles quotation they harness ought to have put them on the highest epistemic alert. Recall that the VSI refers to Saleilles as having defended a 'common law for the civilized world' (2) or, in my translation from the original French, a 'common law of civilized humankind'.¹⁴⁹ Clearly, the word 'civilized' is meant to be exclusionary — and to be implementing a somewhat dramatic discrimination, too. In other terms, for Saleilles there are those who are uncivilized, and such undeserving lot quite simply ought not to partake of the 'common law' he is heralding. While Saleilles fails to articulate the contours of this 'us-and-them' delineation, his co-organizer of the *Congrès* and second-in-command, Edouard Lambert (1866–1947), supplies a key hint.

In 1900, Lambert was a young and recently appointed law professor at the university of Lyon. In his major intervention at the *Congrès*, he proceeded to dismiss out of hand from the legitimate sphere of comparative investigations both Islamic and Jewish laws on account of their religious character.¹⁵⁰ To

¹⁴⁹ Supra at 279. The failure of connection that I admonish is particularly surprising given the book's ulterior nod to the correlation between the expressions 'civilised nations' and 'colonial times' (121).

¹⁵⁰ See Lambert, [E] (1905) ['Rapport'] in *Congrès international de droit comparé, Procès-verbaux des séances et documents*, vol I LGDJ at 48. See generally Corcodel, V (2016–17) 'Modern Law and Otherness: Edouard Lambert's Representations of Islamic Law' (19) *Yearbook of Islamic and Middle*

deploy Bonilla Maldonado's grid once more, Lambert distinguished what he regarded as a 'true legal syste[m] [...] creating true law',¹⁵¹ or law existing as an entity 'clearly differentiated from religion or politics',¹⁵² from other '[non-] autonomous' laws that revealed a discreditable and unsurmountable *mélange* with religion or politics, such an example of 'law intersect[ing] with religion' being Islam. Tempted as I am once more, I shall not linger on the indefensible assumption that religion (specifically Roman Catholicism) would not colour French (or Italian) law.¹⁵³ Nor shall I expatiate on the further unwarrantable premiss that a law ought to be excluded from the range of comparative legal scholarship on account of its religious connotations. Rather, I seek to underline how Saleilles and Lambert's converging colonial discourses reveal the Paris *Congrès* that the co-authors are staging in the course of the VSI's introductory chapter to be fake and accordingly misleading: the conference never existed in the way in which the VSI articulates it.¹⁵⁴ (Quaere: are Saleilles's and Lambert's bigoted presentations the speeches that Zweigert and Kötz have in mind when they advance the beffudling observation that the *Congrès* would have shown a 'disarming faith in progress'?¹⁵⁵)

But it is not only at the *Congrès* that colonial rhetoric was at work generating dichotomies and hierarchies whereby some models (the speakers' own!) were deemed worthier than others. Sociologists, in particular, openly styled their 1900 conference, which took place the week after the comparative-law gathering, the *Congrès international de sociologie coloniale* (International Congress of Colonial Sociology),¹⁵⁶ thus proving themselves more forthright than comparatists-at-

Eastern Law 134.

¹⁵¹ Bonilla Maldonado, D *Legal Barbarians: Identity, Modern Comparative Law and the Global South* supra note 22 at 24.

¹⁵² Id at 24 and 23.

¹⁵³ Cf Legendre, P *L'Amour du censeur: essai sur l'ordre dogmatique* supra note 10 at 64: 'Whatever one should do to adorn and shirk the difficulty, the religious question is at the heart of the occidental institution, in a manner as real as in Melanesia or for the Bambaras' ['Quoiqu'on fasse pour orner et dérober la difficulté, la question religieuse est au cœur de l'institution occidentale, d'une manière aussi réelle qu'en Mélanésie ou chez les Bambaras'].

¹⁵⁴ For a typical illustration of the (deliberate?) obfuscation being sustained within comparative-law circles, consider the detailed historical introduction to the 2020 reprint of the 1900 Paris *Congrès*'s proceedings. I refer to Boudon, J (2020) 'Introduction' in Société de législation comparée (ed) (2020) *Actes du Congrès de Paris de 1900* Société de législation comparée at vii–xxv. Five pages are devoted to the goals set for comparative law in Paris and specific reference is made to Saleilles's 'droit commun de l'humanité civilisée' ('common law of civilized humankind') [supra at 279]: id at xxi–xxv. In fact, the Saleilles excerpt appears on six occasions throughout the introduction, two of which are in quotation marks. Despite these six occurrences of the word 'civilisée', Julien Boudon fails to offer any observation about the colonial issue (if I may so summarize the matter). However, he finds time to marvel at the fact that Lambert should have referred to 'droit commun législatif' as 'une expression de combat': id at xxii ['legislative common law'; 'a fighting expression']. Both Lambert phrases are in Lambert, [E] ['Rapport'] supra note 150 at 60. And Boudon's introduction has nothing to say either on the fact that Lambert would exclude Islamic and Jewish laws from the province of comparative law. For Lambert's biases, see supra at 283–84. There is a much earlier yet analogously selective treatment of Saleilles's in Constantinesco, L-J *Traité de droit comparé* supra note 118 at 132–38. While Constantinesco expressly refers to Saleilles's words, like Boudon he fails to comment on the formulation's evident colonial import: see id at 132.

¹⁵⁵ Zweigert, K and Kötz, H *Einführung in die Rechtsvergleichung* supra note 87 at 2 ['entwaffnend(e) Fortschrittsgläubigkeit'].

¹⁵⁶ Leseur, P (ed) (1901) [1900] *Congrès international de sociologie coloniale* 2 vols Rousseau.

law. Even more significantly, though, the 1900 *Exposition* as a whole promoted a central (and, one would have thought, unmissable) colonial streak that the VSI is negligently eschewing or voluntarily hiding. Either way, the co-authors have produced a specious and therefore damaging report (the harm affecting what may remain of the VSI's credibility at this stage of my review, but also afflicting yet further comparative law's indigent political reputation).¹⁵⁷

Let me insist: I reckon that anyone investigating the matter in the least bit seriously must attest to the unequivocal fact that the 1900 *Exposition universelle* unfolded as a resounding colonial declaration.¹⁵⁸ For instance, Friedrich Naumann (1860–1919), a prominent German politician and Protestant pastor, wrote about the *Exposition universelle* how he found it 'astonishing' ('erstaunlich') 'with what application [the French] are pushing their colonial politics in the foreground'.¹⁵⁹ And from the standpoint of historian Paul Greenhalgh, there is no doubt that '[i]mperial achievement was celebrated to the full at [the] international exhibitio[n]' and '[a]ny study [...] that would exclude or underplay this aspect would run the risk of misrepresenting [its] overall flavour'.¹⁶⁰ For a respectable comparatist-at-law, the *Exposition universelle*'s pugnacious colonial strain and its accompanying manifestations of contempt, phobia, and hatred simply cannot be concealed from view so as to facilitate the production of a deceptively idyllic narrative constructed around the ideas of harmony and unity, a distorted chronicle wanting to pretend that *all was well*. Crucially, to close one's eyes to colonial discourse is not to opt for neutrality because silence is anything but anodyne. Rather, to ignore coloniality — if on the basis of cursory research — is effectively to take a defiant stand: it is to countenance a certain set of highly disputable values or commitments. But how, then, was the 1900 *Exposition* so thoroughly colonial — in effect, both a recapitulation and a re-assertion of the colonialist epistemology of Europe as it stood at the turn of the twentieth century?

Through the *Exposition universelle*, France purported to offer Parisians and other visitors a three-dimensional appreciation of the French empire, then the second largest on the planet after the United Kingdom's. Having been conquered in 1896, Madagascar was France's most recent imperial addition, and its pavilion was given pride of place in the centre of *place du Trocadéro* immediately across from Eiffel's tower.¹⁶¹ The main message was economic, the idea being to show France's overseas possessions as lands of wealth harbouring great profitability

¹⁵⁷ Eg: Kennedy, D (1997) 'New Approaches to Comparative Law: Comparativism and International Governance' *Utah Law Review* 545 at 554: '[C]omparative law [...] see[s] itself as precisely not about politics or governance.' David Kennedy refers to a 'disengagement from governance', indeed to 'an aspirational distance from governance', what he styles 'technocratic comparative law': id at 593, 592, and 598, respectively. See also Kennedy, D (2003) 'The Methods and the Politics' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Transitions and Transitions* Cambridge University Press at 345–433.

¹⁵⁸ The number of books and articles on the 1900 *Exposition universelle* is innumerable. For a thoroughly documented text, see Geppert, ACT (2010) *Fleeting Cities: Imperial Expositions in Fin-de-Siècle Europe* Palgrave Macmillan at 62–100.

¹⁵⁹ Naumann, F (1909) *Ausstellungsbrieife* Buchverlag der 'Hilfe' at 99 ['mit welchem Fleiß (die Franzosen) ihre Kolonialpolitik in den Vordergrund schieben'].

¹⁶⁰ Greenhalgh, P (1988) *Ephemeral Vistas* Manchester University Press at 52.

¹⁶¹ Cf Mandell, RD (1967) *Paris 1900* University of Toronto Press at 66: 'Indo-China, Cambodia, Senegal, Tunisia, and especially Algeria all had pavilions grander than those of several rich sovereign states elsewhere at the [E]xposition' [emphasis supplied].

potential. In the process, a further piece of information was relayed to the effect that the French flag now flew in decidedly exotic or barbaric outposts. Thus, the *Ministère des colonies* (Ministry of the Colonies), housed in the Louvre, harnessed both commercial and spectacular themes, all destined to advance the cause of unmitigated nationalism.¹⁶² There was a precedent since on the occasion of the 1889 *Exposition*, model villages had been built on site so as to display how the inhabitants of Cambodia, Dahomey (Benin), or Tunisia lived in their far-away lands. To enhance the authenticity of the Parisian experience, individuals from Indochina, Senegal, and Tahiti had been brought to grace the pavilions. The 1900 *Exposition universelle* proceeded along analogous lines and transferred nearly 500 specimens of native villages and restaurants to Paris.¹⁶³ For instance, the French 'Governor-General of Indochina dismantled a house built by a Vietnamese merchant on the Saigon River and rebuilt it in the Trocadero Gardens to house an exhibit of forest products from all the Indochinese territories'.¹⁶⁴ Still on the subject of authenticity, the Dahomean pavilion harboured 'a "Tower of Sacrifices" decorated with pikes on which there were "actual skulls of slaves [who had been] executed"' back in wild and sanguinary Dahomey — a stunning proof of the natural superiority of European civilization and ultimately of the genetic inferiority of non-European races.¹⁶⁵

Most problematically, though, over 400 autochthonous residents from the French possessions, having forcibly been taken to Paris in order to do the decorative work on the colonial pavilions under the supervision of French architects and builders, were kept on *Exposition* grounds for the duration of the seven-month event in order to contribute unfamiliar colour. It does not seem excessive to speak of a human zoo.¹⁶⁶ In the *Alliance française* pavilion, a Parisian visitor could gawk at some of these hostages being forcibly taught French — the only language in which the subaltern could then legitimately (be made to) speak.¹⁶⁷ As Greenhalgh remarks, 'colonial peoples were not [...] to serve as exotic vendors, waiters and servants, but simply to be looked at'.¹⁶⁸ The natives were on site and on sight.¹⁶⁹ (Note that there were fifty million visitors throughout the

¹⁶² I draw on Schneider, W (1981) 'Colonies at the 1900 World Fair' (31/5) *History Today* 31.

¹⁶³ See Geppert, ACT *Fleeting Cities: Imperial Expositions in Fin-de-Siècle Europe* supra note 158 at 85. See also Greenhalgh, P *Ephemeral Vistas* supra note 160 at 82–111.

¹⁶⁴ Schneider, W 'Colonies at the 1900 World Fair' supra note 162 at 34.

¹⁶⁵ Id at 35.

¹⁶⁶ See Geppert, ACT *Fleeting Cities: Imperial Expositions in Fin-de-Siècle Europe* supra note 158 at 85. To my knowledge, the most detailed study on human zoos is Blanchard, P et al (eds) (2011) *Zoos humains et exhibitions coloniales* (2nd ed) La Découverte.

¹⁶⁷ I refer, of course, to Spivak, GC (1988) 'Can the Subaltern Speak?' in Nelson, C and Grossberg, L (eds) *Marxism and the Interpretation of Culture* University of Illinois Press at 271–313.

¹⁶⁸ Greenhalgh, P *Ephemeral Vistas* supra note 160 at 85–86. But see Thompson, AM (1900) *Dangle's Guide to Paris and the Exhibition* Scott at 84: 'Here are the multi-coloured dwellings of the various Asiatic and African natives subject to the dominion of France [...]. Here one may sit and take tea or coffee, served by men of strange tropical nationalities, whose faces look as polished as your fire-grate at home [...], to be exhibited, as near as our European ideas of decency will permit, in their habits as they live. Some of these people have never before worn clothes, and even now wear them much against their will.'

¹⁶⁹ Cf Greenhalgh, P *Ephemeral Vistas* supra note 160 at 84: 'One can only speculate on what the Senegalese man thought, as he looked back at the gaping expressions of the Parisian crowd, a pale and unhealthy looking mob shrouded in their gaudy dresses and frock-coats, laughing and

seven-month *Exposition*, a daily average of 240,000 entries, ‘by far the largest, most popular world fair that had ever been held’.¹⁷⁰)

Unlike the situation that had prevailed at the 1889 *Exposition universelle* when only French colonies had been on show, in 1900 other nations such as England, Germany, the Netherlands, and Portugal were invited to devote exhibition space to their colonial enterprises. In other words, the 1900 *Exposition* increased colonial presence and made it an even more arrogant display of ‘imperial potency’.¹⁷¹ If you will, ‘the colonial sections at the 1900 *Exposition* saw Europe at its presumptuous, confident peak [...]. Empire here was transformed from military and commercial conquest, from the brutal control of other peoples for cynical economic purposes, to propagandistic entertainment, to a fair. The gaiety of the pavilions was purposely meant to hide the darker side of the gloried conquest, the near genocide which had at different times occurred all over the imperial world, the destruction of cultures, the appropriation of wealth on an unprecedented and greed-ridden scale. The *Exposition* was in every way a harlequin’s mask hiding brutish, heavy features beneath.’¹⁷²

The furtherance of imperialism proved effective, not least through ‘the [...] performative roles assigned to indigenous peoples’ thus cast in the role of disorganized and primitive populations rightly subject to European domination.¹⁷³ Envisage Paul Morand, the distinguished French novelist whom Ezra Pound translated and Proust prefaced, who addressed his childhood experience of the *Exposition universelle* at length in his mid-life autobiography: ‘My true kingdom will be the *Trocadéro*. [...] I spend my days in that Arab, Negro, Polynesian town, which goes from the Eiffel Tower to Passy, a gentle Paris hill suddenly carrying on its back Africa, Asia [...]. [...] [O]ne heard there Chinese violins scrape, pit vipers ring, flutes of Arab music wail, the Aissaouas scream from mystical pain [...]. Among mosques, straw huts, near the tower of Sacrifices, strode barefoot, with a bearing proud and harmonious, tall Negroes, savages still, the subjects of ancient kings, old or recent enemies having become our liegemen [...]. It is at the *Trocadéro* that I understood the greatness [...] of all that France had accomplished in less than fifty years.’¹⁷⁴ Athwart Morand’s view, the

sneering at what they undoubtedly considered the just spoils of war.’

¹⁷⁰ Schneider, W ‘Colonies at the 1900 World Fair’ supra note 162 at 31.

¹⁷¹ The expression is Edward Said’s. Writing about the prior Paris *Exposition universelle* of 1867, Said remarked on ‘one of the greatest and earliest displays of imperial potency’: Said, EW (1993) *Culture and Imperialism* Knopf at 119.

¹⁷² Greenhalgh, P *Ephemeral Vistas* supra note 160 at 67–68 [emphasis supplied].

¹⁷³ Hanson, D (2018) ‘Re-presenting the Arab-Islamic World at the Nineteenth-Century World’s Fairs’ in Raizman, D and Robey, E (eds) *Expanding Nationalisms at World’s Fairs* Routledge at 28.

¹⁷⁴ Morand, P (1941) [1930] 1900 (2nd ed) Flammarion at 64–113. I lift the quotation from id at 101–4 [‘Mon vrai royaume, ce sera le Trocadéro. (...) Je passe mes journées dans cette ville arabe, nègre, polynésienne, qui va de la Tour Eiffel à Passy, douce colline parisienne portant soudain sur son dos l’Afrique, l’Asie (...). (...) (O)n y entendait racler les violons chinois, résonner les crotales, gémir les flûtes des musiques arabes, hurler de douleur mystique les Aïssaouas (...). Parmi des mosquées, des paillottes, près de la tour des Sacrifices, circulaient pieds nus, d’une allure fière et harmonieuse, de grands nègres, sauvages encore, sujets d’anciens rois, vieux ou récents ennemis devenus nos hommes liges (...). C’est au Trocadéro que j’ai compris la grandeur (...) de tout ce que la France avait accompli en moins de cinquante ans’] (emphasis supplied in English). While Morand is often quoted because of his writerly fame, French discourse partial to colonization in the early 1900s was widespread. For a well-researched survey, see Girardet, R (2022) [1972] *L’Idée coloniale en France* Bartillat at 87–115.

Exposition universelle stands as a typical instance of Edward Said's justly decried Orientalism,¹⁷⁵ 'mainly, although not exclusively, [...] a British and French cultural enterprise',¹⁷⁶ 'the high-handed executive attitude of nineteenth-century and early-twentieth-century European colonialism',¹⁷⁷ 'a system of knowledge about the Orient' whereby Europe is 'dominating, restructuring, and having authority over the Orient',¹⁷⁸ 'a sign of [...] power over the Orient',¹⁷⁹ a strategy evidencing 'the idea of European identity as a superior one in comparison with all the non-European peoples and cultures'.¹⁸⁰

The 1900 *Exposition universelle* thus marks a further important step towards 'the institution of the aboriginal'.¹⁸¹ More precisely, the *Exposition* can properly be regarded as '[a] dispositive that has defined and constructed [the colonized] essentially as *aboriginals*' — a disciplinary dispositive.¹⁸² The quality of 'humanity' is no longer a given; rather, it is contemplated as the outcome of 'a process of tearing away from the supposed extravagancies of the body' (recall the Dahomean skulls on pikes).¹⁸³ Yet, the *Exposition universelle* lays bare 'an irreducible oppositional structure', a primordial paradox.¹⁸⁴ Through colonization, France purports to make the aboriginal a fully-fledged member of the Nation; however, around the *Trocadéro* the *Exposition universelle* ensures that the aboriginal is seen in all respects to be fundamentally foreign and therefore different from the Nation's people.¹⁸⁵

Despite its strong commitment to the bold parading of France's imperial might — the display of strategic and sustained expropriations or appropriations of land, of extraction or exploitation of native resources, not to mention outright attempts to enslave or destroy local populations — the colonial arrangement on view at the *Exposition universelle* drew a sharp critique from many French colonialists, who were of the opinion that the colonial cause had been diluted within the greater exhibitional project. These critics declared that the *Exposition* was not doing enough to promote the self-entrusted French civilizing mission (or *mission civilisatrice*), the state policy of unrepentant colonial expansion.¹⁸⁶ Concretely,

¹⁷⁵ See generally Said, EW (1978) *Orientalism* Random House. With specific reference to comparative law, see Ruskola, T (2013) *Legal Orientalism* Harvard University Press.

¹⁷⁶ Said, EW *Orientalism* supra note 175 at 4.

¹⁷⁷ Id at 2.

¹⁷⁸ Id at 6 and 3.

¹⁷⁹ Id at 6.

¹⁸⁰ Id at 7.

¹⁸¹ Barkat, SM (2024) *Le Corps d'exception* Editions Amsterdam at 37 ['l'institution de l'indigène'].

¹⁸² Id at 39 ['(u)n dispositif qui les a définis et construits essentiellement comme *indigènes*'].

¹⁸³ Id at 56 ['un processus d'arrachement aux extravagances supposées du corps']. For the story concerning the Dahomean skulls, see supra at 286.

¹⁸⁴ Barkat, SM *Le Corps d'exception* supra note 181 at 52 ['une structure d'opposition irréductible'].

¹⁸⁵ See id at 50.

¹⁸⁶ The idea of the French civilizing mission evokes in particular Jules Ferry (1832–93), a prominent political figure in nineteenth-century France and a fierce advocate of colonial amplification. Eg: [Ferry, J] (1897) [28 July 1885] 'Discours' in *Discours et opinions de Jules Ferry* Robiquet, P (ed) vol V Colin at 210–11: '[O]ne must say openly that indeed, superior races have a right vis-à-vis inferior races... . [...] I repeat that there is for superior races a right, because

the protesters demanded a further exhibition that would be exclusively devoted to colonialism. Such despondent voices proved sufficiently powerful (the cause of colonialism itself a politically significant enough enterprise) for a Parisian *Exposition coloniale nationale* (National Colonial Exhibition) duly to be staged but a few years later in 1907. Again, villages were built to recreate original habitats from all corners of the French colonial empire of the day. And once more, people from far-away colonies were brought to Paris to be scrutinized by over 1,8 million curious visitors from May until October. At this writing, the *Bois de Vincennes*, located on the eastern edge of Paris, still features solid remnants of this human zoo, abandoned and decaying buildings, a latter-day testimony to the sordid history of European enrichment through mass thievery, enslavement, suffering, and death — all political markers of settler societies and indigenous immiseration.

A practice of subjugation based on beliefs of superiority and entitlement that involves the domination of one people over others, in particular through the seizing of land and the sequestration of access to resources, not to mention an exercise in the cultural imposition of values and language (or the forcible removal of individuals from their native lands to Paris), commandingly and haughtily celebrated by the French state at the 1900 *Exposition universelle*, colonialism à la française is hardly compatible with the pacific and ingenious atmosphere that the co-authors have elected to plot in the VSI. Since the idea of a balmy and futuristic ambiance obviously does not come from the co-authors' own critical thought, one can only wonder where they procured their stated interpretation. To be sure, there is no shortage of readily-accessible texts proclaiming *la grandeur de la France* including from the standpoint of colonialism, not least pronouncements penned by French intellectuals themselves. There is even a French statute to this effect (if in the more subdued language that one expects from a legislative text).¹⁸⁷ Which of these documents did the co-authors peruse?

I do not wish to dwell on the reasons that led the VSI to pretend the 1900 *Exposition universelle* not to have been the salient colonial statement that it so obviously was, other than to remark how the attitude consisting in the obliteration of inconvenient information revelatory of a colonial disposition boasts a long-standing pedigree within comparative law — as Bonilla Maldonado demonstrates to most convincing effect.¹⁸⁸ Perhaps I may simply add that the

there is a duty for them. They have the duty to civilize inferior races' [(I)] faut dire ouvertement qu'en effet, les races supérieures ont un droit vis-à-vis des races inférieures... (... Je répète qu'il y a pour les races supérieures un droit, parce qu'il y a un devoir pour elles. Elles ont le devoir de civiliser les races inférieures...']. For an investigation of the French civilizing mission, see generally Conklin, AL (1997) *A Mission to Civilize* Stanford University Press. In France, Ferry is better known nowadays for another key policy of his that consisted in promoting the free, mandatory, and laic character of public education.

¹⁸⁷ 'Statute no 2005-158 of 23 February 2005 Bearing Recognition from the Nation and National Contribution in Favour of the Repatriated French' ('Loi no 2005-158 du 23 février 2005 portant reconnaissance de la Nation et contribution nationale en faveur des Français rapatriés') <www.legifrance.gouv.fr/loda/id/JORFTEXT000000444898> art 4: 'University research programmes shall accord to the history of the French presence overseas, notably in North Africa, the place that it deserves' ['Les programmes de recherche universitaire accordent à l'histoire de la présence française outre-mer, notamment en Afrique du Nord, la place qu'elle mérite']. Observe that 'the French presence overseas' is statutorily — that is, legally — deemed to be 'deserv[ing]' ('mérit[ante]').

¹⁸⁸ See Bonilla Maldonado, D *Legal Barbarians: Identity, Modern Comparative Law and the Global South* supra note 22 passim. For an extensive (and fascinating) demonstration of another

co-authors' ignorance is arguably facilitated by the fact that they hail from Italy, a *quondam* colonial power. If there is merit to this intuition, it would serve as further indictment of the VSI as an all-Italian enterprise. And what of the fact that in Italian the word 'storia' captures an uncanny overlap between 'history' and 'story'? Could it be that this Italian etymological quirk would have conditioned the Italian co-authors to resolve the tension between reality and artifice through an easy conflation of fact and fiction on account of the two focusses having been called identically in their language for centuries? Be that as it all may, the VSI's utterly skewed account of what took place in Paris in 1900, whether at the *Congrès international de droit comparé* or at the *Exposition universelle*, stands, I think, as an instance of alarming historical blindness, a case of momentous deception, too.

The retort that my analysis of the two 1900 Parisian events that I am addressing — the *Congrès* and the *Exposition* — is far too elaborate for a book like the VSI would be superfluous since I fully appreciate this fact. And the reason why I am writing in such detail is simply to demonstrate the abyss between the VSI's shoddy re-presentation and the information that any piece of careful research is bound readily to divulge. Now, deconstruction beckons reconstruction. Let me suggest, then, an alternative narrative to the VSI's in line with the book's introductory remit and accompanying space strictures. As I contemplate the issue, my account carries at least four advantages over the VSI's: it is focussed on comparative law (nothing on the Olympics, on chess tournaments, or on the Paris bar — the kind of tokenism that the co-authors appear to have in mind when they repeatedly advocate for 'interdisciplinarity'); it purports to overcome comparative law's expedient disciplinary amnesia in the form of its routine expungement of the colonial fact; it is interpretively fair (neither am I reproducing a formulaic narrative nor am I setting aside inconvenient particulars in order to fit a preconceived ideological agenda); and it is brief (at 400 words exactly instead of the VSI's 565 words or so, my text is nearly thirty per cent shorter in a specific editorial context where every word counts). Needless to add, *mais cela va mieux en le disant*, there is neither representativity nor objectivity in my interpretive bricolage (which is therefore not descriptive). And there is no truth to my statement either, notwithstanding any voluntarism I might have enthusiastically harnessed in trying to achieve such an unattainable epistemic ambition — no representativity/objectivity/truth/subjectivity, no rots, then.¹⁸⁹ Nonetheless, and irrespective of how evidently perfectible my report happens to be, the justness of my summary far exceeds the VSI's obedient fabrication — at least so goes my appreciation of the matter. And I cover more ground, too. Here, then, is a text that I think the VSI might advantageously have featured:

In the wake of the 1804 French civil code, at once a nationalization of law and of legal language away from the pan-European teaching of Roman law in Latin, institutional initiatives multiplied throughout the nineteenth century both in France and across neighbouring European countries to encourage or legitimize the development of comparative legal studies. Journals were launched, chairs were established in the ancient universities, books were published, scholarly societies were founded, and conferences were organized. In this last regard, the 1900 Paris Congress has become

discipline's structural (and French) association with colonial thought, see Steinmetz, G (2023) *The Colonial Origins of Modern Social Thought* Princeton University Press.

¹⁸⁹ Infra at 407–14.

much better known than its Brussels and Paris antecedents from 1862 and 1889. Indeed, the idea that the 1900 Paris Congress stands as comparative law's founding moment has anchored itself as a seemingly undefeasible part of the field's lore. Although it billed itself as international, the 1900 Paris Congress very largely consisted of French organizers and participants. The lead coordinator, one Raymond Saleilles, a distinguished Sorbonne academic, enjoined a 'common law of civilized humankind'. His principal assistant, Edouard Lambert, then a young professor in Lyon, expressly excluded Islamic law from the scope of comparative law because of its religious character. Such colonial predilections were not unusual. The Paris *Exposition universelle*, to which the Congress was technically connected along with more than 120 other state-approved gatherings covering the full disciplinary gamut, featured a significant colonial streak, France being keen to showcase its empire and reveal its colonial possessions' (purloined) wealth. In addition to numerous colonial pavilions, the *Exposition* had hundreds of colonials on live display. When comparatists refer to the 1900 Paris Congress, they customarily and conveniently choose to overlook the colonial issue (as they do when they hail Montesquieu as some sort of distant founder of comparative legal studies). Meanwhile, in the United States academics started writing on foreign law in the 1830s, the most prominent name being John Wigmore who, basing himself on his three-year experience as a law teacher in Japan, proved especially prolific throughout the 1890s. After the 1904 Universal Congress of Lawyers and Jurists in St Louis had featured proceedings on comparative law for the first time in the United States, the Annual Bulletin of the American Bar Association's Comparative Law Bureau launched in 1908. The arrival of German jurists of Jewish descent like Max Rheinstein (1933) and Rudolf Schlesinger (1938) energized comparative law, Schlesinger releasing his pioneering casebook in 1950 and the *American Journal of Comparative Law* appearing in 1952.

Et voilà.

Obsessing Over Ordering

The VSI features a fixation with classification — including a wholly unsubstantiated (and, frankly, ludicrous) claim that '[o]ne of the major analytical aims of comparative law has been, and is, to group legal data into different categories, providing a systematic ordering of legal knowledge through classifications' (17). Given the co-authors' belief that comparative law is importantly about inconsequential tinkering with divisional lines, the VSI sees fit to allocate two complete chapters to categorical thinking (that is, forty pages or nearly thirty per cent of the entire book). It is now appropriate for me to consider these two sections, that is, chapters two and three of the VSI. In fairness, I must disclose at the outset that the theme of classification of legal orders into groups is for me a source of nearly uncontainable boredom. It is a topic that I have never taught and continue to refuse to teach. Students who have enrolled in my comparative law classes — whether in Australia or France, in Brazil or the United States, in China or Switzerland — in the hope of being taken on a Cook's tour of the planet's laws have been sorely disappointed as I hardly broach this matter. (The orthodox French conception of *droit comparé* being aligned with

the VSI's as regards the prioritization of tabulation, civil-law tradition *oblige*, an amiable Sorbonne colleague once remarked to me that my work was 'en porte-à-faux', that is, stood in an awkward position, vis-à-vis the French mainstream. My compliant colleague evidently assumed that the dominant view within *droit comparé* was not to be questioned. For him, if there was a lack of fit between my comparative work and the leading position, the blame had squarely to rest with delinquent me.) But there is the VSI's categorical urge, and there is also the co-authors' compulsive earmarking of almost one third of their book towards a consideration of 'legal systems' and 'legal traditions'. And thus I require to do the issue a measure of justice even as I very much persist in thinking, along with Beckett, that because of their boxy thinking, '[t]he classifiers are the obscurantists.'¹⁹⁰

Perhaps I can begin my canvassing of the VSI's two relevant chapters by emphasizing the fact that it is the very first time I have come across a double-barrelled treatment of the matter of laws' categorization. In my experience, either comparatists choose to work with 'systems' (prominently, of course, René David, of *Les Grands systèmes's* fame),¹⁹¹ or they elect to operate by reference to 'traditions' (John Merryman's *The Civil Law Tradition* or Patrick Glenn's *Legal Traditions of the World* some of the most renowned illustrations of this alternative perspective).¹⁹² Accordingly, I find it most peculiar that a comparative-law book — in particular such a short text as the VSI where the apportionment of space is at a massive premium — should pledge fully two consecutive chapters to 'legal systems', on one hand, and 'legal traditions', on the other. But then the co-authors entertain the bizarre claim that 'taxonomy forms a crucial part of comparative legal studies' (19). At this juncture, one does well to bear in mind that the VSI is an all-Italian affair. Indeed, I cannot forget a passage from Merryman's (whose principal foreign-law expertise lay in Italian law): 'Th[e] emphasis on systematic values [in the civil-law tradition] tends to produce a great deal of interest in [...] classifications. Much scholarly effort has gone into the development and refinement of [...] classes, which are then taught in a fairly mechanical, uncritical way.'¹⁹³ It is typically comparatists like David, Zweigert and Kötz, or

¹⁹⁰ [Beckett, S] (2009) [13 December 1926] [Letter to MM Howe] in *The Letters of Samuel Beckett* Fehsenfeld, MD and Overbeck, LM (eds) vol I Cambridge University Press at 397. Cf Nietzsche, F [1889] *Götzen-Dämmerung* in *Digitale Kritische Gesamtausgabe* Colli, G; Montinari, M and D'Iorio, P (eds) <<http://www.nietzschesource.org/#eKGWB/GD>> §26: 'The will to the system is a lack of uprightness' ['Der Wille zur System ist ein Mangel an Rechtschaffenheit']. The best account I know of boxy thinking is Robert Nozick's. I refer to Nozick, R (1974) *Anarchy, State, and Utopia* Basic Books at xiii: 'All those things are lying out there, and they must be fit in. You push and shove the material into the rigid area getting it into the boundary on one side, and it bulges out on another. You run around and press in the protruding bulge, producing yet another in another place. So you push and shove and clip off corners from the things so they'll fit and you press in until finally almost everything sits unstably more or less in there; what doesn't gets heaved far away so that it won't be noticed. [...] Quickly, you find an angle from which it looks like an exact fit and take a snapshot; at a fast shutter speed before something else bulges out too noticeably. Then, back to the darkroom to touch up the rents, rips, and tears in the fabric of the perimeter. All that remains is to publish the photograph as a representation of exactly how things are.' I owe this reference to Alexandra Mercescu.

¹⁹¹ In 1964, René David rebranded his 1950 *Traité élémentaire de droit civil comparé* as *Les Grands systèmes de droit contemporains*. For the current edition of the book at this writing, see David, R; Jauffret-Spinosi, C and Goré, M (2020) *Les Grands systèmes de droit contemporains* (12th ed) Dalloz.

¹⁹² Merryman, JH *The Civil Law Tradition* supra note 56; Glenn, HP (2014) *Legal Traditions of the World* (5th ed) Oxford University Press.

¹⁹³ Merryman, JH *The Civil Law Tradition* supra note 56 at 63.

Uwe Kischel — civilians all — who take the view that classification is worth their (or anyone's) time and thus devote large swathes of their textbooks to this matter. When the VSI asserts that the categorization of the planet's laws is a key feature of comparative law, the co-authors are therefore contending that it is an important enterprise in terms of comparative law civil-law style or even more specifically comparative law *all'Italiana*. Common-law lawyers, for example, are not so preoccupied with boxy thinking (and are therefore not nearly as bridled in their impetus to come to terms with the 'real' world). But then, as Merryman notes in a turn of phrase that I have long thought genial, the civil law 'smells of the lamp'.¹⁹⁴

In the event, despite its heading (18), the VSI's chapter on legal systems is not on legal systems. Rather, it concerns mostly legal families (18–27), partly legal traditions (27–28), and — strikingly, I suggest — 'legal transplants' (29–37). For the moment, I shall leave to one side the two pages on legal tradition since, as I have noted, the VSI devotes a full chapter — in fact, the book's longest chapter (38–66) — to this very matter. Overlooking this avoidable editorial overlap, then, I am left with legal families and 'legal transplants', neither 'family' nor 'transplant' pertaining to 'system' — somewhat puzzling classificatory hiatuses in a chapter expressly devoted to classification, *mais passons*.

To my astonishment (although I must confess that my capacity for consternation is wearing a trifle thin), the expression 'legal family' is deployed in complete innocence, thus without the least awareness of its troubling epistemic and political implications. For instance, the VSI states as follows: 'Legal taxonomy categorizes the several legal systems of the world into a handful of "families" based on common patterns, with each legal system seen as a member of a given family' (19). Observe without further ado how it cannot be, of course, that 'legal taxonomy' categorizes the planet's laws. Instead, it is very much individual and identifiable comparatists-at-law-as-taxonomists who, acting against the background of their enculturation and mobilizing their academic agenda, treat categorization as a worthwhile intellectual activity and proceed to categorize laws this or that way. The process that the VSI seeks to paint as somehow depersonalized is, in effect, deeply personalized (if encultured). But my principal point is that I cannot understand how the VSI should plunge into a somewhat extensive (and, for my money, completely tedious) discussion of the different 'legal families' without devoting so much as a sentence to the question of whether the familial metaphor itself is at all suitable (just as problematically the VSI also mentions 'parent' laws [20], again without the merest exploration whatsoever of this imagery). As Kim Scheppele has had occasion to remark, '[m]etaphors matter in shaping thought, and so it is crucial to get the metaphors right for highlighting key features of the matter under discussion.'¹⁹⁵ But then, *famiglie giuridiche* being a staple of *diritto comparato*, how could one reasonably have expected the all-Italian VSI to challenge the concept?

Before I condemn in the strongest terms the marshalling of the word 'family' within comparative law, I am eager to disclose an interest and register my profound loathing for the very idea and the very fact of the family in general,

¹⁹⁴ Id at 66.

¹⁹⁵ Scheppele, KL (2006) 'The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency' in Choudhry, S (ed) *The Migration of Constitutional Ideas* Cambridge University Press at 347.

which I regard as a foremost enemy of the self. I could not say it more pointedly than André Gide: 'Families, I hate you!'¹⁹⁶ And I fully endorse every word of lawyer-turned-lesbian-activist-writer Constance Debré's brave condemnation: 'I have a political programme. [...] I am for the suppression of the family, I am for the suppression of childhood too if one can.'¹⁹⁷ While I am most emphatically on side with Beckett and firmly believe, like him, that '[a]ll groups are horrible',¹⁹⁸ it has to be that the family remains the most oppressive, suffocating group of all. I am therefore resolutely of Derrida's opinion: 'I struggle with all my strength, hard enough to draw blood, against [...] everything that is, in the world, a trap. The prototype is the "family".'¹⁹⁹ In my personal experience, family — the ordinary *brutality* of the family — is quite a ghastly affair: 'There was father. That grey void. There mother. That other.'²⁰⁰ It is a fair bet that given half a chance, my family would stand an excellent chance of ranking as one of the twentieth century's lousiest. Certainly, my father and brother (my only sibling) would prove very strong contenders. Not therefore claiming any disinterestedness (although to argue disinterestedness would still be to announce an interest in being uninterested), I now turn to comparative law. Why, in my view, ought comparatists firmly to avoid the expression 'legal family' if they are somehow minded to spend their time inutitely aggregating the planet's laws into purportedly neat clusters?

My demurrer has much to do with a remark of Bernard Rudden's. Speaking in terms that brook no dissent, my Oxford supervisor once instructed his pupil that the common law had never been adopted voluntarily anywhere. Now, what do colonization, conquest, and imperialism have to do with the cozy rhetoric that terms like 'families' of laws or 'parent' laws readily evoke *and are meant to connote* — for good measure, Kischel also mentions 'offspring' and 'siblin[g]' laws?²⁰¹ In my view, to speak uncritically of 'legal families' is to remain wilfully blind to five hundred years of geopolitics and counting. Admittedly, a comparatist like myself, who learned in his very first semester in law school how the Judicial Committee of the Privy Council, London's colonial court as of 1833, had consistently distorted the Canadian constitution in order to strengthen the hand

¹⁹⁶ Gide, A (1972) [1897] *Les Nourritures terrestres* Gallimard at 67 ['Familles, je vous hais!'].

¹⁹⁷ Debré, C (2022) *Nom* Flammarion at 107 ['J'ai un programme politique. (...) (J) Je suis pour la suppression de la famille, je suis pour la suppression de l'enfance aussi si on peut']. For Simone de Beauvoir, '[t]he misfortune of man [...] comes from [the fact] that he was first a child, [...] a state of servitude and ignorance': Beauvoir, S de (1947) *Pour une morale de l'ambiguïté* Gallimard at 51 and 54 ['(l)e malheur de l'homme (...) vient de ce qu'il a d'abord été un enfant', (...) un état de servitude et d'ignorance']. I agree, wholeheartedly.

¹⁹⁸ [Beckett, S] (2009) [6 June 1939] [Letter to T McGreevey] in *The Letters of Samuel Beckett* Fehsenfeld, MD and Overbeck, LM (eds) vol I Cambridge University Press at 660. For his part, Derrida observes that 'the very word ["community"] makes [him] nauseous': Derrida, J (2022) [30 December 1976] [Personal Notebooks] in Peeters, B *Derrida* supra note 12 at 361 ['le mot même (de "communauté") m'écœure'].

¹⁹⁹ [Derrida, J] (2022) [22 August 1956] [Letter to M Monory] in Peeters, B *Derrida* supra note 12 at 107 ['(J) Je me débats de toutes mes forces, et jusqu'au sang, contre (...) tout ce qui, dans le monde, est piégé. Le prototype est la "famille"'] (emphasis omitted).

²⁰⁰ Beckett, S (2009) [1982] 'A Piece of Monologue' in *Krapp's Last Tape and Other Shorter Plays* Gontarski, SE (ed) Faber & Faber at 118. I also commend Larkin, P (1988) [1971] 'This Be the Verse' in *Collected Poems* A Thwaite (ed) Faber & Faber at 180.

²⁰¹ Kischel, U (2019) *Comparative Law* Hammel, A (tr) Oxford University Press at 204. For the German text, see Kischel, U (2015) *Rechtsvergleichung* Beck at 221 ['Abkömmlinge'; 'Geschwister'].

of the provinces (in effect states) at the expense of the federal government,²⁰² approaches the term ‘family’ with the kind of sensitivity that may forever elude Italian comparatists. (In passing, I observe that the VSI does not appear to know about the Privy Council since in the course of the twelve lines that the co-authors allocate to the planetwide dissemination of English law [56–57], they conspicuously fail to address this key imperial institution. The argument that the Privy Council would pertain to ancient legal history does not carry. In Australia, appeals to the Privy Council could be filed until 1986, and New Zealand only discontinued them as recently as 2004. Surely, a single sentence on the Privy Council could have advantageously replaced one of the many disposable statements regarding taxonomy that fill the VSI over so many pages.)

The absence of any semantic critique as regards ‘legal family’ is especially disturbing given that the VSI proves willing to allocate substantial coverage to the concept. René David, who is acknowledged as the father of ‘legal families’,²⁰³ thus attracts practically four full pages of text in the book (21–25). I discern in such excessive homage to David a further revealing demonstration of the deleterious effects of an all-Italian perspective on comparative law, a key factor accounting for the VSI’s panegyric arguably having to do with the fact that David’s Italian importer and keeper of the Davidian flame in Italy was none other than one Rodolfo Sacco, the co-authors’ idol.²⁰⁴ (For an additional illustration of the deleterious impact of all-Italian comparative law, consider the two seemingly obligatory nods to Mattei’s idiosyncratic ordering [27 and 39], a 1997 sorting that has not garnered any notable traction from what I can tell, its irrepressible author having fastidiously reconsidered his grouping in 2023.²⁰⁵)

The last English version of David’s *Grands systèmes* appeared in 1985, forty years ago.²⁰⁶ This datation means that in the common-law world David has been a calcified anachronism for decades, hence the rapidly diminished and now well-nigh non-existent afterlife of his book. From a planetary perspective, the VSI is therefore engaged in a massive overselling of comparative law’s collective memory because David’s reverberations have been demonstrably circumscribed

²⁰² One Lord Haldane was cast as the principal villain. See generally Vaughan, F (2010) *Viscount Haldane: ‘The Wicked Step-father of the Canadian Constitution’* University of Toronto Press.

²⁰³ There is early evidence of the deployment of ‘family’ (‘famille’) in David, R (1950) *Traité élémentaire de droit civil comparé* LGDJ at 217. See generally Esquirol, J (2001) ‘René David: At the Head of the Legal Family’ in Riles, A (ed) *Rethinking the Masters of Comparative Law* Hart at 212–37.

²⁰⁴ Eg: David, R (2004) *I grandi sistemi giuridici contemporanei* (5th ed) Sacco, R (ed) Cedam. The first Italian edition appeared in 1967, three years after the French release.

²⁰⁵ See Mattei, U ‘Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems’ supra note 94; Mattei, U (2023) ‘The Legal Metaverse and Comparative Taxonomy’ (71) *American Journal of Comparative Law* 900.

²⁰⁶ See David, R and Brierley, JECB (1985) *Major Legal Systems of the World Today* (3rd ed) Stevens. Anecdotally, I remember how, at my Canadian law school, I was made to buy David-in-English to serve as pre-first-year summer reading. I later realized that the Dean happened to be the book’s translator — a very early introduction to the self-interested ways of academe, with many more disillusionments to follow. Although *Les Grands systèmes* — whether in French or English — strikes me as very troublesome epistemically speaking, I do not purport to deny David’s audacity when he left a professorial post in France, in 1933, to become a law student in Cambridge. Nowadays, such a professional move appears implausible in the extreme. To picture it taking place in the 1930s stretches the imagination almost beyond what seems conceivable. For my salutation of David’s initiative, see Legrand, P (2016) ‘René David: la contre-allée (1906–1990)’ in Gonod, P; Rousselet-Pimont, A and Cadiet, L (eds) *L’Ecole de droit de la Sorbonne dans la cité* (2nd ed) IRJ Sorbonne Editions at 233–37.

geographically and chronologically. And then, there is David as the quintessential colonialist, a character that Bonilla Maldonado exposes in a detailed examination of the French comparatist's French-imperial proclivities as he proceeded to engage in the codification initiative that Ethiopia had commissioned from him in the 1950s.²⁰⁷ Notwithstanding Bonilla Maldonado's well-documented research, despite the fact that the VSI's co-authors list Bonilla Maldonado's book in their *ineffectual* bibliography, and irrespective of a professed decolonial preoccupation (104–6), no 'colonial David' haunts the pages of the VSI. The book's readership thus finds itself being treated to an oversized David twice: he was neither as influential nor as progressive as what the co-authors are intimating.

While on the subject-matter of coloniality, let me say in more general terms that I cannot begin to understand how any self-respecting comparatist can express concern for '[d]ecolonizing [c]omparative [l]aw' (104–6) and simultaneously address the theme of 'legal families' — unless, that is, the point be to dismiss the impolitic designation in the course of one sharp sentence. For example, unguardedly to write without further ado that 'England and India [...] belong to the Common Law family' (94) is, in my view, nothing short of mind-boggling misrepresentation *per incuriam*. (I return presently to the particularly violent imperialism that England visited on India.²⁰⁸)

Impudent Impunity

The theme of aggrandizement as applied to René David's comparative work allows me effortlessly to raise the related topic of the VSI's treatment of Patrick Glenn's writings with respect to the matter of legal traditions. Observe that although the VSI features both 'Patrick Glenn' and 'H Patrick Glenn' indifferently (27 and 38), there is no question that it is referring to the identical person, the discrepancy being the result of poor editing. (On a gossipy note, 'H' stood for 'Hugh', a surname that Glenn disliked and never used.) It is unclear why Glenn's work is being chosen as the benchmark against which the co-authors elect to organize their homespun categorization of laws (of course, inevitably, they had to add their own arrangement to those already in circulation). But it seems that Glenn's deployment of the term 'tradition' (27) and the fact that his configuration would have become 'a very well-known classification' (38) are key. As I read the VSI, the co-authors favour the concept of 'tradition' because they regard it as 'dynamic' or 'changing' (28) and also since it highlights the law's 'hybridity' (28). Contrariwise, they reproach 'legal system' for implying excessive 'stab[ility]' (27), for suggesting 'pur[ity]' (28), and for focussing on 'the nation-states and formal sources of law' (28) — but, perplexingly, not for being mired in coloniality.

I find that the VSI is greatly underplaying the conservatism that must stand as a crucial component of any reasonable understanding of 'tradition'. Personally, contrary to the VSI, I would promptly associate the ideas of 'stab[ility]', 'pur[ity]', and 'formal[ity]' with 'legal tradition' rather than 'legal system'. Martin Krygier,

²⁰⁷ See Bonilla Maldonado, D *Legal Barbarians: Identity, Modern Comparative Law and the Global South* supra note 22 at 117–26. In Bonilla Maldonado's words, David's goal was to 'disseminat[e] Europe': id at 125. Merryman was justifiably critical of David's involvement in the Ethiopian project. See Legrand, P 'John Henry Merryman and Comparative Legal Studies: A Dialogue' supra note 13 at 56.

²⁰⁸ *Infra* at 324–27.

the author of an excellent article on law as tradition — that the VSI does not cite — thus holds that tradition ‘institutionalize[s] the recording, preservation and transmission of [...] the legal past’,²⁰⁹ a process that connotes the idea of ‘truth’ and the immutability that accompanies veridiction,²¹⁰ which is precisely the reason why there has developed a powerful movement advocating for detraditionalization,²¹¹ that is, militating in favour of ‘a shift of authority’, ‘[a] decline of the belief in pre-given [...] orders of things’, and a ‘displace[ment] from established sources’.²¹² If you will, tradition is about the *longue durée*, a point that Merryman properly underscored ages ago when he referred to ‘deeply rooted, historically conditioned attitudes [...] about the way law is or should be made, applied, studied, perfected, and taught’.²¹³

This review is not the proper locus to assess the merits or demerits of ‘tradition’ at any length although I am minded to specify that I consider Glenn’s move from ‘system’ to ‘tradition’ as largely cosmetic, a variation on the theme of David’s historically overarching model that remains deeply ingrained within orthodox comparative law’s ways generally and within the civil law’s manner in particular — which is why my preference easily goes to culture, a decisively more rewarding heuristic (tradition and possibly system, in the broadest sense of the term, being better apprehended as cultural subsets).²¹⁴ What I do find troublesome, though, is how the VSI opts for such a unilateral — and for such a unidimensionally positive — view of the traditionary. If the co-authors are to lay so much capital by classification and if they are to organize their own prized ordering by reference to ‘tradition’, the briefest of critical engagement with the concept seems the ‘[u]nnullable least’.²¹⁵ Some critique might also have helped the reader wishing to understand why, after heaping praise on Glenn (27 and 38), the VSI then veers away from his seven-category classification to substitute its own four-category model (39) — neither the former nor the latter

²⁰⁹ Krygier, M (1986) ‘Law as Tradition’ (5) *Law and Philosophy* 237 at 241. Cf Ricœur, P (1985) *Temps et récit*, vol III Editions du Seuil at 400: ‘By way of tradition we understand [...] *things already said*, inasmuch as they are transmitted to us along the chains of interpretation and of reinterpretation’ [‘Par tradition nous entendons (...) *les choses déjà dites*, en tant qu’elles nous sont transmises le long des chaînes d’interprétation et de réinterprétation’].

²¹⁰ Eg: Le Gall, L and Thomas, M (2024) *Tradition* Anamosa at 54: ‘Truth is at the very heart of the notion of tradition’ [‘La vérité est au cœur même de la notion de tradition’].

²¹¹ Eg: Heelas, P; Lash, S and Morris, P (eds) (1996) *Detraditionalization* Blackwell. For a widely read critique of tradition, see Smith, Z (2000) *White Teeth* Vintage at 161: ‘If religion is the opiate of the people, tradition is an even more sinister analgesic, simply because it rarely appears sinister. If religion is a tight band, a throbbing vein, and a needle, tradition is a far homelier concoction: poppy seeds ground into tea; a sweet cocoa drink laced with cocaine; the kind of thing your grandmother might have made.’

²¹² Heelas, P (1996) ‘Detraditionalization and Its Rivals’ in Heelas, P; Lash, S and Morris, P (eds) *Detraditionalization* Blackwell at 2.

²¹³ Merryman, JH *The Civil Law Tradition* supra note 56 at 2. The VSI actually refers to this passage of Merryman’s on tradition without, however, drawing any conclusions from it (38).

²¹⁴ At the outset, in the very first edition of his book, Glenn acknowledged that his work ‘owe[d] a great deal’ to David: Glenn, HP (2000) *Legal Traditions of the World* Oxford University Press at 142n98. The late William Twining expressly addresses Glenn’s gambit and offers an interpretation converging with mine: he also regards this variation on the categorical theme as specious. See infra at 299. For my understanding of culture with specific reference to comparative law, see Legrand, P ‘Foreign Law, the Comparatist, and Culture: How It Is’ supra note 31.

²¹⁵ Beckett, S *Worstward Ho* supra note 43 at 95.

being more objective than any geographical map. To be sure, this variation is but a re-arrangement of the proverbial deck chairs. Yet, the co-authors' move must have its reasons. And these ought to have been explained, if succinctly.

Despite the inadequate treatment of the analytical issues I mention, the VSI's most deplorable gesture by far regarding Glenn on legal traditions consists in the extraordinary act of censorship that the co-authors have seemingly chosen to implement in order to shield from refutation academic research that has now been authoritatively interpreted as severely wanting. (I accept that 'censorship' is strong language. But how else to call what I reckon is so obviously taking place? Formatting?) For the VSI, Glenn's book, it appears, is to be envisaged as some sort of relic. As the co-authors bestow unto Glenn posthumous critical immunity, the VSI's readership is being seriously misled into believing that Glenn's re-presentation of legal traditions deserves to be given pride of place in light of the acclaim it would have attracted (Glenn actually bookends the VSI's two chapters on classification [38 and 66]). Nothing could be further from the editorial reality, however, and the co-authors are, in my opinion, quite simply and most significantly disfiguring the record.²¹⁶ But it is now incumbent upon me to outline the information that the VSI has elected to exclude from its narrative and thus to hide from its readers.

In 2006, the newly established, London-based *Journal of Comparative Law* (this very journal!), then under the general editorship of Nicholas Foster, decided that its inaugural issue would feature a collective review of Glenn's *Legal Traditions of the World*.²¹⁷ The various chapters or parts of chapters were therefore entrusted to thirteen reviewers, each one an expert on the relevant topic, all of them working independently from each other. The published reviews total one hundred pages. I now proceed to list the critical (and exemplary) excerpts from these thirteen expert assessments that I have collected.²¹⁸

'Hardly any of us [reviewers] have chosen as a residence the type of glass house Professor Glenn has chosen to inhabit, but we recognise his bravery for doing so, and we have therefore done our best to resist the temptation to throw (unfair) stones' (Nicholas Foster).²¹⁹

²¹⁶ It is not the first time that I have seen such blanc-seing being granted to Glenn. Eg: Leckey, R (2017) 'Review of Comparative Law' (26) *Social and Legal Studies* 3. For my critique, see Legrand, P *Negative Comparative Law: A Strong Programme for Weak Thought* supra note 54 at 16n38.

²¹⁷ Foster, NHD (ed) (2006) 'A Fresh Start for Comparative Legal Studies?' (1/1) *Journal of Comparative Law* 100.

²¹⁸ I feel bound to record that in June 1997 I was invited to assess the typescript that Glenn had submitted to Oxford University Press with a view to breaking the deadlock that had arisen between two conflicting evaluations. By way of report, I wrote to Christopher Rycroft, a commissioning editor at the Press, that 'the design of [Glenn's] project [wa]s fundamentally misguided and epistemologically flawed.' I added that '[t]his book [wa]s doomed to be derivative and superficial.' Moreover, I commented that 'even if one was to accept the merits of [this] brand of comparative scholarship, it remain[ed] that this *particular* book [wa]s poorly structured, poorly written, and poorly researched.' Specifically, I pronounced that '[b]y and large, the text [wa]s convoluted and rambling' [on file]. A lady from the Press later contacted me by telephone to ask if publication as student material rather than as a scholarly 'Clarendon' monograph would address my concerns (which, she appeared to concede, were not completely devoid of merit). Evidently, Oxford University Press was determined to release Glenn's text, if sans the Clarendon imprint, what proved to be a sound marketing decision. And, at the end of the day, even an academic publisher is not the Red Cross.

²¹⁹ Foster, NHD (2006) 'Introduction' in Foster, NHD (ed), 'A Fresh Start for Comparative Legal Studies?' (1/1) *Journal of Comparative Law* 100 at 100.

'[The book] invites the interpretation that this "fresh start" for comparative law is no more than a more sophisticated "Cook's tour" of the great legal families of the world — as if one has been upgraded from an ordinary package tour to a luxury cruise ship with a more sophisticated guide to the standard sights' (William Twining).²²⁰

'The value of Glenn's work [...] is likely to be diminished by an overambitious and unsuccessful attempt to turn tradition into a totalising force in law. As for Glenn's endeavours to reinvigorate comparative law, these too suffer from the same infirmity in his argument' (Andrew Halpin).²²¹

'[W]e [...] need a satisfactory conceptual basis in the form of an explanation of the concept of "law", which Glenn fails to provide. We cannot discuss the place of law within a tradition or a society, compare its place with those of morality, religion and "other forms of life" (whatever that means), or consider whether it is separated from them (whatever exactly that may mean) unless we have at least a rough, working notion of what we mean by "law"; and this Glenn does not consider' (Gordon Woodman).²²²

'In my comment, I wish to argue that there are significant deficiencies in Glenn's conception of law and his focus within the civil law tradition' (John Bell).²²³

'Glenn completely ignores not only the very challenging issue of categorising Scandinavian law, but its very existence. [...] Apart from [a] reference to the cool climate, Glenn mentions only the Saami in a Scandinavian context, and these references are also rife with mistakes and misconstruction' (Camilla Baasch Andersen).²²⁴

'The Soviet era, for obvious reasons, suppressed comparative legal enquiry except to stress its contribution to contrasting the positive virtues of Soviet law against the negative features of "bourgeois" law. While the post-Soviet era has done away with those simplistic characterisations, [...] the acid which Patrick Glenn has poured in the wounds is unexpected, undeserved, and thoroughly damaging to the larger discipline of comparative law' (William Butler).²²⁵

²²⁰ Twining, W (2006) 'Glenn on Tradition: An Overview' in Foster, NHD (ed) 'A Fresh Start for Comparative Legal Studies?' (1/1) *Journal of Comparative Law* 107 at 108.

²²¹ Halpin, A (2006) 'Glenn's *Legal Traditions of the World*: Some Broader Philosophical Issues' in Foster, NHD (ed) 'A Fresh Start for Comparative Legal Studies?' (1/1) *Journal of Comparative Law* 116 at 121.

²²² Woodman, G (2006) 'The Chthonic Legal Tradition — Or Everything That Is Not Something Else' in Foster, NHD (ed) 'A Fresh Start for Comparative Legal Studies?' (1/1) *Journal of Comparative Law* 123 at 125.

²²³ Bell, J (2006) 'Chapter Five: Civil Law Tradition' in Foster, NHD (ed) 'A Fresh Start for Comparative Legal Studies?' (1/1) *Journal of Comparative Law* 130 at 130.

²²⁴ Andersen, CB (2006) 'Scandinavian Law in *Legal Traditions of the World*' in Foster, NHD (ed) 'A Fresh Start for Comparative Legal Studies?' (1/1) *Journal of Comparative Law* 140 at 140.

²²⁵ Butler, WE (2006) 'Russia, *Legal Traditions of the World*, and Legal Change' in Foster, NHD

'In order to review the chapter [on Islamic law] without too many interruptions, only a few problems and mistakes have been mentioned. These are regrettably numerous, and range from straight errors to misapprehensions and distortions. It is difficult to understand why there are so many when they would have been easily spotted and remedied by someone with a knowledge of Islamic law and the Arabic language, and their sheer number means that the chapter cannot be recommended as an introduction to the subject' (Nicholas Foster).²²⁶

'There is a curious kind of denaturing of reality. [...] [R]eaders of this chapter [on the common-law tradition] will barely catch a glimpse of the modern, administrative, regulatory state or the welfare state both defined by, operating through and constrained by masses of statutory and administratively created legal rules' (Martin Shapiro).²²⁷

'My assessment of the book as a whole is that [Glenn] rather glides too elegantly and sometimes sloppily over huge areas of violent disagreement in relation to law and different traditions. [...] I often cringed that an award-winning book should still be repeating, in 2004, such profoundly deficient notions about how Hindu law has developed and is developing today. [...] A brief trip to London to learn about Hindu law and an even briefer excursion to the National Law School of India in Bangalore was not the right method to learn about how Hindu law works today' (Werner Menski).²²⁸

'I am one of a handful of lawyers working on Buddhist law [...]. Glenn has not read [the linguists and historians who investigate the subject], and I doubt that he has read the work of us lawyers in any depth. [...] I cannot speak for [others], but my own work on Southeast Asia is far from iconoclastic. I follow a consensus that has been built up by the last two generations of Southeast Asian legal historians. [...] I went to some trouble ten years ago (since these younger scholars published only in their vernaculars) to edit a volume in which they presented their work in English. I am sorry that Glenn has not read what Southeast Asians are saying about their own legal tradition' (Andrew Huxley).²²⁹

'[T]here is surely a point at which bold analysis and broad characterisation distort rather than inform, and in the Chinese case [Professor Glenn's] analysis may well have reached that point. [...] Professor Glenn offers conceptual ambiguity and a concern with typology that undermines his

(ed) 'A Fresh Start for Comparative Legal Studies?' (1/1) *Journal of Comparative Law* 142 at 143.

²²⁶ Foster, NHD (2006) 'Islamic Law as Tradition: Chapter Six of *Legal Traditions of the World*' in Foster, NHD (ed) 'A Fresh Start for Comparative Legal Studies?' (1/1) *Journal of Comparative Law* 147 at 150.

²²⁷ Shapiro, M (2006) 'Common Law Traditions' in Foster, NHD (ed) 'A Fresh Start for Comparative Legal Studies?' (1/1) *Journal of Comparative Law* 151 at 151–52.

²²⁸ Menski, W (2006) 'Glenn's Vision of the Hindu Legal Tradition' in Foster, NHD (ed) 'A Fresh Start for Comparative Legal Studies?' (1/1) *Journal of Comparative Law* 153 at 155–57.

²²⁹ Huxley, A (2006) 'Buddhist Law, Asian Law, Eurasian Law' in Foster, NHD (ed) 'A Fresh Start for Comparative Legal Studies?' (1/1) *Journal of Comparative Law* 158 at 158–59.

attempt to introduce the student of comparative law to the “Asian legal tradition”, whatever that conceptual juggernaut might turn out to be, if indeed it has any meaning at all’ (Michael Palmer).²³⁰

‘[T]he generalist reader will be left [...] with the impression that Japanese legal tradition has survived essentially intact from some non-time specific age of Chinese influence, carrying along in its flow like a piece of flotsam a “preserved” set of 19th and 20th century imports from the West. This belies both the complexity and the continuing development of Japanese legal tradition’ (Sian Stickings).²³¹

‘Glenn’s general strategy [...] in relation to the “talmudic legal tradition” is severely flawed — inevitably so, given the author’s apparent lack of access to the primary sources. [...] I concur [...] with others in this collective review who complain at the lack of precision in Glenn’s formulation of his theory of traditions. [...] Glenn’s use of “talmudic” to characterise the Jewish legal tradition [...] reflects a number of choices which are problematic, both for his own and other purposes’ (Bernard Jackson).²³²

I am keen to return to the issue of the VSI’s censorship, as I style the matter. The collective review that I discuss has been freely available since its release, fully seventeen years before the VSI’s publication. And the co-authors’ *weak* bibliography, for all its blemishes (and there are many and some of them are serious), shows familiarity with the *Journal of Comparative Law*. Charitably, I discard the possibility of sheer sloth. Why then pretend that the collective review does not exist? Why not mention the collective review in the *flimsy* bibliography? After all, this collective review stands as a rare event in the field of comparative law (how many one-hundred page reviews have ever been devoted to a comparative-law text?), and it brings together a number of distinguished comparatists whom their peers hold in high regard and deem able to speak dependably on the foreign law that is the focus of their respective specializations. Yet, the VSI proceeds as if this collective review — a first-rate exercise in scholarly critique — had literally never seen the light of day. Why this *omertà*? And it is not only a question of this collective review. Consider James Whitman’s critique of *Legal Traditions of the World in Rechtsgeschichte*, the German legal history journal. According to Whitman, ‘[l]overs of serious scholarship are sure to dislike [Glenn’s] book’, ‘a poorly executed, self-indulgent piece of work’.²³³ Whitman also highlights ‘embarrassing misconceptions’ and ‘rambling chapters’; noting that ‘[i]nfelicities and errors abound’, he also observes that the text is ‘poorly worked out’.²³⁴ Well aware of Whitman’s review, I am charitably

²³⁰ Palmer, M (2006) ‘On Galloping Horses and Picking Flowers: China, Chinese Law and the “Asian Legal Tradition”’ in Foster, NHD (ed) ‘A Fresh Start for Comparative Legal Studies?’ (1/1) *Journal of Comparative Law* 165 at 169–70.

²³¹ Stickings, S (2006) ‘Where Does Japan Belong?’ in Foster, NHD (ed) ‘A Fresh Start for Comparative Legal Studies?’ (1/1) *Journal of Comparative Law* 171 at 173.

²³² Jackson, BS (2006) ‘Internal and External Comparisons of Religious Law: Reflections from Jewish Law’ in Foster, NHD (ed) ‘A Fresh Start for Comparative Legal Studies?’ (1/1) *Journal of Comparative Law* 177 at 180, 180n17, and 182n27, respectively.

²³³ Whitman, JQ (2006) ‘A Simple Story’ (4) *Rechtsgeschichte* 206 at 206.

²³⁴ Id at 207.

prepared to assume, the VSI chooses to omit any reference whatsoever to this forceful critique of Glenn's, the damning reaction of a leading comparatist.

Quite apart from Glenn's 'significant deficiencies' in his treatment of the civil-law tradition (Bell), his 'references [to Scandinavian law] [being] [...] rife with mistakes and misconstructions' (Andersen), his writing of a chapter on Islamic law 'with[out] a knowledge of Islamic law and the Arabic language' (Foster), his treatment of the common-law tradition 'denaturing [...] reality' (Shapiro), his 'profoundly deficient notions about [...] Hindu law' (Menski), his failure to 'read what Southeast Asians are saying about their own legal tradition' (Huxley), his 'lack of access to the primary sources' as regards the Jewish legal tradition (Jackson), his 'embarrassing misconceptions' (Whitman), and so on and so forth, quite apart from all such shortcomings, then, neither the collective review, although most comprehensive, nor Whitman's appreciation, although most insightful, exhaust the problems arising from Glenn's book.

Contemplate, for instance, an excerpt from *Legal Traditions of the World* where Glenn holds, in a manner faithfully implementing the orthodox view within the field of comparative law (particularly once different laws from different locations have all been Englished within a space where linguistic disparateness has now morphed into seeming commonality), that there can be understanding across laws or legal cultures and that such understanding is ultimately uncomplicated. Writing with reference to Russian law, Glenn thus maintains that '[i]f you are a western lawyer with no previous experience of Soviet or socialist law, there are no major conceptual problems in understanding it. Simply assume a hyper-inflated public law sector in the jurisdiction in which you presently function.'²³⁵ I profoundly disagree. (I so easily imagine how curtly Bernard Rudden, whose foreign expertise lay precisely in Soviet and Russian law, would have responded to such a declaration at once so naive and flippant, so *uneducated*.) My decades of comparative-law scholarship lead me to maintain that the understanding Glenn assumes possible on the comparatist's part simply cannot be made to happen (even assuming fluency in the Russian language — which, in Glenn's case, is an unduly generous concession since he did not have such skill).

What is on display in Glenn's text, I find, is but the pathological, irrational, and frankly paralyzing illusion of mastery or control over otherness, which can only be assumed and enunciated because a comparatist is prepared to elide, repress, reject, or disavow any cognitive limits qualifying the self's understanding and the possibility of the self's epistemic reach — what I see as the makings of a colonial or imperial mindset. Rather, I easily and unreservedly side with Ludwig Wittgenstein. Talking about someone offering an explanation and remarking that an explanation must always beget a further one, the Cambridge philosopher exclaimed: 'I still don't understand what he means, and never shall!'²³⁶ (Please

²³⁵ Glenn, HP *Legal Traditions of the World* supra note 192 at 348. Glenn's book is replete with such inane observations. Since they address understanding, a few of his remarks on translation can also be informatively quoted. For Glenn, understanding across languages does not appear to raise particularly challenging issues. '[E]ven in our own language', he writes, '[s]ome people, and professors, are just impossible to understand': id at 49. In any event, '[t]he translation industry in the world stands as testimony to [the fact of translatability]': ibid. And, '[i]f you don't like translations, [...] you can always learn the other language': ibid. (It occurs to me that perhaps Glenn meant to be humorous.)

²³⁶ Wittgenstein, L (2009) [1946–49] *Philosophical Investigations* (4th German–English ed) Hacker, PMS and Schulte, J (eds) Anscombe, GEM; Hacker, PMS and Schulte, J (trs) Wiley-Blackwell §87

note: it is not at all that one cannot research foreign law, that one cannot engage in comparison. I am not encouraging abdication with a faux despair before the possibility of comparative law. Rather, I ask the comparatist-at-law to display a good measure of modesty, a becoming humility. Dismissing Glenn's glib arrogance, I suggest that one makes piecemeal but worthy progress by auditing the preconceptions that must distort one's appreciation of other laws. Then, one assumes the task of patiently looking and thinking and looking and thinking again, and again...)

For the sake of reconstruction, once more, I suggest that instead of writing how '[i]n comparative scholarship, H Patrick Glenn has elaborated a very well-known classification of the "legal traditions of the world", providing a template based on seven categories' (38), the VSI could have added, quite simply, the following proviso: '[...] that was the focus of a severe critique by thirteen experts writing within the framework of a collective review'. In my opinion, these nineteen words (or a variation on such formulation) and a reference to the *Journal of Comparative Law's* collective review in the *dim* bibliography were necessary — but would have been sufficient — to address the controversy surrounding Glenn's book. Meanwhile, the VSI's preposteration in forfending the *Journal's* critical fardellage must inevitably generate scholarly disquiet.

How to Get Transplants So Badly Wrong

Censorial writing, as I see the matter, is not confined to the VSI's treatment of Glenn's critics, however, for it also colours the topic of legal 'transplants', what would be Alan Watson's brainchild, where Watson's most conspicuous antagonist — me! — is nearly cancelled. (What would be taking place if not cancellation? What sense would there be to the assumption that the co-authors would not have been aware of my work and of the high visibility it has assumed over the past two decades or so? But I am getting ahead of myself.)

Before all else, let me repeat how I find it very strange that the topic of legal 'transplants' should be addressed principally in a chapter entitled 'Classifying Legal Systems' (29–37). Try as I may, I cannot see the connection. Now, the VSI maintains that the expression 'legal transplants' is Alan Watson's; he would have '[c]oined' it (30). Although the co-authors do not specify where such 'coinage' would have been inscribed, they presumably refer to Watson's monograph, *Legal Transplants*, the only work of his to appear in the VSI's *inept* bibliography with respect to the chapter on legal systems.²³⁷ It seems fair to say that Watson's paternity as regards the phrase 'legal transplant' stands as the received opinion within comparative law, if an unexamined one, the very reason why I expected to find this taken-for-granted view being duly duplicated in the VSI — which it acquiescently is. However, some elementary electronic research conducted with a few suitable keywords (no need for any painstaking archival truffling) can easily show that the horticultural/surgical metaphor long antedates Watson *cui de falso credita* whose desert, then, is not so much to have '[c]oined' it but rather to have made it famous, to have volumnised it (no small feat, of course, and all to his merit — although one might claim that since his theory is so profoundly fallacious, no honour is in fact to be had).

at 45 ['(I)ch verstehe also noch immer nicht, und nie, was er meint!'].

²³⁷ The *editio princeps* is Watson, A (1974) *Legal Transplants* Scottish Academic Press.

For example, there is a 1937 article in the *Law Quarterly Review* where one Hermann Mannheim mentions 'transplantation', 'transplanting', and 'to transplant' with specific reference to the criminal jury in continental Europe.²³⁸ A further illustration of a pre-Watson marshalling of the notion can be found in the work of the respected Cambridge comparatist, CJ Hamson. Addressing the dissemination of European laws in 1956, Hamson mentions 'transplantation' frequently and mobilizes the verb 'to transplant'.²³⁹ Hamson thus writes of 'the characteristic differences of European law as transplanted in Turkey'.²⁴⁰ Much closer to Watson's book, the 1973 *American Journal of Comparative Law* published an article by one John Beckstrom, a US law professor at Northwestern University, whose very title refers to the 'transplantation of legal systems'.²⁴¹ Beckstrom uses the noun 'transplants' on many occasions throughout his text.²⁴² And then, there is Otto Kahn-Freund's LSE lecture of June 1973, whose published version features forty occurrences over twenty-seven pages of the words 'transplantation', 'transplanting', 'transplanted', 'transplantable', 'to transplant', and 'untransplantable'.²⁴³ Given the prevalence of the metaphor in his intervention (or at least in the written version thereof), it seems reasonable to assume that if Kahn-Freund had been aware of Watson's work, he would have mentioned his name, which he does not. As I refer to Mannheim, Hamson, Beckstrom, and Kahn-Freund, there is no justification for me to believe — and I therefore do not claim — that my list is exhaustive. In fact, I strongly suspect that other, and perhaps earlier, harnessing of the metaphor could be ascertained. I repeat that I am limiting myself to elementary electronic research only.

In his *Legal Transplants*, Watson dates the preface 'June 1973'.²⁴⁴ Still in the foreword, he indicates that 'the impulse to write this book came from a course on Jurisprudence which [he] taught at the University of Virginia Law School in the Fall Semester, 1970.' Moreover, in the notes to the 1994 afterword written on the occasion of the second edition, in effect a reprint of the 1974 text, Watson specifies that he 'lay the completed manuscript aside for three years', having elected to do so '[o]ut of deference' to Tony Honoré who, Watson reveals, regarded the typescript as 'an attack on Comparative Law as he had practiced it for twenty

²³⁸ Mannheim, H (1937) 'Trial by Jury in Modern Continental Criminal Law' (53) *Law Quarterly Review* 99 at 99, 100, and 116, respectively. A criminal judge and professor of law in Berlin, Mannheim (1889–1974) moved to England in 1934 on account of the ascendancy of the Nazi regime. He started teaching at LSE in 1935. A criminologist *avant la lettre*, Mannheim focussed on comparative research.

²³⁹ Hamson, CJ (1956) 'The Istanbul Conference of 1955' (5) *International and Comparative Law Quarterly* 26 at 27 and 31 ('transplantation' — thrice and once, respectively) and 36 ('to transplant').

²⁴⁰ Id at 32.

²⁴¹ Beckstrom, JH (1973) 'Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia' (21) *American Journal of Comparative Law* 557.

²⁴² Eg: id at 557 (four times).

²⁴³ Kahn-Freund, O (1974) 'On Uses and Misuses of Comparative Law' (37) *Modern Law Review* 1. Kahn-Freund had retired from the Oxford professorship of comparative law in 1970.

²⁴⁴ Watson, A (1993) *Legal Transplants* (2nd ed) University of Georgia Press at [xiii]. For convenience's sake, I refer to the second and current edition, a reprint of the largely inaccessible 1974 text. The reprint, which occurred after Watson's absquatulation from the United Kingdom to the United States, includes the original preface, the only notable differences characterizing the later release, as far as I can tell, being the addition of a second preface and an afterword.

years'.²⁴⁵ Leaving aside the puzzling matter of deferential scholarship, the upshot of my chronology is that Mannheim's and Hamson's usages clearly antedated Watson's, on one hand, and that Beckstrom's and Kahn-Freund's were roughly contemporary with his and seemingly developed in ignorance of Watson's work, on the other. (I am charitably willing to allow that Watson did not know about Beckstrom or Kahn-Freund's publications although it seems more difficult to conclude that he would not have been aware of either Mannheim's or Hamson's writings, one having appeared in a leading British law journal, the other having been published in the leading British comparative-law journal by the then Professor of Comparative Law in the University of Cambridge. However, I am not concerned with the probity of Watson's sources.)

The VSI generously devotes three pages to a re-presentation of Watson's argument (30–32) — Watson, one of the famous troublous troubadours of comparative law. The VSI follows these three pages with the most cursory overview of critique imaginable, a panorama that fills less than a page and does not mention any name (33). Even within the twenty-six lines summarizing what would be the principal objections to the 'transplants' thesis, the co-authors manage to say that Watson's work has 'merit' and to call it 'dynamic' (33). Yet again, the VSI falls prey, in my view, to a distressing case of censorious misrepresentation. No sooner had *Legal Transplants* been published in the 1970s that many leading scholarly voices expressed the most forceful resistance to Watson's argument and comprehensively rejected his conjectures, an aversion that has since continued to manifest itself in strong language. One would be hard-pressed to trace this significant critical streak to the VSI.

An early reviewer of Watson's monograph was Robert Seidman, a US law professor at Boston University, who remarked how Watson's 'domain of study [...] is, in the positivist tradition, the universe of rules',²⁴⁶ a positivism that 'leads him astray'.²⁴⁷ For Seidman, '[b]ecause [Watson] has already abjured any study of societal factors as "sociology" and not "law", when he is forced to take these factors into account, he does so without any careful analysis or testing of hypotheses'.²⁴⁸ Seidman added: 'To subsume all "non-legal historico-political factors" under the rubric of chance [as Watson does] is to turn one's back on what obviously are the most powerful influences in the formation of legal systems'.²⁴⁹ It is, noted Seidman, 'to say nothing'.²⁵⁰ Seidman concluded that Watson's effort was 'so unilluminating', 'so empty', and 'so sterile'.²⁵¹

For his part, Eric Stein, the distinguished US comparatist, writing three years after the release of *Legal Transplants*, opined that Watson 'blur[s] the detail and soften[s] the difficulties'.²⁵² He pointed how '[he] f[ou]nd it somewhat difficult to

²⁴⁵ Id at 118n1. Tony Honoré was Regius Professor of Civil Law at Oxford from 1971 until 1988.

²⁴⁶ Seidman, RB (1975) 'Book Review' (55) *Boston University Law Review* 682 at 683.

²⁴⁷ Id at 687.

²⁴⁸ Id at 683.

²⁴⁹ Id at 684.

²⁵⁰ Ibid.

²⁵¹ Id at 683, 687, and 687, respectively.

²⁵² Stein, E (1977) 'Uses, Misuses — and Nonuses of Comparative Law' (72) *Northwestern*

conjure up an image of a law reformer on a *tour d'horizon* of foreign legal systems, plucking ideas from "black letter" rules in complete ignorance of how such rules operate as "living law" and where they fit into the legal system.²⁵³ Meanwhile, prominent Stanford legal scholar Lawrence Friedman was characteristically forthright: 'I find the thesis quite unconvincing,'²⁵⁴ 'all [of it] pure assertion, pure conclusion'.²⁵⁵ The claim, said Friedman, is 'strange, contorted', to the point where Watson is 'confused about confusion'.²⁵⁶ According to Friedman, '[t]he transplant argument is [...] weak because it is based on a narrow concept of a "legal rule"'. For Watson, a rule means words strung out on paper, not a living process.²⁵⁷ In sum, Watson's claim had to be 'fundamentally wrong'.²⁵⁸ Many years later, Friedman would maintain that '[Watson's] premises are ludicrous' and that '[a]nyone who has the slightest interest in law as a social or historical phenomenon simply cannot take seriously Watson's notions'.²⁵⁹ Friedman considered Watson's thesis to be so deficient that 'attacking [him] [wa]s like shooting fish in a barrel'.²⁶⁰

Richard Abel would not disagree with Friedman's imagery.²⁶¹ In Abel's view, Watson propounds 'a theory of law in society grounded upon the principle of absurdity, irrationality, and disconnection',²⁶² the result being that for Watson '[b]oth substantive rules and legal procedures are essentially [politically] neutral',²⁶³ an 'assumption [...] disproved by everything that we have learned from empirical studies of law in society during the past few decades' (and Abel was writing nearly fifty years ago...)²⁶⁴ If you will, 'the most serious problem with Watson's theory is that it is not a theory at all'.²⁶⁵ Envisaging law as 'narrowly instrumental',²⁶⁶ a strategy that is 'futile and positively misleading',²⁶⁷ '[t]he most that Watson does is to offer a series of metaphors that seem to do

University Law Review 198 at 204.

²⁵³ Id at 209.

²⁵⁴ Friedman, LM (1979) 'Book Review' (6) *British Journal of Law and Society* 127. Friedman was then reviewing Watson's *Society and Legal Change* (1977), where Watson had closely reprised his 1974 'transplants' argument.

²⁵⁵ Ibid.

²⁵⁶ Id at 128.

²⁵⁷ Ibid.

²⁵⁸ Id at 129.

²⁵⁹ Friedman, L (2001) 'Some Comments on Cotterrell and Legal Transplants' in Nelken, D and Feest, J (eds) *Adapting Legal Cultures* Hart at 93.

²⁶⁰ Ibid.

²⁶¹ See Abel, RL (1982) 'Law as Lag: Inertia as a Social Theory of Law' (80) *Michigan Law Review* 785.

²⁶² Id at 791.

²⁶³ Id at 806.

²⁶⁴ Ibid.

²⁶⁵ Id at 793.

²⁶⁶ Id at 799.

²⁶⁷ Id at 800.

more to mystify the linkage [between law and society] than to illuminate it.²⁶⁸ For Abel, Watson's thesis is but 'a missed opportunity'.²⁶⁹

Unexpectedly, and ill-advisedly, I thought, William Ewald sought to redeem part at least of Watson's argument by introducing the characters of 'Strong Watson' and 'Weak Watson'.²⁷⁰ For Ewald, 'Strong Watson' is 'a menace to himself and to others'.²⁷¹ In Ewald's words, 'Strong Watson' is 'hopelessly antique. If we follow his advice, we shall never get to the new landscapes; indeed, not even to the door. We will, in fact, end in a place [...] with the traditional style of comparative-law scholarship that scorns ideas and fixes its gaze lovingly on the black-letter rules of the private law. That style of scholarship [...] is bankrupt.'²⁷² Observe that Ewald's tale of two Watsons and his attempt to salvage what he regards as the weaker version of Watson's claim has rightly been dismissed as 'full of problems'.²⁷³

Quite apart from the fact that the VSI's very few lines on the reaction to Watson's work do not give the least sense of the magnitude of the critique that has been consistently directed at his legal 'transplants' argument (I am only drawing on a small sample of dissenting publications, a single one of them — Ewald's — appearing anywhere in the VSI),²⁷⁴ the co-authors have for all intents and purposes chosen the near-obliteration of me, as I noted at the outset of my discussion.²⁷⁵ This quasi-erasure seems odd given that I have long been regarded within comparative law as Watson's best-known critic on account of a short article I published more than a quarter century ago that has consistently generated significant and sustained interest since its release (much to my surprise, I may add, but this is not the matter I am addressing). The impact of this publication is easily confirmable empirically — independently, then, of any appreciation of mine.

I wrote my anti-Watson retort, 'The Impossibility of Legal "Transplants"', having been invited to contribute to the then new *Maastricht Journal of European and Comparative Law*, whose founding editor was the European Union law expert, Bruno de Witte, a fine academic.²⁷⁶ At the time, I was teaching at Lancaster

²⁶⁸ Id at 794.

²⁶⁹ Id at 807.

²⁷⁰ Ewald, W (1995) 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (43) *American Journal of Comparative Law* 489 at 491.

²⁷¹ Id at 492.

²⁷² Ibid.

²⁷³ Cotterrell, R (2001) 'Is There a Logic of Legal Transplants?' in Nelken, D and Feest, J (eds) *Adapting Legal Cultures* Hart at 74. Roger Cotterrell's extensive critique of Watson's thesis has properly been called 'devastating': Friedman, L 'Some Comments on Cotterrell and Legal Transplants' *supra* note 259 at 93. For Cotterrell's discussion, see Cotterrell, R 'Is There a Logic of Legal Transplants?' *supra* at 71–92.

²⁷⁴ Why refer to Ewald only? Is it because he did his silvery best to take Watson's side?

²⁷⁵ *Supra* at 303.

²⁷⁶ Legrand, P (1997) 'The Impossibility of Legal "Transplants"' (4) *Maastricht Journal of European and Comparative Law* 111. Having succumbed to an insistent request, for the sake of collegiality, I subsequently re-published the text as Legrand P, (2001) 'What "Legal Transplants"?' in Nelken, D and Feest, J (eds) *Adapting Legal Cultures* Hart at 55–70. Unlike another comparatist, whose every article seemed to resurface as a book chapter (at times *ohne* co-authors) throughout the

University's vibrant law school — easily my most rewarding full-time academic post, certainly a major turning point in my intellectual life (with profuse thanks to Peter Goodrich, Geoffrey Samuel, David Sugarman, and Costas Douzinas). I was then seeing de Witte regularly on account of the fact that the university of Maastricht was directing the Erasmus law network to which Lancaster belonged. In those days, all manner of meetings, events, or annual conferences were regularly organized for institutional participants within the network, not to mention bilateral initiatives involving Lancaster and Maastricht (all handsomely subsidized, if memory serves). I thought it was generous and open-minded of de Witte to canvass my contribution as my views on uniformization of laws, to express myself in the most general language, did not align with his (but, as I have just observed, he is a fine academic). I lavished much time and effort on my writing (and 'shopped' the argument around). Over the years, the paper proved a resounding statistical success. By way of support for this hardly impartial proposition, and for the benefit of those who may have unaccountably allowed their subscription to lapse, I wish to indigitate the *Maastricht Journal's* celebration of its thirtieth anniversary in 2023. On this occasion, data was compiled and released revealing that 'The Impossibility' is, by far, the *Maastricht Journal's* most widely cited text since the inaugural issue unsuspectingly hit the stands in 1993. The figures, howsoever they are computed, give 'The Impossibility' 1,121 citations, the article next-in-line earning 296.²⁷⁷ (Bizarrely, the chief statistician somehow manages to claim that my argument concerns 'the fundamental issue of the possibility to create integration of law via European Directives',²⁷⁸ an over-interpretation that simply cannot withstand even the most cursory perusal of my text, which has nothing whatsoever to do with EU directives.) I can only hope that Bruno de Witte remains pleased to have solicited my participation three decades ago.

To my knowledge, 'The Impossibility' has been translated on at least four occasions (in Chinese, Italian, Portuguese, and Ukrainian). It has also been anthologized twice. And 'The Impossibility' has long become a mainstay of the debate on 'legal transplants', Watson and I being regularly pitted against each other in law reviews and classrooms seemingly all over the planet (I can personally attest to the existence of reading-list occurrences on all continents). The Watson/Légrand confrontation — no mere velitation by any means — has become so prevalent that one comparatist, Andrew Harding, has openly shared his displeasure that these two names should be monopolizing the conversation, so to speak.²⁷⁹

1990s and 2000s, I have not been in the habit of re-publishing. Accordingly, I regard the recycling of 'The Impossibility' as a non-event. Others have largely been doing so, too.

²⁷⁷ See Faure, M (2023) 'The Maastricht Journal of European and Comparative Law Turns 30' (30) *Maastricht Journal of European and Comparative Law* 673 at 674.

²⁷⁸ Ibid.

²⁷⁹ I have in mind Harding, A (2019) 'The Legal Transplants Debate: Getting Beyond the Impasse?' in Breda, V (ed) *Legal Transplants in East Asia and Oceania* Cambridge University Press at 13–33. Taking stock of the way in which academic fields in the law have coalesced at this writing, I suppose there can be broad agreement to the effect that the subject-matter of 'legal transplants' appropriately pertains primarily to comparative law and that discussions with respect to this theme aptly fall primordially within the province of comparative-law scholarship. To formulate this point in slightly different (and ampliative) language, I think it is a fairly consensual contention to behold that the diffusion of ideas across legal borders — laws' traffic — is a comparative topic *par excellence* and that amongst legal scholars comparatists-at-law ought to be optimally equipped to address the relevant issues with meaningful insight. One therefore readily assumes pertinent parleys arising on the theme of so-called 'legal transplants'

spontaneously to take place within comparative law and amongst comparatists-at-law. No one familiar with the exchange of views that materialized between Watson and me in the late 1990s — and this must mean, albeit in advance of empirical study, every comparatist-at-law or so — would therefore have been at all surprised that the issues should have detained comparative-law journals and attracted the attention of two comparatists-at-law like Watson and me. Lo and behold, Andrew Harding is at harrumphing pains to let his readers know that if they ever formed such an impression, they have been sorely mistaken. No: the disputation on ‘legal transplants’ did not involve two comparatists-at-law. Embracing an age-old motion that consists in discrediting the individuals whose work one wants to challenge — the oh-so-facile *ad hominem* attack — Harding is keen, very early in his argument, to establish how the protagonists in the so-called ‘legal transplants’ debate do not qualify as bona fide comparatists-at-law: one (Watson) is but ‘a legal historian’ (id at 14), the other (me!) is ‘a legal theorist with an interest in comparative law’: *ibid.* I am happy to leave it to John Cairns hagiographically to redeem Watson’s comparative credentials — which, frankly, I cannot see any serious comparatist-at-law challenging with the slightest earnestness. Despite my utter disagreement with Watson, it certainly never occurred to me not to involve him as a comparatist. On the topic of my own competence in comparative law, which according to Harding would extend to the expression of an ‘interest’ only, I read this qualification as a disqualification, an outright attempt to discredit me and disparage my *Maastricht* contribution. (In passing, I must confess to a good measure of astonishment at Harding’s belittling characterization, and I am moved to ask: *how much* must one do for one to be deemed a comparatist-at-law? *How many pages* must one write in the *American Journal of Comparative Law*? *How many articles* must one print in the *Journal of Comparative Law*?) Again, eliminativist tactics are all too habitual. Consider the sort of work that the words ‘an interest in comparative law’ are meant to do. Harding’s ambition as he introduces his alternative facts is to deprive my thesis on ‘legal transplants’ of entitlement to respect, to annihilate any warrant that my contention might be minded to draw from the institutional authority typically vested in specialization or expertise. If I do not count as a bona fide comparatist, if I am not professionally conversant with the discipline of comparative law, if I am coming to the comparison of laws as an amateur, as a dilettante, as someone with a mere ‘interest’, my thoughts about comparative-law thought hardly deserve sustained attention and certainly do not justify the persistent consideration that they have been attracting for more than a quarter century in a half-dozen languages, not least concerning the matter of ‘legal transplants’. While Harding recognizes my *Maastricht* text’s standing within comparative law, he expressly bemoans the fact of its visibility *as* comparative law: see id at 13. Harding’s goal in his book chapter is thus to disentitle me *ab initio*; when it comes to ‘legal transplants’, I would simply not prove an honourable scholarly interlocutor. Of course, it is not enough for Harding to dismiss Watson and me on account of our postulated charlatanry. In addition, Harding requires to establish his personal credentials as comparatist-at-law, which he does (somewhat cursorily, in my view) by describing himself as ‘a teacher who has taught classes on legal transplants for many years’: id at 15. In his impetuosity to berate Watson and me as mere pretenders and in his further haste to thrust himself forward as someone worthy of being designated as a genuine comparatist-at-law, Harding fails to appreciate that I, too, may well have been teaching ‘classes on legal transplants for many years’ (if I may be allowed to respond to Harding’s argument at its own level of unsophistication). Has Harding not bothered to research the matter before drawing the condemnatory distinction that he inscribes in his essay? ‘We would not want [one] to be misjudged, or hastily judged, by the reader, for the want of a few facts. [...] Facts, we cannot repeat it too often, let us have facts, plenty of facts’: Beckett, *S Dream of Fair to Middling Women* *supra* note 33 at 74. As a matter of fact, then, I teach at the minimum eleven courses in five law schools on three continents in every academic year. Often, I teach one or two additional courses in a given academic year in yet more law schools on yet more continents. All of these courses, bar none, are on comparative law broadly understood (quite an ‘interest’...). And, allowing for occasional adjustments (but not for leave, which I have never enjoyed), this pedagogical pattern has now been prevailing for more than thirty years. All in all, my tally represents a not inconsiderable number of courses in comparative law. Is it not conceivable that I, too, in one or other of these numerous courses, may well have been teaching ‘classes on legal transplants’ and that I may perhaps have been doing so ‘for many years’? In effect, Harding, once more in predictable fashion, is attempting to construct his professional identity on the conflictual mode of the ‘they’/‘I’ division. And the fashioning of an ‘I’ (I, Harding) demands as its very condition of possibility the demarcation of a ‘they’ (they, Watson and Legrand). Watson and I are serving as Harding’s ‘other’, thus allowing him to assert his dependability through a two-pronged strategy of ‘exclusion of’ and ‘differentiation from’. In the process, pluralism must be excluded: there will be no room for different comparatists or for different comparatisms. What must prevail is monody — Harding’s own monody, of course. As it asserts itself hegemonically, Harding’s position features a crude exercise in epistemic power, an application of sheer epistemic violence, a deployment of epistemicide, his main ambition to destroy Watson’s comparative warrant and also to kill my standing as a comparatist-at-law. Even ignoring Harding’s emphatic excommunications that would permit him to appear as the last

Since my *Maastricht* publication, many comparatists have proved supportive of my anti-Watson stricture. Before I consider some of these endorsements, perhaps it makes sense to do what the VSI inexplicably opts not to do and to restate, in their simplest form, the terms of the debate.

To illustrate Watson's doctrine of 'legal transplants' in Watson's own words, let me offer a Watson quotation typifying his argument: 'Visigothic Spain, parts of post-mediaeval Germany and nineteenth century California could accept for a variety of reasons what is basically the same régime of matrimonial property.'²⁸⁰ In response, I maintain that the word 'transplant' and its conventional semantic connotations must suppose the transfer of an invariant, say, a plant or a liver: that plant from the blue pot to the red pot, that liver from Mary to Jane. However, law is not an invariant, and it can never be an invariant because it is not structured in a way that can ever allow it to exist as an invariant. It follows that when it comes to law — to put the matter in 'bumper-sticker' form (if this US colloquialism may be indulged) — there can be 'no transportation without transformation'.²⁸¹ Whatever happened across 'Visigothic Spain, parts of post-mediaeval Germany and nineteenth century California' (to quote Watson) cannot, by any means, properly be called a legal 'transplant'. Assuming the replication that Watson heralds (I cannot pronounce on the substantive issue), what will have taken place is a process of dissemination or diffusion — and certainly not a 'transplant'.

To my allies (steadfastly *mezza voce* and not in the least thrasonically)! Günter Frankenberg describes my argument as '[q]uite persuasiv[e]'.²⁸² More or less at the other end of the theoretical spectrum within comparative law, Ralf Michaels opines that 'Legrand's thesis is sometimes viewed as exaggerated but generally sound, at least among comparative lawyers'.²⁸³ Meanwhile, Gary Watt observes that 'Legrand is technically right to say that transplant is impossible'.²⁸⁴ For his part, Sujit Choudhry remarks that '[w]hat Legrand has accomplished is to illustrate the inaptness of the legal transplant metaphor'.²⁸⁵ And Pip Nicholson

comparatist-at-law standing while Watson and I both patently fail to make the grade (recall the teaching of 'classes on legal transplants for many years'...), I hold that the reasoning on offer was left quite some distance from fruition: the fragile rhetorical scaffolding on display is marred by sustained reductionism and confusion, substantial simplism and distortion. But I want to refrain from wielding the *tu quoque* argument. I have one final remark, though. In his bibliography, Harding attributes two publications to me (see Harding, A 'The Legal Transplants Debate: Getting Beyond the Impasse?' *supra* at 32). However, one of them is not by me at all. It was written by Alan Watson. *Ce n'est pas sérieux*.

²⁸⁰ Watson, A (2001) *Society and Legal Change* (2nd ed) Temple University Press at 110.

²⁸¹ Latour, B (1992) *Aramis ou l'amour des techniques* La Découverte at 104 ['pas de transport sans transformation'].

²⁸² Frankenberg, G (2013) 'Constitutions as Commodities: Notes on a Theory of Transfer' in Frankenberg, G (ed) *Order from Transfer* Elgar at 6.

²⁸³ Michaels, R (2013) '"One Size Can Fit All" — Some Heretical Thoughts on the Mass Production of Legal Transplants' in Frankenberg, G (ed) *Order from Transfer* Elgar at 65.

²⁸⁴ Watt, G (2012) '"Comparison as Deep Appreciation"' in Monateri, PG (ed) *Methods of Comparative Law* Elgar at 93.

²⁸⁵ Choudhry, S (2006) 'Migration as a New Metaphor in Comparative Constitutional Law' in Choudhry, S (ed) *The Migration of Constitutional Ideas* Cambridge University Press at 19. Choudhry would replace 'transplant' with 'migration'. One difficulty with 'migration', however, is that it can address a temporary phenomenon involving a shuttle between base and destination (consider storks and other migratory birds). Moving away from Choudhry, one is usefully reminded how path dependence can so easily generate entrenchment into a blinkered view, specifically into the

notes that '[t]ransplant theorists [...] such as Legrand rightly believe that [Alan] Watson "pay[s] undue attention to the texts of written language to the detriment of the framework of intangibles within which interpretive communities operate"'. As a corrective, their highly nuanced studies locate legal rules in a cognitive framework that emphasises the linkages between legal transfers and underlying social values and practices.'²⁸⁶ In the detailed analysis that he devotes to the matter, Michele Graziadei — Michele Graziadei! — holds that 'there is some truth in Legrand's claim that "the transplant" cannot survive the change of context unscathed.'²⁸⁷ According to Annelise Riles, 'Legrand's thesis adds a number of sophisticated angles to comparative legal theory.'²⁸⁸ And these are only the expressions of approval that have serendipitously happened to come my way. Not bad for a fourteen-page article, *n'est-ce pas*?

In terms of the VSI, I trust my readership will readily accept that I am not nearly so concerned about having my contribution practically eliminated from a debate that has been a landmark in the field of comparative law for nearly thirty years as I am with the grossly one-sided re-presentation that the co-authors choose to offer of the state of play within comparative law. To devote fully three pages to Watson and his theory and to expedite his critics over twenty-six lines *without mentioning a single name* stands to my mind, I repeat, as an unacceptable display of censorship. However, such is not the complete story since the issue of legal 'transplants' somehow resurfaces three chapters later (98–99) and yet again in a further section entitled 'The Emperor Justinian Before the Austrian Code' (103–4). There is also a brief mention of legal 'transplants' in a chapter named 'Legal Traditions' (65), such disorganized treatment of the topic another occurrence of poor editing. Of particular interest, in my view, is the VSI's treatment of the question under the heading 'The Emperor Justinian Before the Austrian Code' — a discussion that, incidentally, does not feature in the *laconic* index (144).

This consideration consists of thirty lines only (104). And out of these thirty lines, Watson gets allocated slightly over twenty-two. For its part, my critique — which suddenly, if dimly, comes to light — receives a little more than one line of coverage, in fact fourteen words exactly. The contrast between twenty-two lines and fourteen words is another illustration of the strikingly lopsided preference that the co-authors choose to express towards the author of *Legal Transplants*. But my surname is finally mentioned, seemingly a grudging acknowledgement of my noteworthy participation in the debate — such significance perhaps finding

perpetuation of a decisively flawed terminology (and of a host of decisively flawed implications). Consider the most eerie contentions that the expression 'legal transplant' is 'easy and useful', 'helpful', and 'brings with it a rich history that is thoughtful about methodology' (Watson, Alan Watson, 'thoughtful about methodology?'): Goldbach, TS (2019) 'Why Legal Transplants?' (15) *Annual Review of Law & Social Science* 583 at 584, 596, and 596, respectively. In the face of such bewildering claims, Wittgenstein somehow leaps to mind. See *supra* at 240.

²⁸⁶ Nicholson, P (2008) 'Legal Culture "Repacked": Drug Trials in Vietnam' in Nicholson, P and Biddulph, S (eds) *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* Nijhoff at 55–56. Nicholson's quotation is from Legrand, P 'The Impossibility of "Legal Transplants"' *supra* note 276 at 121.

²⁸⁷ Graziadei, M (2019) 'Comparative Law, Transplants, and Receptions' in Reimann, M and Zimmermann, R (eds) *The Oxford Handbook of Comparative Law* (2nd ed) Oxford University Press at 469.

²⁸⁸ Riles, A (2019) 'Comparative Law and Socio-Legal Studies' in Reimann, M and Zimmermann, R (eds) *The Oxford Handbook of Comparative Law* (2nd ed) Oxford University Press at 792.

quantitative confirmation at least in the words of a comparatist to the effect that 'Legrand's many contributions on legal transplants cannot all be cited in the space of a footnote.'²⁸⁹ It is, then, as if the VSI had suddenly remembered the Watson/Legrand controversy, an afterthought occurring many pages after the main discussion. What to think in the face of such editorial haphazardness? Many would hold, I suppose, that it is ultimately better to make an appearance out-of-turn, even if the briefest of cameos, than not to perform at all. But I wonder if it still remains better to appear when one's views find themselves being thoroughly distorted — quite a feat for the VSI to achieve over the course of a mere fourteen words. Let me explain.

The co-authors write that '[a]ccording to Watson, if a tomato grower sells his plants and the buyer puts them in her garden, they are still the same tomato plants despite being in different soil and sunlight. According to Legrand, it is the garden, not the individual plant, that really matters'(104). The 'tomato' illustration is Watson's, and it is worth quoting at length: 'I am a tomato grower. I have plastic trays each with 24 small containers filled with a soil mix. Into each container I place a tomato seed, which I proceed to water and fertilize. When the plants are about six centimeters tall, I sell them. A buyer takes one, pinches it out of its container, and plants it in his yard. The plant soon stretches out its roots into the surrounding, very different soil. The purchaser fertilizes it with his own, different from mine, fertilizer. The tomato plant is in a very different ethos on which its future depends. Even the sun strikes it differently. The tomato plant may flourish or even wither. Now to put a question not considered by the Greek philosophers. Is the tomato plant the same plant as it was under my care? If I understand Pierre Legrand correctly his answer is No! There has been no transplant because transplants are impossible.'²⁹⁰

It is the historian Norman Stone who once said: '[C]an I have a challenger who can read?'²⁹¹ I accept, needless to add, that reading is hard work. However much a reader may seem as if he is at rest, his body — his eyes, the meaning-making parts of his brain — is fully activated. Reading can even prove an acute experience, demanding a degree of vigilance and full-body presence not unlike walking down a steep escarpment at Black's Beach or driving at speed on a narrow country road in Corsica. The stillness of the reading body thus betrays the fact that reading is an activity: to read is to do something. To remain charitable, as must be the comparatist-at-law's ambition, let me simply say, then, that Watson has misread me. Ex hypothesi, the tomato plants having been sold, on one hand, and the tomato plants having later been put in the buyer's garden, on the other, are the identical tomato plants (give or take one missing leaf that would have fallen during the transfer). The simple and straightforward point is that I have no difficulty whatsoever in perceiving any given tomato plant leaving the seller's world and then entering the buyer's world as one tomato plant and thus as a tomato plant remaining identical to itself. I am minded to add that I find it hard to imagine how anyone could sensibly think otherwise — which would be why, if Watson is to be believed, '[the] question [was] not considered

²⁸⁹ Graziadei, M 'Comparative Law, Transplants, and Receptions' supra note 287 at 462n87.

²⁹⁰ Watson, A (2000) 'Legal Transplants and European Private Law' (4/4) *Electronic Journal of Comparative Law* 1 at 10.

²⁹¹ Stone, N (28 May 1993) [Letters to the Editor] *The Times Literary Supplement* 17 at 17.

by the Greek philosophers.’ (Again, I use the term ‘identical’ loosely because it is easy to expect that the tomato plant will have been damaged in the course of its transfer from seller to buyer in which case identity, strictly speaking, would be forsaken.) Once more, to suggest, as Watson does and the VSI’s co-authors slavishly do also, that I disagree with the tomato plant example is to reveal the depth of the misconception at work. The VSI’s error is compounded by the further enunciation that I would be more interested in the new location of the tomato plant (the ‘garden’) than in the tomato plant itself. In fact, contrary to what the VSI is suggesting, my claim is that “‘the transplant” cannot survive the change of context unscathed.”²⁹² In terms of Watson’s application, the situation is therefore precisely the opposite of what the VSI’s co-authors maintain: I am concerned with the tomato plant, not with the garden. It is the tomato plant that is moving, hence it is the tomato plant that is my focus.

I must accept that, even leaving aside the usual detractors’ predictable, mechanical detractions, ‘[o]ne may be understood, [...] but never understood *well*’.²⁹³ And if one is advancing a new idea, a proposal abruptly interrupting the long established consensus, the risk of misunderstanding — or is it rebarbativity? — presumably finds itself enhanced (thus, I have seen it argued, more or less assertively, that I regard the law as mirroring society even as I have never thought or written anything of the kind).²⁹⁴ I also accept that once published, a text escapes the control of its author and falls under the aegis of its interpreters. Yet, it remains that there is ‘the law of the [...] text, its injunction, its signature’.²⁹⁵ Indeed, ‘[reading] cannot legitimately transgress the text towards something other than itself’.²⁹⁶ In other words, ‘[t]he text [...] must be read, interrogated mercilessly but therefore respected, and at the outset in the body of its letter’.²⁹⁷ Here, then, must be the interpreter’s credo: ‘I can interrogate, contradict, attack, or simply deconstruct a logic of the text that came before me, in front of me, but I cannot and must not change it’.²⁹⁸ Now, the VSI does change my text; and it does distort my argument.²⁹⁹

Given that my entire claim is directed at law’s movement, for the VSI’s co-authors to pretend that I am interested not in the law’s movement but in the

²⁹² Supra at 311.

²⁹³ Latour, B (2001) ‘Irréductions’ in *Pasteur: guerre et paix des microbes* (2nd ed) La Découverte at 274 [‘(o)n peut être compris, (...) mais jamais *bien* compris’].

²⁹⁴ Eg: Teubner, G (1998) ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences’ (61) *Modern Law Review* 11 at 14–15; Graziadei, M ‘Comparative Law, Transplants, and Receptions’ supra note 287 at 465–70.

²⁹⁵ Derrida, J (1998) ‘Fidélité à plus d’un’ (13) *Cahiers Intersignes* 221 at 262 [‘la loi d(u) (...) texte, (...) son injonction, (...) sa signature’].

²⁹⁶ Derrida, J *De la grammatologie* supra note 8 at 227 [‘(la lecture) ne peut légitimement transgresser le texte vers autre chose que lui’].

²⁹⁷ Derrida, J (2001) *Papier machine* Galilée at 373–74 [‘(l)e texte (...) doit être lu, interrogé sans merci mais donc respecté, et d’abord dans le corps de sa lettre’].

²⁹⁸ Id at 374 [‘Je peux interroger, contredire, attaquer ou simplement déconstruire une logique du texte venu avant moi, devant moi, mais je ne peux ni ne dois le changer’].

²⁹⁹ Cf Latour, B (1987) *Science in Action* Harvard University Press at 56: ‘Readers are devious people, obstinate and unpredictable — even the five or six left to read the paper from beginning to end.’ In the case of ‘The Impossibility’, it is unclear to me whether this shortlist includes the VSI’s co-authors. I hope so.

environment surrounding the moving law at the point of landing, is to enter a discrepancy that lies beyond any legitimate interpretive lee-way. One cannot read whatever one wants or hopes to read in a text: 'One does not do whatever one wants with language.'³⁰⁰ (Frankly, Watson is not faring any better when he holds me to the caricatural view that 'transplants are impossible' even as my article is entitled 'The Impossibility of "Legal Transplants"'. Of course, a tomato transplant is possible. But a *legal* transplant is not — which is, literally, the entire point of my argument. I am prompted to ask: is there good faith?)

But let us leave tomato plants and turn to address law. Once more, my threshold claim is precisely that laws are not tomato plants — nor are they livers, for that matter. While the tomato plant moving from the seller's greenhouse to the buyer's garden can sensibly be regarded as one tomato plant identical to itself (barring the odd scrape in transit) and while Mary's liver now to be found in Jane's body can at least just as sensibly be regarded as one liver identical to itself (overlooking the ageing process), such is not the case with law where, again, there can be 'no transportation without transformation'.³⁰¹ Any transportation of law involving any two countries can supply optimal exemplification. Consider US class actions and French *actions de groupe*. In 2014, France imported US class actions — or, if you will, US class actions made their way to France (Choudhry would say that they migrated to France).³⁰² Now, in the United States any lawyer can launch a class action by filing a complaint with the appropriate court and meeting both the usual procedural requirements as regards standing and the special criteria with respect to representativity that will permit the judge to certify the class in advance of the trial.³⁰³ Contrariwise, in France only a state-accredited non-governmental organization engaged in the defence of consumer interests can initiate an 'action de groupe',³⁰⁴ and there are fifteen such recognized bodies only.³⁰⁵ What happened?

In the co-presence of two different national regulatory cultures, there took place a phenomenon that sociologists or anthropologists name 'acculturation'.³⁰⁶

³⁰⁰ Derrida, J (2005) [2004] *Apprendre à vivre enfin* Birnbaum, J (ed) Galilée at 38 ['On ne fait pas n'importe quoi avec la langue']. Cf Wasser, A (2024) 'Empiricism, Criticism, and the Object of Criticism' (55) *New Literary History* 473 at 484: '[T]he constructive activity of criticism should be distinguished from absolute creation, or creation *ex nihilo* [...]. Instead of creating her object from nothing, and instead of creating freely without constraints, the critic works on language [...] that already exist[s].'

³⁰¹ Latour, B *Aramis ou l'amour des techniques* supra note 281 at 104.

³⁰² See Choudhry, S 'Migration as a New Metaphor in Comparative Constitutional Law' supra note 285 at 1–35.

³⁰³ See Federal Rules of Civil Procedure §23.

³⁰⁴ See *Code de la consommation* (Code of Consumer Law) arts L621–1 and 811–1.

³⁰⁵ I draw this figure from an official French government website, <<https://www.economie.gouv.fr/particuliers/action-de-groupe>>. While I refer to private law ('droit privé'), the situation is analogous with respect to public law ('droit public'), that is, as regards lawsuits concerning not a private manufacturer of household appliances, for example, but a public body being reproached for failure to honour its legal obligations. See *Code de la justice administrative* (Code of Administrative Justice) art L–77–10–4. Presumably, I need not rehearse the fact that France, giving effect to what it considers the hallowed distinction between private and public law, features two discrete pyramids of adjudicative bodies, each structure tasked with managing litigation in one of the two never-the-twain-shall-meet legal spheres.

³⁰⁶ See generally Berry, JW (2019) *Acculturation* Cambridge University Press.

Otherwise said, the French importer tweaked the US model so that it would fit optimally within French law and French legal culture. In this regard, France has long favoured state interventionism over individualism or market self-regulation, and the US class action therefore had to be adjusted in order to agree with French predilections — hence the ‘action de groupe’. Bearing in mind Robert Gordon’s decisive insight to the effect that ‘the specific legal practices of a culture are simply dialects of a parent social speech’,³⁰⁷ the French statocentrism that I discuss was fully expectable in a country where, as opposed to the situation prevailing in the United States, a leading French political scientist feels able to discern the ‘precariousness of individual right’.³⁰⁸ In France, according to Lucien Jaume, ‘the recognition of [an] individual right [...] could not come first; it is obtained by subtraction from or by autolimitation of the prerogative of the public authority.’³⁰⁹ The state is conceptualized as ‘the body [vouchsafing] definition, control, implementation of the general interest’,³¹⁰ so that private interests can enjoy derivative legitimacy only. In sum, ‘centralization and the omnipresence of the state [are thought of as being] indispensable to the freedom of the individual.’³¹¹ And if there exists one individual right, it is ‘to be well governed’.³¹² To return to ‘actions de groupe’ and frame the matter in more brutal language, the idea that some particularly enterprising French and aggressive lawyer would be able to launch ‘actions de groupe’ *à gogo* and generate substantial self-enrichment along the jocund way simply could not be reconciled with the loftier, society-oriented legal/cultural assumptions that the French state considers to be properly informing the workings of French law and French legal culture and that sit well away from individual wealth-maximization strategies, which France is determined to monitor in order to avoid what are regarded as the excessive profits that the largely unregulated play of US market forces is allowed to generate.

Crucially, adaptation is a one-way process: it is for the import to fit the receiving law, not the other way around. Now, because a receiving legal culture’s porosity is restricted, it is only ‘finitely elastic’.³¹³ Since culture operates as an ongoing integrative process, what one encounters by way of alternative experience is readily intelligibilized against the backdrop of existing local patterns within which the foreign model must be incorporated. If you will, the matter involves the contrivance of epistemic safeguards whereby external perturbations are coded as information in the receiving culture’s pre-defined terms, change

³⁰⁷ Gordon, RW (1984) ‘Critical Legal Histories’ (36) *Stanford Law Review* 57 at 90.

³⁰⁸ Jaume, L (1997) *L’Individu effacé* Fayard at 372 [‘précarité du droit individuel’]. Indeed, ‘[i]t is very difficult, and socially risky, in France, to speak in one’s own name’: id at 456 [‘(i)l est très difficile, et socialement risqué, en France, de parler en son nom propre’].

³⁰⁹ Id at 371 [‘la reconnaissance du droit individuel (...) ne saurait être première; elle s’obtient par soustraction ou par autolimitation de la prérogative de la puissance publique’].

³¹⁰ Id at 18–19 [‘l’instance de définition, de contrôle, de mise en application de l’intérêt général’] (emphasis omitted).

³¹¹ Spitz, J-F (2005) *Le Moment républicain en France* Gallimard at 447 [‘la centralisation et l’omniprésence de l’Etat (sont pensées comme étant) indispensables à la liberté de l’individu’].

³¹² Jaume, L *L’Individu effacé* supra note 308 at 539 [‘être bien gouverné’] (emphasis omitted).

³¹³ Bohannon, P (1995) *How Culture Works* Free Press at 167. See also Bauman, Z (1993) *Postmodern Ethics* Blackwell at 13: ‘If there is anything in relation to which today’s culture plays the role of a homeostat, it is [...] the overwhelming demand for constant change.’

thus being typically accommodated in ways marginal and incremental. Like other organisms, a legal culture — here, the receiving legal culture — strives to maintain a state of equilibrium in connection with its environment and to perpetuate itself: it thus aims to overcome transgressions.³¹⁴ To this end, it is 'backed by a body of knowledge that, in a sense, has a boundary around it, a boundary that is more or less secure against the easy entry of contrary new knowledge'.³¹⁵ As has been usefully observed, 'legal cultures, like languages, can absorb huge amounts of foreign material while preserving a distinctive structure and flavor.'³¹⁶ If you will, '[c]ultures are cunning tailors.'³¹⁷

The displacement of law from one country to another is frequent (in passing, let me insist that I have never thought otherwise: if, as I do, one hails from a country that was colonized by two imperial powers consecutively and that is located a stone's throw from the most important exporter of laws on the planet, one can hardly be insensitive to the matter of law's itinerancy). However, any idea that such a motion could properly be styled a 'transplant' is deeply mistaken. The metaphor is hopelessly wrong, and to write that 'transplants always involve a degree of cultural adaptation' is completely to misunderstand the fixity inherent to the etymology of 'transplant'.³¹⁸ If there is 'cultural adaptation', there is no 'transplant', period. And if there is a 'transplant', there is no 'cultural adaptation', period. It cannot rain and not rain at once. When it comes to law, since there is always 'cultural adaptation', there can never be a 'transplant': 'transplants', properly speaking, are impossible — and laws' difference across borders remains irreducible.³¹⁹ Only the most untenable ultra-positivism à la Kelsen could potentially salvage the word 'transplant' with respect to law: only

³¹⁴ Adjustment schemes differ across cultures or languages. Thus, 'Johann Sebastian Bach' is 'Johann Sebastian Bach' in English and 'Jean-Sébastien Bach' in French. Likewise, 'Galileo' and 'Julius Caesar' are 'Galileo' and 'Julius Caesar' for anglophones and 'Galilée' and 'Jules César' for francophones. See Hofstadter, DR (1997) *Le Ton beau de Marot* Bloomsbury at 320–23.

³¹⁵ Hardin, R (2011) *How Do You Know?* Princeton University Press at 166.

³¹⁶ Galanter, M (1994) 'Predators and Parasites: Lawyer-Bashing and Civil Justice' (28) *Georgia Law Review* 633 at 680. Cf Fish, S *Doing What Comes Naturally* supra note 45 at 150: '[An interpretive community] is an engine of change because its assumptions are not a mechanism for shutting out the world but for organizing it, for seeing phenomena as already related to the interests and goals that make the community what it is. The community, in other words, is always engaged in doing work, the work of transforming the landscape into material for its own project.'

³¹⁷ King, C (2019) *The Reinvention of Humanity* Bodley Head at 274.

³¹⁸ The phrasal oxymoron is in Graziadei, M (2009) 'Legal Transplants and the Frontiers of Legal Knowledge' (10) *Theoretical Inquiries in Law* 723 at 728.

³¹⁹ Should I, strictly speaking, reserve the case of the institutional imposition locally of law come from elsewhere? Under such exceptional circumstances, cultural adaptation might be largely sacrificed on the altar of political expediency. However, it remains hard to imagine a situation where there would take place no acculturation whatsoever. For a discussion of an 'institutional driver', the Supreme Court of Thailand (San Dika), imposing the English model of corporate criminal liability despite a local civil-law ethos favouring a different approach, see Schuldt, L (2024) 'Driving Irritation: Thailand's Supreme Court and the English Roots of Criminal Corporate Liability' (19) *Asian Journal of Comparative Law* 142. While it is not his goal to do so, Lasse Schuldt's illustration supports my argument. Through its pressing of the English model, the Supreme Court of Thailand is 'irritating' local law (I evidently borrow the term from Gunther Teubner's, whose work I discuss presently: see infra at 318). But the court is not applying the English framework 'as is'. Rather, it gives it a Thai twist, as Schuldt acknowledges: see id at 155–56. Specifically, Schuldt indicates that the Thai court 'intensified' the English model: id at 156. Between the law at the point of departure and that of arrival across borders, *there can be no identity* not even 'identity' — hence no transplant.

within such theoretical framework could there be ex hypothesi a movement across laws that would materialize without ‘cultural adaptation’. But highfalutin formalism is unsustainable other than within an ivory tower — and a very retrenched one at that. In order to think in terms of ‘transplant’ — that is, again, to assume the invariance of the law between the point of departure and that of arrival across borders — one would have to maintain that the US rule having entered French law, for example, did so without having been subjected to the least modification along the way, that the rule now on French soil would be the very rule, identically so, that had left the United States, that the journey to France would have kept the US rule, tomato-like or liver-like, ‘as is’. Nothing short of such a crude ‘black-letter’ set of assumptions could justify the language of ‘transplant’. And what about language, actually? What about the fact that US law in English is now French law in French? It stands to the most cursory examination that the ‘black-letter’ position simply cannot be maintained. As a result, individuals who, like the VSI’s co-authors, continue intransigently to deploy the language of legal ‘transplants’ against all theoretical and empirical evidence to the contrary, not to mention basic soundness of judgement, are engaging in comparative malpractice and ought not to be entrusted with any pedagogical ministrations in comparative law: one might as well have blind men driving. (I emphasize that there is nothing personal about this observation as I would readily apply it to any ‘comparatist’, *sedicente* or otherwise, teaching that there are ‘legal transplants’. Again, it is the fate of comparative law that matters to me, not personal considerations or sensitivities.)

I have four sets of brief remarks to add before I leave the topic of legal ‘transplants’ as false credo and move away from what I regard as its most unfortunate treatment in the VSI. For the co-authors, as far as I can tell, there is no recognition whatsoever — let me mention it once more — that ‘[m]etaphors matter in shaping thought’,³²⁰ and there is no acknowledgement either that the terms ‘legal transplant’ are for comparative law — let me insist also — one of these expressions that ‘pollute the whole of speech’.³²¹

First, while the negotiation between Watson and me may be (at least statistically) the most famous on point within comparative law, it is not the only controversy that the field has experienced on this issue. I have in mind, in particular, the altercation between John Langbein and Ron Allen.³²² And what does the VSI make of this other high-profile and important disagreement? In a later chapter entitled ‘Methods and Approaches’ (why elsewhere in the book?), the co-authors refer to the Langbein/Allen disputation in one sentence over three lines (85). And, raising the partisan tinnitus to a hardly tolerable level, the VSI indicates Langbein’s name only, a reference to his article — and only to his article — gracing the *lacking* bibliography (137). Meanwhile, Allen’s name is nowhere to be seen, not even in the *poor* bibliography (although one gets Lucio

³²⁰ Scheppele, KL (2006) ‘The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency’ *supra* note 195 at 347.

³²¹ Beckett, S *Malone Dies* *supra* note 38 at 17.

³²² The chronological sequence runs as follows: Langbein, JH (1985) ‘The German Advantage in Civil Procedure’ (52) *University of Chicago Law Review* 823; Allen, RJ et al (1988) ‘The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship’ (82) *Northwestern University Law Review* 705; Langbein, JH (1988) ‘Trashing “The German Advantage”’ (82) *Northwestern University Law Review* 763; Allen, RJ (1988) ‘Idealization and Caricature in Comparative Scholarship’ (82) *Northwestern University Law Review* 785.

Pegoraro at 132, 136, and 142). Neither the fact that Allen is the comparatist whose reaction generated the debate nor the additional fact that his response is regarded as having carried over Langbein's claim have apparently made the least impression on the VSI's co-authors.³²³ Why — *why?* — such a one-sided representation once more? Why, again, refer to one of the protagonists only? As fate would have it — what a coincidence, really! — Langbein, the only character that earns a place in the story, happens to be the one in favour of the 'transplant' agenda (just like Watson, then). I suggest that one would have to be naive in order to believe in sheer fortuity twice (and disingenuous not to spot the VSI's actual preferment for homogenization or standardization processes across legal orders.)

Secondly, the VSI's reference to Gunther Teubner's excellent 1998 *Modern Law Review* article (35) fails to capture the significance of Teubner's contribution.³²⁴ While Watson has been assuming that all is bliss in the realm of legal 'transplants', that laws are perpetually in motion and being consistently and consensually welcomed so that there would be taking place a gigantic operation of legal convergence presumably to continue unfolding until the *grand soir* when one can finally attend to the ultimate achievement of the process of uniformization and at long last witness the advent of 'One Law', Teubner's conclusive corrective is to the effect that things can go wrong (in a manner of speaking). Within a particular institutional setting that purports locally to impose law come from elsewhere, there can occur a mismatch between the receiving law and the forced import on account of the import's impertinence. On account of such a maladjustment, the imported law becomes an 'irritant' (Teubner's word) within the receiving law. The VSI's convoluted précis of Teubner's text misses this simple and basic point, which confirms my own claim that an imported law, if it is to operate optimally within the receiving law-world, cannot travel without experiencing appropriate transformation. (One could argue, of course, how the early 1990s transposition of European Union law within UK law that Teubner addresses does not, strictly speaking, involve the imposition of law come from elsewhere, how there takes place no boundary crossing, how there is no import. The UK had then consented to EU law, and EU law was therefore then part of UK law.)

Thirdly, the VSI's use of 'legal transplants' stretches even the orthodox understanding beyond anything one would have thought imaginable. Thus, to offer the South African constitution as an illustration of a 'legal transplant' moving from South to North on the basis that 'many comparativists have studied it extensively' (36) strikes me as most peculiar. Surely, a law-text does not get 'transplanted' because it has been 'studied [...] extensively'. I maintain that the co-authors' linguistic waywardness simply cannot be countenanced.

³²³ For arguments in favour of Allen's victory, see eg Gross, SR (1987) 'The American Advantage: The Value of Inefficient Litigation' (85) *Michigan Law Review* 734; Bernstein, HL (1988) 'Whose Advantage After All: A Comment on the Comparison of Civil Justice Systems' (21) *University of California at Davis Law Review* 587; Reitz, JC (1990) 'Why We Probably Cannot Adopt the German Advantage in Civil Procedure' (75) *Iowa Law Review* 987; Chase, OG (1997) 'Some Observations on the Cultural Dimension in Civil Procedure Reform' (45) *American Journal of Comparative Law* 861; Bohlander, M (1998) 'The German Advantage Revisited: An Inside View of German Civil Procedure in the Nineties' (13) *Tulane European and Civil Law Forum* 25.

³²⁴ I refer to Teubner, G 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' *supra* note 294.

Fourthly, to hold that legal imports would ‘threaten the genuineness and richness of local cultures’ (35) is to make an extraordinarily sweeping statement that, I contend, is devoid of the least empirical foundation. For reasons I have explained, no legal import — ultimately, not even an irritating one — fails to undergo a local adjustment.³²⁵ While over the last twenty years or so French legal culture has integrated plea bargaining (2004), constitutional review (2010), and class actions (2014), for instance, no participant in the French legal scene — or no perceptive observer thereof — would be suggesting that there has been a discernible loss of ‘Frenchness’ along the importing way. To quote the VSI’s misguided language once more, there has been no loss in terms of the ‘genuineness and richness of [the] local cultur[e]’. Although I cannot bring myself to belabour such an obvious counterpoint, it is evidently the case that legal imports may in fact prove a source of significant local enrichment: see France *supra*, thrice.

Temptacious Totality (On Ridicule)

What I envisage as the VSI’s shambolic treatment of legal ‘transplants’ dovetails neatly with what I think is another profoundly reprehensible feature of this (mercifully brief) book, which is the co-authors’ utterly mystifying decision to pontificate pell-mell on every possible law in every imaginable country. (For my readers who are keeping track, I am still addressing the VSI’s chapter two on legal systems and chapter three on legal traditions.) It is an unfathomable enigma to me why the co-authors feel entitled to refer to more than sixty different laws over less than fifty A-format (or sextodecimo) pages. If anything, I find it even more puzzling that the co-authors should be proceeding without any apparent concern for their lack of even the most basic ability to undertake their weird planetary tour and without any seeming awareness of the obvious intellectual credibility issues arising from their inevitable deficiencies. To my mind, the craving to inscribe a mention of every which law, be it ever so cursory, is yet another illustration of two of the most acute diseases afflicting comparative law: its deplorable under-theorization (that the VSI’s discussion of legal ‘transplants’ also generously exemplifies) and its breathtaking triviality — sprinkled with a good dose of stunning condescension.

A case study in path dependence — the co-authors are writing in the wake of David/Sacco, Zweigert and Kötz, Glenn, or Kischel, to confine myself to four recent and prominent instances — the VSI has an opinion to offer regarding the laws of Australia (21, 57), Belgium (59), Bhutan (63), Bolivia (42, 43), Brazil (43, 59), Cambodia (47, 63), Canada (21, 36, 43, 57), China (24, 52, 59), Colombia (43), Ecuador (43), Egypt (47), England (19, 21, 59), France (20, 59), Germany (20), Hungary (59), India (36, 49, 57), Indonesia (53), Israel (28, 63), Italy (59), Japan (53,

³²⁵ In *Walford v Miles* [1992] 2 AC 128 (HL) at 138, Lord Ackner decided that the doctrine of good faith had no place in English contract law since it was ‘inherently repugnant to the adversarial position of the parties’ and ‘unworkable in practice’. When, in *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481 (HL) at 494, Lord Bingham had to address the doctrine of good faith on account of its enshrinement in the 1993 EU directive on consumer contracts that is the focus of Teubner’s text and whose transposition into English law Teubner regards as an ‘irritant’ on account of the *Walford* decision, the judge promptly proceeded to recast the expression in typical common-law parlance: ‘The requirement of good faith [...] is one of fair and open dealing.’ In other words, there took place the inevitable acculturation short-circuiting any manifestation of legal ‘transplant’. I refer to Teubner, G ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences’ *supra* note 294.

59, 62), Kenya (50), 'Korea' [sic] (53, 62), Laos (63), Louisiana (28), Madagascar (44, 45), Malawi (45), Malaysia (49, 53), Malta (28), Mexico (43), Myanmar (47, 50), Nepal (49), the Netherlands (59), New Zealand (21, 43, 57), Nicaragua (43), Pakistan (49), Paraguay (43), Peru (59), the Philippines (28), Portugal (59), Puerto Rico (28), Québec (28, 63), Russia (23), Scotland (28), Sierra Leone (42), Singapore (49, 53), Somalia (45, 47), Soudan (47), South Africa (36, 57), Spain (59), Sri Lanka (28, 63), Surinam (50), Switzerland (59), Thailand (47), Tunisia (47), Turkey (31), Uganda (50), the United Kingdom (35, 36), the United States (20, 21, 57, 63), the USSR or Soviet Union (21, 23, 32), Vietnam (62), Yugoslavia (59), Zambia (45), and Zimbabwe (45). Fancy that: the VSI even mentions the Pygmies (44) and the Zulus (42) — why, everyone seems included in this recital of names except the hapless Kébékoï and the Papuans (although Québec gets two occurrences, one of them featuring mistaken information since it is wrong to assert without further ado that 'private/civil [sic] law is regulated under the standards of the Civilian tradition and the rest of the legal system is based on Canadian Common Law' (63); for example, the law of civil procedure, very much partaking of 'private/civil law', as the VSI has it, is largely of common-law inspiration, although codified, which is why it heralds typical common-law concepts unknown to civilians such as 'contempt of court' and 'injunctions').

And this list is not exhaustive as I am confining it to the laws that the co-authors are naming in their two chapters on legal systems and legal traditions only (there is more elsewhere in the VSI, and I shall therefore offer a further list in support of my critique of totalization).³²⁶ Moreover, I omit the many references to continents or regions, like 'the South Pacific' (41), 'tropical Africa' (44), or 'South-East Asia' (62), not to mention those to 'the British Mandate in Palestine' (63), 'the Laws of Manu' (51), 'the nationalist Republic of Jiang Jieshi' (53), the 'Boer Republics' (44), 'the Twelve Tables' (57), 'the Ottoman Empire' (47), and — why not? — 'the Protestant Reformation' (60–61). As a bonus, so to speak, the reader is treated to vignettes on the so-called 'Talmudic' tradition (45–47), the 'Islamic' tradition (47–49), the 'Hindu' tradition (49–52), and the 'Confucian' tradition (52–54). One's mental hair rises at this maddening treatment of the material, such motley collection of ill-assorted bits and pieces of largely decorative Westlessness being, in my opinion, nothing short of incomprehendingly vacuous and staggeringly unscholarly. Of course, the VSI also includes brief accounts of the 'common law' (54–57) and 'civil law' (57–60) traditions — to which I turn presently. Bearing in mind the ever relevant principle of charitable interpretation, I am prepared to accept that the VSI's aischreidoscope might fit a secondary school curriculum. (Etymologically, a 'kaleidoscope' is a 'beautiful form to look at'. An 'ugly form to look at' can therefore presumably be styled an 'aischreidoscope' from the Greek 'aischros' meaning 'ugly'.) Before all else, however, the dozens upon dozens of brazen affirmations that come without even the hint of a documented source would have to be verified and confirmed.

In my view, the VSI's implausible account of the laws of all places and all times must be understood in significant respects as an exercise in epistemopathy — there is pathos informing this forlorn quest for total legal knowledge — and as an endeavour in epistemopathology — there is folly marking this doomed attempt at self-transcendence. Yes. The striving to make laws *in toto* into the docile theme of authorial omnipotence and omniscience is sad. It is also

³²⁶ Infra at 342.

delirious. Moreover, it is authoritarian since what is on display is the formulation of a legal cosmos that the co-authors' minds would encompass and therefore control: there is a lust for the compliant accordance of the planet's laws, present and past, within a pre-determined intellectual order, for a *colonization* of the planet's laws. Yes. I note the implementation of a dream of governance over the immensity of legal information, a delusion seeking contentedness in the adjustment of the available particulars to a given focal length, a surrender to the chimeras of totalizing systematization or systematic totalization. The VSI's rapturous crusade to embrace the whole, its corybantic infatuation for entirety, its yearning for comprehensiveness is, *à la lettre*, fantastic, in the sense at least that its assertive arrangement ambiates in the realm of fantasy and is effectively indissociable from fantasy.

One of the specific forms that fantasy adopts — perhaps the predominant shape it takes — is that in their book the co-authors would actually be conveying *knowledge* about the planet's laws although it is thoroughly unclear how they judge any given documentary source to be a reliable repository of information in an area in which they themselves cannot act as an authoritative source. Having identified what they deem to be trustworthy texts (but, again, on what basis?), I assume that the co-authors will not have pursued the chain of authority any further (the VSI certainly does not offer any intimation to the contrary). In its urge to use and deploy documentation rather than substantiate it, the VSI would have failed to seek a 'first knower', that is, it would have elected to *satisfice*. The fact that dozens upon dozens of enunciations as regards foreign laws are presumably left uninvestigated at any length compels one to ask whether one ought not to be talking about the co-authors holding *beliefs* about foreign laws rather than having knowledge of them. Be the credal postulate as it may, it should be obvious that the co-authors' avouchments regarding foreign laws materialize as *meshwork*, the outcome of adventitious and messy tactics. When all is said and done, I contend that there is on display a gnawing rather than a knowing pursuit. I hate to think of the holes, gaping and otherwise, necessarily left within this incongruous obsession for the whole — nothing whatsoever to do, if you ask me, with the 'humble approach to the law' that the VSI claims to favour (8).

While it is easy to point to many vacuous generalizations such as 'Arrangements between non-chthonic state law and chthonic law are not always easy' (42), 'Most of the world's population lives in Asia' (61), and, my prized occurrences of the pointless, 'Time plays a role in the construction of traditions' (38), 'History has affected all traditions' (60), 'History is essential to understand all traditions' (61), and 'Interpretation plays a major role in several traditions' (64) — doesn't it just? — I cannot resist highlighting the most perplexing 'connections' that the VSI claims to be able to draw between the Inns of Court and Islamic schools, on one hand, and between English juries and Islamic legal reasoning, on the other (64).

The relevant passages from the VSI are worth quoting: '[T]he Inns of Court [...] were attached to churches, not so differently from the way in which Islamic schools were attached to mosques' (64). 'Not so differently', opines the VSI. Being pitched at such a level of vagueness, what do these words mean precisely? Consider the following proposition: homeschoolers are not so different from bats since they are unseen during the day. And then, to continue with the VSI: '[T]he way of thinking of the original juries [...] partially overlaps conceptually with the "analogical reasoning" of the Islamic tradition' (64). I suggest that one

might as well talk of a 'partial conceptual overlap' between a month and a cicada since they each last four weeks. In effect, I am immediately reminded of Joseph Vining's trenchant insight: '[T]he comparati[st] presumes similarities between different jurisdictions in the very act of searching for them.'³²⁷ Actually, the VSI's co-authors themselves confirm the ideological agenda that drives their argument when they write elsewhere in their book how they will not allow 'the plethora of cases and experiences' to stand as 'an impediment to finding commonalities' (41). Contrast Clifford Geertz's sophistication: '[T]he comparative study of law cannot be a matter of reducing concrete differences to abstract commonalities. [...] [I]t cannot be a matter of locating identical phenomena masquerading under different names. [...] [W]hatever conclusions it comes to must relate to the management of difference not to the abolition of it.'³²⁸ As it happens, Montesquieu, whom the VSI's co-authors appear to revere, had made Geertz's point long before him when he advised, in the very foreword to *De l'Esprit des lois*, 'not to regard as similar those instances [that are] really different, and not to miss the differences in those that appear similar'.³²⁹

To return to the VSI's claim concerning the alleged 'connections' between the Inns of Court and Islamic schools (the *madrasas*) and between English juries and Islamic legal reasoning, and as I do not harbour the least competence in Islamic law, I thought I would invite a fellow comparatist with long-standing teaching and research experience in the comparison of English law with Islamic law to assist me with the VSI's contentions. Before I report on my correspondence (on file), I must insist that the co-authors' argument regarding the dynamic between the early common law and Islamic law is meant to offer, in the VSI's own terms, an illustration of '[m]utual influence and convergence' across legal traditions (63).

As for the Inns of Court — I refer to the first of the VSI's two statements under examination — my informant advises that 'the Inns of Court have never been "attached" to any church.' In his view, which my own cursory research supports, the VSI's assertion regarding the Inns of Court is therefore in error. It is interesting, I think, to ask how the co-authors would have reached the erroneous correlation they draw as they project the fact of the *madrasas* being 'attached' to mosques unto Inns of Court that would likewise have been 'attached' to a church. Since the VSI does not supply any authority in support of its pronouncement, I encouraged my fellow comparatist to offer his best hypothesis. My colleague suggests that the co-authors possibly drew on the 'Makdisi Father-and-Son' line of analysis and assigned persuasive weight in particular to Makdisi *films* (or perhaps to other scholars who followed his lead).

It is the elder Makdisi, George, who first juxtaposed Inns-and-church with *madrasas*-and-mosques. Crucially, though, Makdisi *père*, a considerable academic figure who long headed the Department of Oriental Studies at the University of Pennsylvania where he taught from 1973 until 1990, never took the matter of possible intersections between the early common law and the Islamic legal

³²⁷ Vining, J (1986) *The Authoritative and the Authoritarian* University of Chicago Press at 65.

³²⁸ Geertz, C *Local Knowledge* supra note 104 at 215–16.

³²⁹ Montesquieu (1995) [1748] *De l'Esprit des lois* Versini, L (ed) vol I Gallimard at 82 ['ne pas regarder comme semblables des cas (...) réellement différents, et ne pas manquer les différences de ceux qui paraissent semblables'].

tradition beyond the province of tentative suggestions. In fact, he expressly acknowledged that ‘the extant sources contain no direct evidence of a connection between the two systems.’³³⁰ Strangely, yet fascinatingly for anyone interested in the construction of legal knowledge, John Makdisi, writing ten years later or so, unaccountably transformed his father’s carefully guarded conjecture into hard fact. Citing exclusively to his father’s work, Makdisi the young exclaimed: ‘[T]he *madrasas* [...] were the precursors of the English Inns of Court.’³³¹ Once one appreciates, in my informant’s words, ‘the fundamental character of the distortion’ that John Makdisi brought to bear on George Makdisi’s writing, one may readily infer that the forceful assertion on offer ‘cannot validly be used as an example of commonality between the two traditions because if the VSI’s co-authors are implying that the idea of legal education by means of Inns attached to religious buildings was brought to England from the Islamic world, there is, as George Makdisi noted, no “direct evidence” of this fact’ — notwithstanding his progeniture’s wishful thinking.

Still with respect to the Inns of Court, churches, *madrasas*, and mosques, my fellow comparatist raises a further objection to the ‘connections’ the VSI argues it can discern across the common-law tradition and Islamic law: ‘If the co-authors are implying that the church influenced the common law via the Inns of Court in the way mosques influenced Islamic law, this is not true. The church was not involved in the development of the common law at all, let alone via the Inns of Court. Nor is it a particularly useful way of thinking about the development and use of Islamic law. It was inevitable that Islamic law would be discussed and taught in mosques given the religious base of Islamic law and its central role in Islam.’

As regards juries and Islamic legal reasoning — I now turn to the second of the VSI’s two puzzling ‘connections’ — my colleague writes thus: ‘The English jury system has always been concerned with facts, early on by providing them, later by applying the law to them. Analogical reasoning in Islamic law (*qiyas*) is a means of applying existing law to new situations. I may be missing something here or perhaps the problem is simply that the sentence is too cryptic, but from the sentence as drafted I cannot understand how there is sufficient similarity between the two phenomena to indicate “[m]utual influence and convergence”.’ Propounding a general observation on the VSI’s overall claim regarding the two alleged interfaces between the early common law and Islamic law, my informant remarks how ‘[a] typical reader of both sentences, ie, someone unfamiliar with Islamic law, would be misinformed by both sentences.’

While I had limited my collegial importunement to the two sentences that my common-law background had prompted me to greet with heightened suspicion as I engaged in a close reading of the VSI, my fellow comparatist, having procured his own copy of the book, felt sufficiently intrigued to consider, albeit unbidden, the three pages that the VSI otherwise devotes to the Islamic legal

³³⁰ Makdisi, G (1990) *The Rise of Humanism in Classical Islam and the Christian West* Edinburgh University Press at 309. George Makdisi’s incipient evocations are expressed in Makdisi, G (1985) ‘The Guilds of Law in Medieval Legal History: An Inquiry Into the Origins of the Inns of Court’ (34) *Cleveland State Law Review* 3 at 12–13 and 18.

³³¹ Makdisi, JA (1999) ‘The Islamic Origins of the Common Law’ (77) *North Carolina Law Review* 1635 at 1712.

tradition. In my informant's terms, '[t]he Islamic law parts of the VSI (47–49) are very poor.' For my benefit, my colleague suggested two examples. As I reckon that both illustrations reveal the VSI's problematic undependability, I prevailed on my fellow comparatist to allow inclusion in this review.

The first instance addresses the spatial reach of Islamic law. In this regard, my informant writes as follows: 'According to the VSI, "[t]h[e] [Islamic] tradition [...] geographically concerns Central and South-East Asia [...] as well as African countries, such as Egypt, Tunisia, Sudan, and Somalia" (47). On the face of this passage, despite being the religious and historical heartland of Islam, with the exception of Egypt the Middle East is not "concerned" with Islamic law. Nor is South Asia, where nearly thirty per cent of all Muslims live, mainly in Bangladesh, India, and Pakistan. Nor are Muslims in Muslim-minority jurisdictions (in the United Kingdom, for instance, there are about 3.9 million Muslims amounting to more than six per cent of the British population).' I am minded to add to my colleague's statistics that in France there are an estimated nine million Muslims amounting to thirteen per cent of the French population. In sum, my informant shows, convincingly in my opinion, that the VSI's geographical concentration, as stated, is much too narrow.

My colleague's second illustration involves the Arabic language. Thus: 'The VSI claims that the Arabic alphabet "only puts consonants in writing" (48). This is incorrect. Short vowel symbols and the *sukun* (marking the absence of a vowel) are often omitted, but long vowels are always represented and short vowels and the *sukun* are represented when needed. It is understandable that someone unfamiliar with the Arabic alphabet would make such a mistake and it is true that, as the co-authors put it, "philological discussions" (48) did and do take place because, when the short vowels are not shown, the written form of words with different meanings can be the same. However, a non-expert reader would find the VSI's sentence difficult to understand and, in any event, would be misinformed as to the nature of the Arabic alphabet.' On this specific point, my colleague consulted with Mashood Baderin (SOAS University of London), Wael Hallaq (Columbia University), and Shady Nasser (Harvard University). He wishes to extend thanks to these three academics, which I am pleased to relay.

Bringing to a close an undaunted foray into the VSI's discomfiting representation of the Islamic legal tradition, my fellow comparatist concludes in terms that, as I read the words, updraw bafflement: 'I wonder why the text is in this state. Several good introductory works exist, including Baderin's *Islamic Law: A Very Short Introduction* (thus in the *Very Short Introduction* series itself) and several lengthier introductions, including the more extensive one by Hallaq, which has even been translated into Italian.³³² It should, therefore, have been possible to produce better quality text.' I wholeheartedly agree: it should have been possible to do better than the VSI.

Indian Travesty

I find it important to enter one more reaction still to the two chapters on legal systems and legal traditions, and my reply concerns a patent contradiction that I

³³² The relevant references are Baderin, MA (2015) *Islamic Law: A Very Short Introduction* Oxford University Press; Hallaq, WB (2009) *An Introduction to Islamic Law* Cambridge University Press; Hallaq, WB (2013) *Introduzione al diritto islamico* Soravia, B (tr) Il Mulino.

discern in the VSI. Later in the book — specifically, in chapter five on ‘Sameness and Difference’ — the co-authors entitle a section ‘Decolonizing Comparative Law’ (104-6). (Curiously, though, the *terse* index does not feature ‘Decolonization’ as an entry [143].) Now, my question is as follows: how can the VSI expect its alleged concern for decolonization to be taken at all seriously given its reference to the British colonization of India as ‘subtle’, as ‘more subtle’ than would have been the case elsewhere (52)? (I am very much minded to add: how can the VSI expect its alleged concern for decolonization to be taken at all seriously given its lack of reference to Teemu Ruskola’s riveting claim to the effect that Orientalism stands as ‘a discourse [...] so deeply embedded that nobody can choose simply to step outside of it with an act of individual will’?³³³)

For the co-authors to camouflage the ruthless British colonization of India and the much-bruited fact of imperial oppression under the notion of ‘subtlety’ is to perform an extraordinary *tour de force* — and, I find, a very shocking one at that. Reading the VSI, one might be forgiven for thinking about the British as the Indians’ prudent benefactors, a far-away people having acted in a spirit of generosity, having been on the right side of the moral issues, and having enthusiastically engaged in a form of xenophilia. As it happens, however, the co-authors’ bowdlerized adjective runs athwart a myriad expert and scholarly accounts that offer a noticeably different version holding that in India ‘[t]he imperial system of law was created by a foreign race and imposed upon a conquered people who had never been consulted in its creation. It was, pure and simple, an instrument of colonial control.’³³⁴ Thus Christopher de Bellaigue, the British Oriental Studies specialist, refers to the existence of ‘a consensus, shared by many current Indian and Western historians, on the iniquity of colonial rule’.³³⁵ Somehow, ‘subtlety’ does not appear to figure in de Bellaigue’s analysis.

A key actor in this imperial process was undoubtedly Sir William Jones, a British judge and philologist, who arrived in Calcutta in 1783 to sit on the colonial judiciary. To give a sense of the power dynamics at play, let me mention how Jones referred to locals as ‘the deluded, besotted, Indians’,³³⁶ the wretched victims of a ‘benumbing and debasing [of] all those faculties, which distinguish men from the herd, that grazes’.³³⁷ Jones also called Indians ‘degenerate and abased’,³³⁸ ‘artful and insincere’,³³⁹ ‘indolen[t], and effemina[te]’.³⁴⁰ I think one can agree that there was not much that was ‘subtle’ about Jones’s appreciation

³³³ Ruskola, T (2022) ‘Beyond Anti-Anti-Orientalism, or How Not to Study Chinese Law’ (70) *American Journal of Comparative Law* 858 at 868.

³³⁴ Tharoor, S (2016) *Inglorious Empire* Scribe at 9.

³³⁵ De Bellaigue, C (11 June 2020) ‘The Pillage of India’ *The New York Review of Books* 25 at 26.

³³⁶ [Jones, W] (1970) [20 September 1789] [Letter to W Pollard] in *The Letters of Sir William Jones* Cannon, G (ed) vol II Oxford University Press at 847.

³³⁷ Jones, W (1807) [1793] ‘The Tenth Anniversary Discourse, on Asiatick History, Civil and Natural’ in *The Works of Sir William Jones* vol III Stockdale at 215.

³³⁸ Jones, W (1807) [1786] ‘The Third Anniversary Discourse, on the Hindus’ in *The Works of Sir William Jones* vol III Stockdale at 32.

³³⁹ Jones, W (1807) [1772] ‘An Essay on the Poetry of the Eastern Nations’ in *Poems, Consisting Chiefly of Translations from the Asiatick Languages* in *The Works of Sir William Jones* vol X Stockdale at 359.

³⁴⁰ Id at 348.

of the Indian mind, which he clearly regarded as weak and defective. To be sure, Jones was not alone in drawing such conclusions. James Mill (Mill *père*) thought the Indians 'dissembling; treacherous, mendacious, to an excess which surpasses even the usual measure of uncultivated society'.³⁴¹ And, of course, the infamous TB Macaulay, he of the (British) East India Company, the effective corporate ruler of India, legendarily wrote that 'a single shelf of a good European library [i]s worth the whole native literature of India and Arabia'.³⁴² In sum, 'the thoughts and institutions of Indians [were depicted] as distortions of normal and natural (that is, Western) thoughts and institutions'.³⁴³ Mentioning in particular Jones's work, which above all sought to impose English law in India, the leading anthropologist Edward Said writes that the judge aimed 'to gather in, to rope off, to domesticate the Orient and thereby turn it into a province of European learning'.³⁴⁴ Somehow, Said does not appear to perceive any 'subtlety' to the Indian manifestation of British imperialism.

Astonishingly, the VSI, although claiming an interest in decoloniality, seems completely oblivious to the way in which esurient British power unfolded in India to ensure the political and legal construction of the colonial subject through the utter disqualification of local ways as they were deemed inadequately developed or insufficiently elaborated — and certainly incapable of self-government — with a view, ultimately, to earning taxation rights on the Indians, to fostering a supply of primary goods to nurture the Industrial Revolution in England, and to creating a market for British merchandise. Through the deployment of the word 'subtle', the co-authors offer an aseptic, formalist — a 'law-as-science' — version of British colonization that purports to make perfectly invisible all epistemic violence whatsoever. I am not even addressing *physical* violence such as the savage marauding of Bengal, the most prosperous industrial region of India, that saw the loss of millions of local lives around 1770, largely the victims of a famine caused in substantial part by the callous policies that the East India Company had been implementing since 1757 in the name of the discourse of Amelioration. (To be sure, the company's mercenary and opportunistic actions were facilitated by the collaboration and partnership of thousands of Indian entrepreneurs, business families, merchants, artisans, bankers, agents, transporters, and intellectuals, who revered the *Angrez* and helped British power to survive in India.)

The fact that *scienza giuridica* can, without any apparent shame, legitimate imperialist pillage in the East — Britain's coercive subjugation of an entire people and its plundering of that people's riches (not to mention its vilification and demonization of Hindu worship and propagation of Christianity as the only worthy faith, not the slightest account having been taken, of course, of the fact that Christians revered idols and harboured superstitions of their own) — is precisely

³⁴¹ Mill, J (1840) [1817] *The History of British India* (4th ed) Wilson, HH (ed) vol II Madden at 220. In the work of Mill's illustrious son, Indians fare no better. See Mill, JS (1859) *On Liberty* Parker at 23.

³⁴² [Macaulay, TB] (1861) [2 February 1835] 'Minute [on Indian Education]' in *Macaulay: Prose and Poetry* Young, GM (ed) Hart-Davis at 722. Thomas Macaulay was a nineteenth-century British historian and politician. For a leading study concerning the 'Minute', see Cutts, EH (1953) 'The Background of Macaulay's Minute' (58) *American Historical Review* 824.

³⁴³ Inden, R (1986) 'Orientalist Constructions of India' (20) *Modern Asian Studies* 401 at 411.

³⁴⁴ Said, EW *Orientalism* supra note 175 at 78.

the kind of deeply embarrassing pseudo-research that gives comparative law a bad political name in academic circles and, frankly, most deservedly so. The VSI's bland reference to the 'subtle[ty]' of the English military presence in India prompts me to juxtapose an alternative and authoritative reading of the matter: 'William Jones's intervention [...] represented the full force of the institutional and epistemic weight of Europe that gave it its conditions of felicity. Jones was perhaps the best talent available at that time and place, but it also was one that embodied and gave full expression to the potency of the performative power of British knowledge and its resultant colonialism.'³⁴⁵

Civil Law as Fallacy (In Brief)

Very much unlike the VSI, I do not feel prepared to expatiate on laws that I have not personally experienced — I mean laws that I have not studied and taught and laws whose language I cannot read. In terms of the manifold laws that the VSI addresses, I shall therefore confine my critical rejoinder to the civil-law and common-law traditions. (Contrary to the co-authors, I do not see why the designations 'civil law' and 'common law' should be capitalized as they relentlessly are throughout the VSI, and I suspect that the 'decision' to feature irrelevant, distracting, aggravating, unidiomatic, and anthropomorphizing capital letters is hardly the result of deep thought.) With respect to the civil-law tradition, I am minded to keep my observations to the bare minimum: I want to offer two historical remarks and one contemporary comment only.

My first historical criticism concerns the *ius commune*. Writing about the *ius commune*, the co-authors maintain that '[it] was treated as the law of the land across continental Europe', or at least they endorse René David's statement to that effect (21). Later, they hold, now clearly speaking in their own right, how the *ius commune* was 'a new substantive law' that 'ruled continental Europe between the 11th and the 19th century' (57). I find it bemusing that one should have to remind two Italian law professors that the so-called '*ius commune*' was never the law of the land across Europe (it was never 'a substantive law' and it never 'ruled continental Europe'). As the co-authors ought to know, to the extent that one could ever speak of a commonality, such transnational configuration consisted of scholarship only. A noted European legal historian, Randall Lesaffer, helpfully summarizes the settled position thus: 'Legal historians refer to the learned law of the Late Middle Ages as the *ius commune*. [...] It was taught and studied at all law faculties throughout Europe'; and Lesaffer adds that '[t]he unity which marked legal scholarship was in no way reflected in legal practice.'³⁴⁶

My second historical notice concerns the spread of civil codes (59–60) that the co-authors — despite their alleged commitment to decolonization (104–6) — manage to discuss without a single word on imperialism, nothing at all

³⁴⁵ Hallaq, WB (2018) *Restating Orientalism* Columbia University Press at 135. See also Ahmed, S (2018) *Archaeology of Babel* Stanford University Press at 184: '[C]omplicit with conquest and colonization', Jones destroyed 'a form of life', a culture. Cf Bhattacharya, B (2016) 'On Comparatism in the Colony: Archives, Methods, and the Project of *Weltliteratur*' (42) *Critical Inquiry* 677 at 685: '[Jones] employed comparatism in the service of colonial governance.' For a critical discussion of Jones in India, see Legrand, P *The Negative Turn in Comparative Law* supra note 73 at 123–27. For a broader critical argument on British colonialism in India, see Legrand, P (2014) 'Law's Translation, Imperial Predilections and the Endurance of the Self' (20) *The Translator* 290 at 294–98.

³⁴⁶ Lesaffer, R (2009) *European Legal History* Cambridge University Press at 265 and 269.

on military might, as if, say, Brazil, Mexico, and Indonesia had willingly and eagerly opted for codification *proprio motu*. (Contrariwise, the VSI unhesitatingly makes the colonial point as regards the circulation of the common law: 'The Common Law tradition has spread throughout the world via [...] colonial paths' [56]. Why this variance, I wonder.) To return to the civil law, I note that the VSI somehow acknowledges colonization in Africa (44–45).

For its part, my contemporary observal addresses the VSI's astoundingly incongruous statement to the effect that the 'Civil Law [...] prevent[s] judges from law-making' (60), the judiciary, then, being introduced as a 'technical bod[y] enforcing parliamentary decisions' (60). I can only express my utter dismay that such clichés should continue to be peddled well into the twenty-first century. Of course, one could easily remind me that I am on record as maintaining that law teachers trained in the civilian tradition are properly uneducable, the VSI on civil-law judges offering but confirmation of my claim.³⁴⁷ Meanwhile, my Chicago students could easily offer a more sophisticated analysis than the VSI's on the matter of judicial normative activism in the civil-law tradition.

The co-authors' flimsy grasp of legal history and even poorer handle on legal theory make it impossible, I suggest, for any serious reader to approach the VSI's treatment of the civil-law tradition with the least confidence. But any claim to credibility on the part of the co-authors becomes many, many times more tenuous as regards the re-presentation of the common-law tradition on display. Indeed, I reckon that the VSI's preposterous concoction, its dismal ragout, betrays the common law on a spectacular scale.

An Uncommonly Misleading Common Law

I shall begin this section by contesting two analogies between the civil-law and common-law traditions that the co-authors propound, both evidencing, I think, disqualifying ethnocentrism/juricentrism ('we have it, so they must have it also') and therefore quite simply unsustainable. For the VSI, continental Europe and England thus feature 'the same legalistic tendency' (19), a conclusion reached through a correlation being drawn between 'the monarchs as legislators' (in continental Europe) and 'the affirmation of *stare decisis*' (in England), which the co-authors define as a 'principle impos[ing] on judges that they must abide by earlier decisions made by their predecessors' (19). Before all else, I find the expression 'legalistic tendency' extremely loose. Presumably, one could say that when my mare obeys my order to stop grazing, she is exhibiting a 'legalistic tendency'. At the very least, one could argue that a driver who keeps in mind the speed limit is showing a 'legalistic tendency'. My point is that an open-textured expression of this kind introduces such a low 'common' denominator as to be ultimately devoid of comparative significance. Now, to suggest that the normative strength of an order issuing from a continental monarch is on a par with the normative impact emanating from a preceding judicial decision within common-law countries is fundamentally to misunderstand the workings of the doctrine of precedent in the common-law tradition and reduce it to a formalist statement devoid of practical relevance — or so I maintain.

Consider Judge Richard Posner, who sat on a US federal court of appeals from 1981 to 2017 (and who, quite apart from his thirty-six years of judicial

³⁴⁷ See Legrand, P (1998) 'Are Civilians Educable?' (18) *Legal Studies* 216.

office, is widely regarded as the leading US legal intellectual of the twentieth and twenty-first centuries). Why would he claim that an earlier Supreme Court decision, which on a formalist reading of the doctrine of precedent he would obviously have been bound to follow as an appellate judge, is ‘often extremely easy to get around’?³⁴⁸ And why, say, did the conservative majority in *Dobbs v Jackson Women’s Health Organization* find it ‘extremely easy to get around’ the liberal majority’s decision of forty-nine years earlier in *Roe v Wade*,³⁴⁹ which on a formalist reading of the doctrine of precedent it would obviously have been bound to follow? Why, in *Loper Bright Enterprises v Raimondo* (2024),³⁵⁰ could the US Supreme Court likewise, ‘extremely easi[ly]’, overthrow *Chevron USA, Inc v National Resources Defense Council* (1984) and cancel what had come to be known over forty years as the doctrine of ‘*Chevron* deference’? These illustrations show how it is thus nothing short of a significant misrepresentation to assert, in the VSI’s words, that ‘[t]he system of precedent entails a certain degree of rigidity’ (56). Within the common-law tradition, a leading discussion of precedent to this day remains Julius Stone’s *Precedent and Law*, where Stone memorably writes that the doctrine of precedent is ‘not so much a straitjacket as a capacious muumuu’.³⁵¹ Contrariwise, I think it is fair to say that legislation (whether monarchical or not) cannot reasonably be said to be ‘extremely easy to get around’ — and, to track Stone, that it is emphatically more ‘straitjacket’ than ‘capacious muumuu’, which entails that the VSI’s parallel between the civil-law and common-law traditions is properly indefensible.

Still on the subject-matter of ethnocentric/juricentric self-projection, the VSI contends that there exists a ‘Western legal tradition’ subsuming the civil-law and the common-law — both of which could fit under this umbrella designation since they would both feature ‘the belief in a logical development of law’ (39). As regards the common law, the co-authors indeed assert that ‘[the judgements’ (sic)] logical organization is essential for constructing the legal order’ (57). (There is also a cryptic statement to the effect that the ‘Common Law embraced the logic of the existing society’ [54].) Quaere: how long is it before a serious student of US law comes across what is arguably Oliver Wendell Holmes’s most famous exclamation that ‘[t]he life of the law has not been logic: it has been experience’?³⁵² And what to make of a further enunciation by a British Law Lord that ‘[t]he common law is a historical development rather than a logical whole, and the fact that a particular doctrine does not logically accord with another or others is no ground for its rejection’?³⁵³ And what of another Law Lord maintaining that ‘[a] case is only authority for what it decides’ and adding ‘I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a

³⁴⁸ Posner, R (12 September 2017) ‘An Exit Interview With a Judicial Firebrand’ (Interview with A Liptak) *The New York Times* A18 at A18. The words are Judge Posner’s.

³⁴⁹ 597 US ____ (2022); 410 US 113 (1973).

³⁵⁰ 603 US ____ (2024); 467 US 837 (1984).

³⁵¹ Stone, J (1985) *Precedent and Law* Butterworths at 229. Judge Posner says of Stone’s imagery: ‘He is right.’ I refer to Posner, RA (2008) *How Judges Think* Harvard University Press at 183n10.

³⁵² Holmes, OW (1881) *The Common Law* Little, Brown at 1. I note that the VSI is aware of Holmes’s existence (14–15), if not of his celebrated assertion.

³⁵³ *Best v Samuel Fox & Co* [1952] AC 716 (HL) at 727 (Lord Porter).

mode of reasoning assumes that the law is a logical code, whereas every lawyer must acknowledge that the law is not always logical at all?³⁵⁴

And what of yet a further Law Lord contending that 'even if the argument were logically unimpeachable, that would not be an end of the matter'?³⁵⁵ And what of an English appellate judge holding that '[t]he decision is a matter of outlook and impression rather than one for logical argument'?³⁵⁶ And what of another English appellate judge being keen to emphasize that 'a result produced by pure logic will not necessarily be the result which produces fairness between the parties'?³⁵⁷ And what of yet another English appellate judge observing that 'the common law of England has not always developed on strictly logical lines, and [that] where logic leads down a path that is beset with practical difficulties the courts have not been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society'?³⁵⁸ And what of the English judge writing extrajudicially in the following terms: 'We have in England a deep distrust of logical reasoning, and it is for the most part well-founded. Fortunately, our judge-made law has seldom deviated into that path; but on some of the rare occasions when it has done so, the results have been disastrous'?³⁵⁹ And what of a leading English academic opining that 'the conception of law as a logically monistic system cannot be supported', that 'the law can never succeed in becoming a completely logical system', or that 'it [can] [n]ever be said that logic will help us to discover what propositions should be selected'?³⁶⁰ Evidently, the VSI's co-authors are unaware of these pronouncements (and of many others along converging lines), and their ignorance has to stem from the simple fact that they have not done their homework: how many *untiring* hours were *not* spent researching the common law? For my part, I cannot think of any other explanation justifying the VSI's wholly inconsiderate parallel between civil-law and common-law epistemologies with specific respect to the value of logic.

It is easy to adduce further VSI statements showing that the co-authors' ethnocentric/juricentric amalgam between the civil-law and common-law traditions cannot be upheld, that it somewhat dramatically fails to capture the epistemic incommensurability across the two legal models. Thus, when the VSI refers to the common law's 'need for a systematic ordering of judgements [sic]' (56), it is simply projecting the civil-law tradition's craving for categorization (and categorical thought) — which is no doubt why I have never ever heard anywhere in the common-law world the merest discussion around the 'need for a systematic ordering of judgements'. And when the VSI refers to 'state codifications' in the United States (39), without specifying that a US 'code' has nothing whatsoever to do with a French or German code — think of the

³⁵⁴ *Quinn v Leatham* [1901] AC 495 (HL) at 506 (Lord Halsbury).

³⁵⁵ *Rugby Joint Water-Board v Shaw-Fox* [1973] AC 202 (HL) at 228 (Lord Simon).

³⁵⁶ *Philadelphia National Bank v Price* [1937] 3 All ER 391 (KB) at 397 (Porter LJ).

³⁵⁷ *In re Berkeley* [1968] Ch 744 (CA) at 759 (Widgery LJ).

³⁵⁸ *Ex parte King* [1984] 3 All ER 897 (CA) at 903 (Griffiths LJ).

³⁵⁹ Konstam, EM (1944) 'Acceptance of Rent After Notice to Quit' (60) *Law Quarterly Review* 232 at 232.

³⁶⁰ Guest, AG (1961) 'Logic in the Law' in Guest, AG (ed) *Oxford Essays in Jurisprudence* Oxford University Press 176 at 196, 197, and 197, respectively.

difference between a simple statutory compilation and consolidation, on one hand, and a structured and structuring crafting of thousands of proactive normative provisions, on the other — it is again falling for flagrant ethnocentrism/juricentrism and hoodwinking its readers in the process. But there is regrettably more to say about the VSI's mistreatment of the common-law tradition.

In order not to clutter this review unduly, I have done myself violence and selected ten assertions only — a kind of 'Top Ten', then — so as to support my claim regarding the VSI's incompetence (etymologically, 'incompetence' connotes the idea of 'not striving' as in 'not striving to research the common-law tradition properly so that a just account of it could be produced'). After each of the ten relevant enunciations, which I attempt to list chronologically by reference to the common law's historical development, I enter the corrective that is necessary to counter the VSI's specious view of the common-law tradition. Because I found some of the VSI's affirmations so outrageous that I could literally not believe my eyes, I sent them to my adviser in all matters 'English law', Geoffrey Samuel (whose name the co-authors manage to misspell at 99). As far as I am concerned (and I do set the bar high), Samuel is an authentic scholar, a learned jurist, an expert in English law, an earnest comparatist, a thoughtful theoretician, and an insightful epistemologist. In particular, Samuel possesses an encyclopaedic knowledge of English judicial decisions. In the early 2000s, when I resolved that French law students had suffered long enough without a decent introduction to the common law written in their language, I unhesitatingly invited Samuel to act as co-author so that he would provide the book with his imprimatur.³⁶¹ To return to the VSI, I therefore solicited Samuel's reaction with respect to what the co-authors are propounding as regards English law. Not only did Samuel generously take time away from his work to answer my questions, but he very kindly allowed me to quote his replies at leisure (all correspondence is on file) — a licence that enables me to provide my reader with what is no doubt a welcome change of critical voice. Having permitted myself the lightest editorial touch, I clearly distinguish Samuel's words from mine in the indispensable counterpoint appearing below each of the VSI's ten lacunary propositions that I have retained. Imperative as they are, I have sought to keep the retorts as short as possible. (In passing, I am making what I think is an important theoretical point both as a matter of the comparatist's disposition and credibility: it is very good comparative practice for a comparatist researching, say, the common law to let common-law lawyers or common-law judges speak in their own voice — to *quote* from them.)

1. VSI: 'In [the Normans'] need for permanent judicial officers, priests were chosen as they were literate and had legal notions in their background deriving from canon law (norms regulating Christianity and emanating from religious authority)' (54).

—Samuel: 'Certainly, the Normans did not change the Anglo-Saxon feudal structure — they just chucked out the existing Lords and replaced them with French ones — but this pre-existing structure had a system of justice based pretty much entirely on the feudal lords a[nd] was thus local and not common. What the Normans started to do was to try to centralize the system a bit more so as to bolster the

³⁶¹ See Legrand, P and Samuel, G (2008) *Introduction au common law* La Découverte.

authority of the King and his Curia Regis (CR). So you had members of the CR going around England to hear largely criminal cases (because the King had promised peace). I have never heard it said, or seen it written, that these justices were priests, and certainly [legal historian John] Baker does not give the slightest indication that this was the case (and he has spent his entire career researching this period). Moreover it seems to me unlikely. And [...] within the CR you see the development of Exchequer, King's Bench and then Common Pleas. In the thirteenth century, then, one can begin to talk of a "common" law. It may be that some members of the CR were men of the church so to speak, and many knew Roman and Canon law, but I think it would be misleading to describe them as "priests" (which actually has quite a specific meaning in English). The strongest influence within the CR were what became the common law judges.'

—PL: I may add that Ralph Turner, the specialist in medieval English legal history, supplements Samuel's intuition by specifying that 'only half [the judiciary of the Angevin kings] were in ecclesiastical orders' — not necessarily priests, then.³⁶²

2. VSI: '[T]he original Common Law relied upon procedural norms more than substantive norms' (54).

—PL: The common law does not think, and has never thought, in terms of 'norms'.³⁶³ Again, this is Kelsen's language, not the common law's.

3. VSI: '[T]he crown [...] transform[ed] [...] the Chancery into a proper tribunal around the 15th century' (55).

—Samuel: 'As for the Court of Chancery, this [...] developed slowly. At first disgruntled litigants petitioned the King — which in effect meant petitioning the [Curia Regis (CR)] and thus they went to the Lord Chancellor (LC). He at first decided these petitions himself, probably after discussion with the common law judges and perhaps others in the CR. He was probably better seen at first as some kind of "appeal" judge. In fact the LC probably saw his decision as coming from a "court" because the CR itself was a court (Curia). Gradually, however, his role became subject to procedural forms (much less formal than the common law ones) and by the end of the fourteenth century his decision-making and his remedies, given the fragmentation of the CR, could be seen as coming from a "Court of Chancery". So, its formation was a gradual procedural process within the CR. The idea that the Crown transformed the LC into a court would, I think, be challenged by [John] Baker. Indeed [Tony] Weir wrote that the LC gradually transformed himself into a court.'

³⁶² Turner, RV (1985) *The English Judiciary in the Age of Glanvill and Bracton, c 1176–1239* Cambridge University Press at 2. The Angevins were an Anglo-French royal house that ruled England from 1154 until 1214.

³⁶³ Supra at 267–68.

4. VSI: '[E]quity jurisprudence [...] was unified with Common Law through the major reforms of the 19th century' (55).

—Samuel: 'It is true that there was a merger of law and equity in 1875, but it was a merger only at the level of procedure. Common law courts could dispense equity and the Court of Chancery could, if it had to, dispense common law. But the separation in substance was, and is, attested to by the existence of a Chancery Division within the High Court. Equitable remedies are different from common law ones, and trusts are a purely equitable creation. There is also a Chancery Bar.'

—PL: Consider *Grist v Bailey*,³⁶⁴ a case that illustrates very well how 'equity jurisprudence' was not 'unified with Common Law', contrary to the VSI's presumptuous assertion. The defendant contracted to sell real estate to the plaintiff for £850 subject to the rights of a sitting tenant. However, both the sitting tenant and his wife had died. With vacant possession, the property was worth £2,250. Although the mistake was not such as would allow the court to treat the contract to be void at common law, Goff J granted rescission of the contract in equity subject to the imposition of a term to the effect that the plaintiff should have the opportunity to purchase the property at the 'vacant possession' price. Throughout, the judgment clearly separates the two bodies of law. For the court, 'the first question which arises is one of [common] law'.³⁶⁵ In this regard, the judge is of the view that an earlier decision (*Bell v Lever Bros*), to which he chooses to attach precedential value, 'lays down very narrow limits within which mistake operates to avoid a contract'.³⁶⁶ Goff J then proceeds to address another earlier decision (*Solle v Butcher*), where the court 'clearly drew a distinction between the effect of mistake at [common] law, which, where effective at all, makes the contract void, and in equity, where it is a ground for rescission'.³⁶⁷ Still drawing on *Solle*, the judge takes the view that the scope of equity is 'wider than jurisdiction at [common] law', and he concludes that 'the defendant is entitled to relief in equity'.³⁶⁸ Goff J specifies that 'this, being equitable relief, may be granted unconditionally or on terms', and he thereby elects to impose a term that 'the relief [he has] ordered should be on condition that the defendant is to enter into a fresh contract at a proper vacant possession price'.³⁶⁹ I repeat that the judgment makes the legal position clear and that the clear position is the opposite of the one that the VSI defends: there are two different bodies of law co-existing side by side and simultaneously, thus making the contract at once unvoidable and rescindable, a basic paradox that has led Bernard Rudden to maintain how English law was 'doomed

³⁶⁴ [1967] 1 Ch 532.

³⁶⁵ Id at 537.

³⁶⁶ Ibid.

³⁶⁷ Id at 538.

³⁶⁸ Id at 538 and 542.

³⁶⁹ Id at 543.

by the past to eternal intellectual incoherence' — a characteristic predicament evidently lost on the VSI's co-authors.³⁷⁰

5. VSI: 'Almost immune from Roman influence, [the Common Law] developed its own unique legal concepts, categories, and vocabulary' (22). (Elsewhere, the VSI holds that 'the original Common Law [...] interacted with Roman law' [64]. At the very least, the incoherence that I highlight suggests poor editing.)

—Samuel: 'The idea that the common law developed its own concepts and categories was true in the sense of the forms of action. Trespass, debt, detinue, trover, etc, were not Roman concepts or categories. But a transformation took place in the nineteenth century (if not before) when this system of forms of action got replaced by "Roman" categories such as contract, tort and property. My own researches into the case law 1850–1880 indicate that the judges often referred to Roman law, Domat, Pothier, and Savigny, especially after the 1846 report on the state of legal education in England, and so it is nonsense to say that Roman law has never been influential. Also, [...] the works of people like Bracton are steeped in Roman law ([legal historian SFC] Milsom said it was a work on Roman and not English law). I once wrote a piece saying how the *Code civil* helped judges restructure English legal thought, and the piece got approvingly discussed by a judge in an extrajudicial lecture. So the judiciary seems to have no problem about civil law influence; and of course [comparatist and legal historian James] Gordley has discussed the nineteenth century Roman/civil law influence in some detail.'

6. VSI: 'British courts [have a] rule-oriented [...] style of legal reasoning [...]' (35).

—Samuel: '[T]he rule-orientated reasoning [...] is very dubious re English common law.'

—PL: On a personal note, I was a law student in the common-law tradition for eight years, and I have been teaching the common law for nearly five times as long (including in various common-law countries). Most rarely only have I come across analyses suggesting that common-law judges engage in 'rule-oriented [...] legal reasoning'. On the two occasions I recall doing so, the text concerned US law exclusively.³⁷¹ At

³⁷⁰ Rudden, B (1992) 'Equity as Alibi' in Goldstein, S (ed) *Equity and Contemporary Legal Developments* Hebrew University of Jerusalem at 40.

³⁷¹ See Eisenberg, MA (2021) *Legal Reasoning* Cambridge University Press; Alexander, L and Sherwin, E (2008) *Demystifying Legal Reasoning* Cambridge University Press. In correspondence dated 5 April 2025, Geoffrey Samuel, who critically reviewed both works, indicates that Alexander and Sherwin's position is more prescriptive than descriptive [on file]. For Samuel's reviews, see Samuel, G (2024) 'What Have Introductory Books on Legal Reasoning Ever Done for Us?' (6/1) *Amicus curiae* 1 (Eisenberg); Samuel, G (2009) 'Can Legal Reasoning Be Demystified?' (29) *Legal Studies* 181 (Alexander/Sherwin). By contrast with the US position upheld by Eisenberg and Alexander/Sherwin, see eg Schauer, F (1989) 'Is the Common law Law?' (77) *California Law Review* 455. For the late Frederick Schauer, a leading US jurisprudent, the only sense in which one can legitimately frame common-law decisions as rules is as 'rules of thumb': *ibid.* Not surprisingly, Schauer concludes that 'it hardly pays to speak of them as rules at all': *id.* at 456.

the bare minimum, the VSI's claim therefore requires, in my view, to be heavily qualified.

7. VSI: '[R]ules [...] are formulated in narrow statements with regard to a peculiar [sic] set of facts' (23).

—PL: The notion of 'rule' has given rise to a considerable number of attempts at definition, and it would seem futile to add to that long list: one might as well try and nail jelly to a wall. Instead, it appears more fruitful to circumscribe one or two elements of 'ruleness', or 'canonicity', that ought to command a wide consensus. One such factor is generality: a rule is something to be applied in an indefinite number of instances; another characteristic is normative weight: the rule provides either a cause or reason for action so that there is a disposition to regard the failure to follow the prescription as a ground for criticism.³⁷² How can one meaningfully talk of a given formulation as constituting a 'rule' unless such statement is of general application and carries a measure of normative weight? Both attributes feature in the following form, which I take to be exemplary of canonicity: *if* certain conditions are satisfied, *then* something follows. Now, a common-law judicial decision is uncontrovertibly prescriptive. It is, however, prescriptive only for the parties to the litigation and does not reveal any authoritative fiat beyond such parties. In other words, it is intrinsically particularised and does not purport to be otherwise. No judge has the authority at common law to pronounce in such a way that his decision could claim to be of general application and exercise a constraining force on later judges.

In *Westdeutsche Landesbank Girozentrale v Islington LBC*, Lord Goff thus recalled how '[t]he function of [the House of Lords] is simply to decide the questions at issue before it in the present case.'³⁷³ Making reference to an earlier judgment, he stated: 'It is [...] apparent from the reasoning of the [judges] that they regarded themselves, not as laying down some broad general principle, but as solving a particular practical problem.'³⁷⁴ Many other cases also insist upon the inherently particularistic character of common-law adjudication,³⁷⁵ for example,

³⁷² Eg: Raz, J (1975) *Practical Reason and Norms* Hutchinson at 49.

³⁷³ [1996] AC 669 (HL) at 685. See also eg *Broome v Cassell & Co* [1972] AC 1027 (HL) at 1085: '[I]t is not the function of [the House of Lords] or indeed of any judges to frame definitions or to lay down hard and fast rules' (Lord Reid); *Spring v Guardian Assurance plc* [1995] 2 AC 296 (HL) at 354: 'Some of the statements I have made I appreciate could be applied to analogous situations. However I do not intend to express any view either way as to what will be the position in those analogous situations. I believe that they are better decided when, and if, a particular case comes before the court. This approach can lead to uncertainty which is undesirable. However, that undesirable consequence is in my view preferable to trying to anticipate the position in relation to other situations which are not the subject matter of this appeal' (Lord Woolf); *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2000] 3 WLR 843 (HL) at 868: 'The constitutional role of the courts is to decide disputes and grant remedies. [...] They would be declining to exercise their constitutional role and adopting a legislative role deciding what the law shall be for others in the future' (Lord Hobhouse).

³⁷⁴ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) at 687.

³⁷⁵ Eg: *Masterson v Holden* [1986] 1 WLR 1017 (QB) at 1043; *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192 (HL) at 201; *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 (HL) at

Huscher v Wells Fargo Bank: '[T]he language of an opinion must be construed with reference to the facts of the case, and the positive authority of a decision goes no further than those facts. A decision is not authority merely for what it says, but for the points actually involved and actually decided.'³⁷⁶

It follows that to speak of common-law 'rules' (or to refer to 'a court ruling') is to talk loosely since 'legal reasoning is a matter, not of applying pre-established legal rules as such, but of pushing outwards from the facts.'³⁷⁷ The common law is, at best, governed by the generative principle of regularized improvisation, and '[t]o represent [the common law] as a systematic structure of rules is to distort it; it is to represent as static what is essentially dynamic and constantly shifting.'³⁷⁸ At common law, the 'normative purchase' is not provided by the supposed rule but rather by whatever factors are used to determine whether a given understanding of a prior decision should be modified or applied.³⁷⁹ And such is the reason why Geoffrey Samuel can aptly write that '[t]he rule model [...] is not adequate to account for the evaluative circumstances, elements and variables [...] in the process of reasoning' — and is in a position properly to add that 'there is more to legal reasoning than just a rule being applied to the facts of a case.'³⁸⁰ One will accordingly find common-law lawyers who have explicitly stated, even recently, that the notion of 'rule' is 'alien' to the common law.³⁸¹ Already, though, Bentham had reached an analogous outcome: 'As a System of general rules, the Common Law is a thing merely imaginary.'³⁸² Rather than engage in epistemic self-projection and bring to bear its ethnocentric/juricentric inclination — its confident predilection for the perceived virtues of ruleness *urbi et orbi* ('we have it, so they must have it also') — the VSI would have been well-advised to consider the common law on its own terms, not

481; *Read v J Lyons & Co* [1947] AC 156 (HL) at 175. In *Re T (A Minor)* [1997] 1 WLR 242 (CA) at 254, Lord Justice Waite's judgment thus strikes an exemplary chord: 'All these cases depend on their own facts and render generalisations — tempting though they may be to the legal or social analyst — wholly out of place.'

³⁷⁶ (2004) 18 Cal Rptr 3d 27 (CA Ct App) at 31 (Rubin J).

³⁷⁷ Samuel, G (2002) *Epistemology and Method in Law* Dartmouth at 104. See generally Legrand, P (2002) 'Alterity: About Rules, For Example' in Birks, P and Pretto, A (eds) *Themes in Comparative Law: In Honour of Bernard Rudden* Oxford University Press at 21–33.

³⁷⁸ Postema, GJ (1986) *Bentham and the Common Law Tradition* Oxford University Press at 10. See also Cooper, TM (1950) 'The Common and the Civil Law — A Scot's View' (63) *Harvard Law Review* 468 at 470, where the author remarks that the common-law judge operates '*solvitur ambulando*'.

³⁷⁹ Cf Vining, J *The Authoritative and the Authoritarian* supra note 327 at 45: 'What are called "the rules laid down by a decision" are verbal formulations of the reasons relied upon by a decision maker in making the decision. Those reasons are values, importances; any decision maker acting in a particular role necessarily gives relative weights to them in making a particular decision.'

³⁸⁰ Samuel, G 'What Have Introductory Books on Legal Reasoning Ever Done for Us?' supra note 371 at 10 and 16.

³⁸¹ Cotterrell, R (2003) *The Politics of Jurisprudence* (2nd ed) LexisNexis at 22.

³⁸² Bentham, J (1977) [c1775] *A Comment on the Commentaries* in *A Comment on the Commentaries and A Fragment on Government* Burns, JH and Hart, HLA (eds) Athlone Press at 119.

as rules, then, but, say, in the way a common-law lawyer himself represents it, as ‘a series of unfortunate events’.³⁸³

8. VSI: ‘The obligation to follow previous decisions, in fact, implies that each judgement [sic] does not merely create rules for the specific case, but fixes objective law’ (56).

—PL: At common law, there is no ‘obligation to follow previous decisions’, unless in strictly formalist (and therefore meaningless) terms. In my experience, the re-iteration of the VSI’s canard is typical of civilians whose familiarity with the common-law tradition is second-hand at best. The fact of the matter is that a common-law judge reprises an earlier decision only if minded to do so. Consider Peter Goodrich’s appreciation: ‘The possibility of distinguishing the facts of a case [...] is clearly a powerful resource in the development of the common law. [...] Because every case is in principle unique it is always possible to distinguish it from prior cases.’³⁸⁴ Meanwhile, for the VSI to talk about ‘rules for the specific case’ is to fall for an overt contradiction in terms. As I just indicated, ruleness entails generality.³⁸⁵ Besides, to continue with the VSI’s markedly problematic enunciation, the common law does not have any notion of ‘objective law’ whatsoever, and the idea that a judgment would have to ascertain ‘objective law’ is a figment of the co-authors’ ethnocentric/juricentric imagination. Undoubtedly, the VSI is straightforwardly — and most mistakenly — transposing the Italian *diritto obiettivo* into the common law assuming, of course, that if Italy has the concept, England and the United States must have it, too. As I picture myself assigning to my Sorbonne students the statement that ‘each judgement does not merely create rules for the specific case, but fixes objective law’ so as to provide them with a critical opportunity to show me that they have learned the basics of common-law reasoning, I realize the major difficulty I would be facing: the refutation of such ethnocentric/juricentric humbug would be so easy that I would find it awkward to distinguish between the better and the other students.

9. VSI: *Obiter dicta* concern ‘factual elements’ (56). Then again, *obiter dicta* refer to ‘the additional parts [of judgements (sic)]’ (123) — whatever this phrase may mean.

—PL: A brief discussion with any first-year law student in London, Chicago, or Melbourne will confirm in short order that the VSI’s two statements on *obiter dicta* stand as two outright misstatements. Contrary to both of the co-authors’ claims (the two arguments incidentally being irreconcilable), *obiter dicta* are judicial observations regarding issues not before the court or judicial remarks concerning

³⁸³ Giddens, T (2021) ‘A Series of Unfortunate Events or the Common Law’ (33) *Law and Literature* 23 [capitalization omitted].

³⁸⁴ Goodrich, P (1986) *Reading the Law* Blackwell at 163–64. Cf Schlag, P (1998) *The Enchantment of Reason* Duke University Press at 107: ‘[T]he experiences of “being bound by the law or “following the law” [...] seem a lot like the experience of “hearing voices”.’

³⁸⁵ *Supra* at 335.

matters not necessary to the outcome being reached by the court (for example, imagine wide-ranging thoughts on a certain body of law). Wholly irrelevant judicial asides would also qualify. Although an *obiter dictum* does not carry precedential value, it could be heeded on account, say, of the standing of the judge who issued the comment or because of the status of the relevant court. Needless to add, there is nothing objective or true about the designation of a given enunciation as *obiter dictum*, and 'the judge will simply [...] dismiss as [*obiter*] dicta those previous statements that the judge [...] has decided that she does not wish to follow.'³⁸⁶

10. VSI: 'The United States of America [...] has constructed its base [sic] with components which do not exist in the UK, such as a rigid constitution, federalism, and constitutional adjudication' (57).

—PL: The US constitution is not rigid.³⁸⁷ For instance, it can be interpreted to support abortion rights or not,³⁸⁸ individual gun rights or not,³⁸⁹ state constraints on freedom of religion in a time of pandemic or not,³⁹⁰ judicial deference to government agencies or not,³⁹¹ and so forth. Even originalism — about which the VSI has nothing whatsoever to say although it is by far the most consequential doctrine of constitutional interpretation to have emerged on the hither side of the Declaration of Independence — is not rigid in the sense at least that original meaning can pertain to intentionalism or textualism and within textualism, to lay understanding or expert opinion.³⁹² What is rigid, however, is the

³⁸⁶ Schauer, F (2009) *Thinking Like a Lawyer* Harvard University Press at 184 [emphasis supplied].

³⁸⁷ Three months after I had written this sentence and made the elementary claim therein, I encountered eminent support for my statement in the person of Jack Balkin, one of the United States' most authoritative constitutionalists. See Balkin, JM (2024) *Memory and Authority: The Uses of History in Constitutional Interpretation* Yale University Press at 68: '[T]he American Constitution is quite flexible.'

³⁸⁸ Compare *Roe v Wade* (1973) 410 US 113 (USSC) and *Dobbs v Jackson Women's Health Organization* (2022) 597 US ____ (USSC).

³⁸⁹ Compare the opinion of the court, on one hand, and the two dissents, on the other, in *District of Columbia v Heller* (2008) 554 US 570 (USSC).

³⁹⁰ Compare *South Bay United Pentecostal Church v Newsom* (2020) 590 US ____ (USSC) and *Roman Catholic Diocese of Brooklyn v Cuomo* (2020) 592 US ____ (USSC).

³⁹¹ Compare *Chevron USA, Inc v Natural Resources Defense Council* (1984) 467 US 837 (USSC) and *Loper Bright Enterprises v Raimondo* (2024) 603 US ____ (USSC).

³⁹² The word 'plethoric' is hardly satisfactory to attest to the quantity of publications on originalism, and the task of drawing the shortest list of exemplary texts is inevitably fraught. Eg: McGinnis, JO and Rappaport, MB (2013) *Originalism and the Good Constitution* Harvard University Press; Wurman, I (2017) *A Debt Against the Living* Cambridge University Press; Greene, J (2012) 'The Case for Original Intent' (80) *George Washington Law Review* 1683; McGinnis, JO and Rappaport, MB (2024) 'What Is Original Public Meaning?' (80) *Alabama Law Review* 223; Baude, W and Sachs, SE (2019) 'Grounding Originalism' (113) *Northwestern University Law Review* 1455; Balkin, JM (2011) *Living Originalism* Harvard University Press; Segall, EJ (2018) *Originalism as Faith* Cambridge University Press; Gienapp, J (2024) *Against Constitutional Originalism* Yale University Press. Foremost US constitutionalists insist on originalism as culture. Eg: Balkin, JM *Memory and Authority: The Uses of History in Constitutional Interpretation* supra note 387 at 77–93 and passim; Baude, W (2015) 'Is Originalism Our Law?' (115) *Columbia Law Review* 2349 at 2399–403; Calabresi, SG (2006) 'The Tradition of the Written Constitution: Text, Precedent, and Burke' (57) *Alabama Law Review* 635 at 637; Strauss, DA (2003) 'Common Law, Common Ground, and Jefferson's Principle' (112) *Yale Law Journal* 1717 at 1734. Note that in the United

US constitution's amendment procedure — a very different matter (which is why I simply cannot understand how, according to the VSI, 'the US [would] come to mind [...] when amending federal systems' [113]).

Also, to maintain of 'constitutional adjudication' that it 'do[es] not exist in the UK' (57) is nonsense – unless the VSI is making a bold epistemic claim turning on the absence of a normative private law/public law distinction. But such argument's purchase depends on an explanation assuming a profound appreciation for the UK legal scene that I cannot concede. To keep things simple, then, whether the approval of the Westminster Parliament and the legislatures of Scotland, Northern Ireland, and Wales was required before the UK government could notify the European Union of its intention to leave (*Miller No. 1*) and whether the Prime Minister could lawfully prorogue Parliament for five weeks (*Miller No. 2*) are issues pertaining to the royal prerogative and thus properly identifiable as constitutional adjudication (rather than as land law or maritime law).³⁹³ Incidentally, while the UK is not a federal country, the devolution that it has featured since the 1990s suggests a more complex governance than the VSI acknowledges (57).

Anyone who would unaccountably still harbour misgivings about the extent of the VSI's deficient understanding of the common-law tradition may wish to contemplate further blunders to the effect that 'factual elements' would be 'exclu[ded]' from the doctrine of precedent (56) or that there would exist 'the Anglo-Saxon conception of administration' (121). I have already indicated why the expression 'Anglo-Saxon' cannot avail.³⁹⁴ Apart from this terminological point, I hold that to link the US and British 'conceptions of administration' and claim to see a commonality is not unlike connecting the stars to create a constellation: one is imagining what one is observing (one *wants* to see it...).³⁹⁵ Consider British administrative law: I accept that the terrain is boggy, but the fact remains that the VSI does not navigate it adroitly at all. Envisage the *Miller* cases, for instance. Could the co-authors explain why the Crown is slated as plaintiff and either a senior minister (*Miller No. 1*) or the Prime Minister (*Miller No. 2*) as defendant? How can Her Majesty be suing Her Majesty's Government? Do the co-authors not understand how such constitutional dynamic characteristic of the British model of administration has nothing whatsoever to do with the US configuration of administration and certainly does not partake of some 'Anglo-Saxon' framework — a wholly fictitious and irresponsible construct?

And, of course, one never writes 'Frederic William Maitland' in extenso (54) — a formulation confirming, to my mind, the VSI's *unacquaintance* with the common-law tradition. (In fairness, one never writes 'Baron de Montesquieu' either [31–32]. Note, however, that the VSI unceremoniously debaronizes

States, it is the constitution that made the United States. Contrariwise, France was France before any constitution came along.

³⁹³ *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 (*Miller No. 1*) (UKSC); *R (Miller) v Prime Minister* [2020] AC 373 (*Miller No. 2*) (UKSC).

³⁹⁴ *Supra* at 267.

³⁹⁵ Vining's critique of similarization comes to mind: *supra* at 322.

Montesquieu on at least three occasions [4, 67, and 93], such inconsistencies once again attesting to slapdash editing.) To close on the co-authors' rogue summary of the common law, let me simply say as earnestly as I can that anyone in search of a brief exposition of the rudiments of common-law history or epistemology must steer very well clear of the VSI's misinformed and misinforming ways.

Last Words from Montmartre

On the subject of closure, and as I am now reaching the tenth rubric that I heralded, I shall attempt an ending of this review. Please note that my final heading is not mine as it refers to the English version of a moving autobiography, effectively the author's suicide note, recounting the passionate and disquieting relationship between two young women while offering compelling reflections on intercultural life.³⁹⁶

At this juncture, I have addressed the shorter half of the VSI, that is, sixty-six pages out of 145. The rest of the book features three further chapters: 'Methods and Approaches' (67–91); 'Sameness and Difference' (92–106); and 'What For? The Uses of Comparative Law' (107–26). There is also a four-page conclusion (127–30), a twelve-page *feeble* bibliography (131–42),³⁹⁷ and a *curt* index (143–45). I have carefully read these eighty pages or so, and I refuse to engage with them (at the risk, I accept, of disappointing readers agog for my textermination to continue). *C'est ainsi*. I readily confess mental lassitude or despondency, utter dejection: how, but *how*, can a purportedly academic text prove so incessantly vapid, not to mention so sustainedly deluded? I am aware, of course, of the Victorian trope of onwardness that is 'one of the commonest Beckettian markers'.³⁹⁸ And I cannot forget how Beckett ends *The Unnamable*: 'I can't go on, I'll go on.'³⁹⁹ Well, on this rarest of occasions I must beg to differ from Beckett's otherwise so commendably perspicuous insights: *I cannot go on, and I will not go on*. I have now written approximately 55,000 words. By my estimation, the VSI numbers about 50,000 words. I do not find I have abdicated my responsibility if only in sheer quantitative terms, my review thus far being roughly as long as the book itself. Perhaps some readers will think otherwise and opine that I am forsaking my reviewing duties: *tant pis pour eux*. Given how I regard the VSI as easily the worst book about comparative law that I have read in very many years (I thought Kischel's *Comparative Law* had queered the pitch),⁴⁰⁰ I hold I actually

³⁹⁶ Qiu, M (2014) [1995] *Last Words from Montmartre* Heinrich, AL (tr) New York Review of Books.

³⁹⁷ I have thus far alluded to the VSI's bibliography on various occasions in the course of this review (eg: see *supra* at 270 and 303) and variously referred to it as freakish, perfidious, unavailing, wanting, warped, impaired, flawed, vacant, unserviceable, ineffectual, weak, flimsy, dim, inept, lacking, poor, and feeble. To summarize: whether on account of the absence of scholarly justification informing its inclusions and exclusions or because of its want of currency, some entries being as much as twenty years out of date, the bibliography is unreliable, which is, of course, precisely the contrary of what a bibliography is meant to be.

³⁹⁸ Abbott, HP (1996) *Beckett Writing Beckett* Cornell University Press at 35.

³⁹⁹ Beckett, S *The Unnamable* *supra* note 20 at 134.

⁴⁰⁰ See Legrand, P (2020) 'Kischel's Comparative Law: *Fortschritt ohne Fortschritt*' (15/2) *Journal of Comparative Law* 292. As I observed in my review of Kischel's book, the intellectual thinness of the contents stands in 'alarming contrast' to the physical thickness of the volume: *id* at 300. In the case of the VSI, however, there is a direct correlation between the thinness of the contents and that of the physical book. It is an instance of thinness *squared*. For the English and German

deserve special credit for my perseverance: I read the sixty-six pages that I have covered extremely closely, and I read them more than once, too.

To anyone who is at all concerned with the intellectual good health of comparative law — with its scholarly credibility — the woeful impoverishment of the comparing mind on unabashed display throughout the VSI can only be cause for significant distress. Just as foreign law does not leave the comparatist as he was when he found it and fashioned it into his narrative — when he *invented* it — the VSI does not leave me as I was when I found it and made it the focus of my essay. For one thing, I feel sheer bemusement that two academics should be willing to release for publication a jerry-built text so evidently very far from being ready for publication. Also, I experience, once more, a deep sense of shame.⁴⁰¹ To have the field where I toil daily (as in ‘every single day of the year’, and not at all on a *cinq-à-sept* basis) — and indeed to have the person I am, for I regard comparatism as a lifestyle (it is not that I do comparative law, but that I *am* a comparatist-at-law) — to have all of that, then, cavalierly reduced to the VSI’s expository muddle is profoundly unsettling as I feel tainted by association (although I should not, of course), which is why a bathetic shrug cannot do (more presently on why I worry).⁴⁰² And I am utterly astounded to realize how comparative law can still prove to be so unsophisticated well into the twenty-first century, how comparatists can cleave to thinking roughly a couple of hundred years out of date. In my view, the publication of the VSI properly pertains to an editorial scandal (and I choose this term advisedly). That such tawdry ‘scholarship’ — an exercise in discipular and patriotic censorship marred with a confounding litany of misconceptions and errors, many of them significant — should be allowed to be thrust unto an unsuspecting public bearing the ‘Oxford University Press’ imprint shows, I would strongly argue, how so low academic editorial standards have so rapidly fallen. *But does anyone, does any comparatist still care (I mean genuinely so...)?*

Such goes this review, then: ‘Finished, it’s finished, nearly finished, it must be nearly finished.’⁴⁰³

Being the inveterate *Widersprecher* that I am — ‘[n]othing for me will ever be against enough’⁴⁰⁴ — I cannot resist, however, entering some cursory remarks on the chapters concerning ‘Methods and Approaches’ (67–91) and ‘Sameness and Difference’ (92–106) even though my observations do not properly qualify as a review of these VSI segments. Not even my critical steadfastness, however, can convince me to write more than just a few words on the well-rehearsed platitudes that the co-authors have assembled on the uses of foreign-law research. I refer to the dumbfounding ‘What For? The Uses of Comparative Law’ (107–26).

bibliographical references to Kischel’s book, see *supra* note 201.

⁴⁰¹ I have explained how Zweigert and Kötz’s amateurish musings on English common law made me feel such embarrassment upon reading the deadpan reaction of Lawrence Rosen, the distinguished Princeton anthropologist of law and Islamicist, whose scathing retort appositely refuses to make the least reparative concession. See Samuel, G and Legrand, P (2020) ‘A Conversation on Comparative Law’ (15/2) *Journal of Comparative Law* 371 at 372–73. For the references to Zweigert and Kötz, on one hand, and to Rosen, on the other, see Legrand, P *Negative Comparative Law: A Strong Programme for Weak Thought* *supra* note 54 at 69.

⁴⁰² *Infra* at 385–414.

⁴⁰³ Beckett, S (2009) [1958] *Endgame* McDonald, R (ed) Faber & Faber at 6.

⁴⁰⁴ [Beckett, S] (2009) [11 August 1948] [Letter to G Duthuit] in *The Letters of Samuel Beckett* Craig, G et al (eds) vol II Cambridge University Press at 95 [‘(r)ien ne me sera jamais assez contre’].

Notwithstanding that one would have expected this chapter to come at the beginning of the VSI rather than at the end, the reversal of the usual direction of travel does nothing to salvage what I consider to be the text's lamentable contents. Reflect as I may, I simply cannot see the point of this final segment. Had the co-authors exhausted their list of potential topics short of the word target? Surely, the stitching exercise that is 'What For? The Uses of Comparative Law' cannot be meant for the committed comparatist, who is already well aware of the benefits to be derived from the expansion of one's normative sights towards foreign law. Is this chapter therefore purporting to sway the sceptic? But such order of business is implausible in the extreme for it is very hard to picture anyone who does not have a keen *ab initio* interest in comparative law mustering the resilience to read that far into the VSI. And how could the perusal of these twenty pages ever turn a jurist from harbouring a nationalist mindset to the disclosure of a comparative outlook? Be that as it all may, 'the "telephone-book approach" to comparative law' is here making an extraordinary show of force as the scavenging for word bites deemed to confirm the co-authors' oh-so-impressive ability to write about countries all over the planet plainly reveals how 'the animating spirit of comparative law [that] has been the Muse Trivia' pursues its seemingly relentless epistemic governance not least in the way it continues to indulge dispiriting compilations.⁴⁰⁵ *Vedi invece*: over twenty pages the VSI's readership gets to encounter, in a further snowstorm of names,⁴⁰⁶ references to the laws of Argentina (110, 113, 126), Australia (110, 117), Austria (116, 118), Belgium (116), Brazil (110, 118, 126), Canada (109, 110, 111, 116, 117), the Caribbean (112), Central Europe (110, 111), Chile (113, 117, 119), China (111, 114, 117), Colombia (117, 118, 126), Costa Rica (117), the Czech Republic (113), Denmark (113, 116), Eastern Europe (110, 111, 118), Ecuador (117), El Salvador (117), France (109, 111, 114, 116, 117, 118, 120–21, 123, 126), Germany (110, 111, 113, 116, 117, 118, 119, 124, 126), Ghana (125), Greece (117), Guatemala (117), Honduras (117), India (110, 119, 125, 126), Israel (124), Italy (111, 113, 114, 117, 118, 120, 126), Japan (113), Latin America (109, 112, 118, 125–26), Mexico (110, 117, 118), Nepal (119), the Netherlands (116), Nicaragua (117), Nigeria (125), Paraguay (110, 117), Poland (111), Portugal (109, 117, 118), Russia (118), South Africa (110, 119, 123, 124), South-East Asia (110), Spain (109, 111, 113, 114, 117–18, 118, 120), Switzerland (109, 118), the United Kingdom (111, 116, 117, 118, 125, 126), the United States (109, 110, 113, 115–16, 117, 118, 124–25, 126), Uruguay (110, 117), and Venezuela (110, 117, 118), not to mention the European Union (107, 110, 120, 121), the Council of Europe (107, 122, 126), and the Inter-American System of Protection of Human Rights (107, 122). *Wow — or rather, phew!* (No doubt if there were laws on Mars, they would be included, too.)

⁴⁰⁵ Ewald, W (1995) 'Comparative Jurisprudence (I): What Was It Like to Try a Rat?' (143) *University of Pennsylvania Law Review* 1889 at 1983 and 1892. While the VSI mentions this text — properly so, and not only because of its extraordinary length — it manages to fumble with the reference: although the co-authors get the title right in the body text (80), they get it wrong in the section heading (79). In this latter highly visible regard, the co-authors instead write 'What Is It Like to Try a Rat?'. The use of the present tense is at once absurd — rats are no longer put on trial — and deceptive for the whole point of William Ewald's argument is to ask whether a comparatist today can make sense of an institutional practice from many centuries ago now liable to be deemed irrational or primitive. The section heading gives the unfortunate impression that Ewald's epistemic concern would have been lost on the VSI's co-authors, at least momentarily so.

⁴⁰⁶ *Supra* at 319–20.

I should mention that the ‘connect[ion]’ between international law and comparative law that the VSI chooses to draw would have been very well inspired to avoid the tired and tiring reference to Article 38 of the 1945 Statute of the International Court of Justice and its inscription of so-called ‘general principles of law’ (121), a conceit better suited to *Alice in Wonderland* (a point that the positivist co-authors typically fail to notice: for them, it seems, since the assertion is inscribed in the law-text, it is therefore true). As a matter of fact, international criminal tribunals’ references to the Statute’s ‘general principles of law’ have generated ‘unpersuasive, if not illegitimate, solutions’, not least since these outcomes were drawn from a ‘sampling [...] extremely limited and cursory’, even the occasional ‘slightly more expansive sampling’ leading to ‘superficial comparisons’ rendering the whole enterprise ‘futile’.⁴⁰⁷ Needless to add, the VSI eschews such perceptive conclusions, perhaps because they run athwart the unexamined ideology of uniformization of laws apparently animating the co-authors from beginning to end.

Rather than focus on non-existent ‘general principles of law’, the co-authors ought to have mentioned the much-publicized and widely-discussed work on comparative international law that was initially released in book form fully six years before the VSI, the governing idea being that even international law enjoys (and must enjoy) a local interpretive existence such that there can be no ‘international law’ *stricto sensu*. Instead, one encounters ‘French international law’ or ‘Brazilian international law’ (that is, ‘droit international français’ or ‘direito internacional brasileiro’).⁴⁰⁸ Unless it is that this inexpedient line of reasoning must also be suppressed. Incidentally, and contrary to the VSI’s assertion, the French *Cour de cassation* is not ‘prohibited from referring to foreign sources’ (123). Surely, the co-authors mean to exclude private international law from their implausible statement given that the court must then evidently address foreign law. (While I refer to ‘private international law’, the VSI uses both ‘private international law’ [5] and ‘conflict of laws’ [18] indifferently. It is quite unclear to me that the co-authors have realized this terminological looseness on their part.) In any event, the idea that there would exist a ‘prohibit[ion]’ on foreign references in the *Cour de cassation* is hogwash, and if the *Cour* was minded to do so, it could begin to enter references to foreign law (or to Molière, for that matter) as early as tomorrow. The co-authors are presumably confusing France with Oklahoma.⁴⁰⁹

⁴⁰⁷ Jain, N (2015) ‘Comparative International Law at the ICTY: The General Principles Experiment’ (109) *American Journal of International Law* 486 at 496.

⁴⁰⁸ See Roberts, A (2017) *Is International Law International?* Oxford University Press; Roberts, A et al (eds) (2018) *Comparative International Law* Oxford University Press. There are relevant articles antedating these two books by many years. Eg: Koskenniemi, M (2009) ‘The Case for Comparative International Law’ (20) *Finnish Yearbook of International Law* 1; Roberts, A (2011) ‘Comparative International Law? The Role of National Courts in Creating and Enforcing International Law’ (60) *International and Comparative Law Quarterly* 57; Roberts, A et al (eds) (2015) ‘Symposium: Exploring Comparative International Law’ (109) *American Journal of International Law* 467. For a critique, see Aspremont, J d’ (2019) ‘Comparativism and Colonizing Thinking in International Law’ (57) *Canadian Yearbook of International Law* 89.

⁴⁰⁹ I have in mind 12 Oklahoma Statutes Annotated §20, B (Prohibition on Use of Foreign Law). Since the statute initially specified an interdiction for state judges to resort to sharia law, the early version of the law-text was pronounced unconstitutional because of undue governmental interference with the free exercise of religion in breach of the First and Fourteenth Amendments to the US Constitution: see *Awad v Ziriax* 966 F Supp 2d 1198 (WD Ok 2013). Note that in line with the basic tenets of US federalism, the statute could ever extend to state courts only.

But I indicated that while not concerning myself with the uses of foreign-law research at any length, I would briefly react to the chapters on 'Methods and Approaches' (67–91) and 'Sameness and Difference' (92–106) that I have decided not to review. In the process, I shall leave to one side what I personally consider as the flag-waving cravenness being shown towards Rodolfo Sacco, someone who, in all likelihood on account of the dilettantist dabbling into linguistics his siblinghood encouraged and that would have made a deep impression on Italian positivists/formalists/textualists given the most elementary level at which he was making his pitch, finds himself being preposterously catapulted into the role of comparative law's principal theoretician (73–76). With his customary acuity, and clearly relying on his own extensive fieldwork in Italy, John Merryman discerned the civilian's propensity for 'indoctrinat[ion]'.⁴¹⁰ For my part, I simply wish to insist on the fact that I regard the co-authors' primary and unbecoming 'scholarly' chauvinism to be promoting values of intellectual retrenchment that stand diametrically opposite to the beyond-borders openness that ought to be the hallmark of comparative law.

The fourth part of the book, the chapter on 'Methods and Approaches' (67–91), mostly displays what I consider remaindered stuff from the epistemic bargain basement. In particular, the VSI's co-authors maintain — stupefyingly, to my mind — how for 'comparison [to be] feasible', one must 'seek an invariant, universal language that could provide an unbiased and objective framework', 'a neutral referent' (70). According to the VSI, such must indeed be comparative law's 'critical challenge' (69). In my opinion, there is even more folly on offer as one is also informed how it is 'the belief in the universality of problems [that] make[s] comparison possible' (71). Yet no statement, I suggest, is as daft as the (poorly-crafted) enunciation that '[to] mak[e] comparative law a discipline requires an accredited methodology' (67). An 'accredited methodology'! A bureau of accreditation to warrant the comparatist's method, to ensure that it speaks 'an invariant, universal language', to vouch for its display of an 'unbiased and objective framework', to confirm its operation as 'a neutral referent'! An official authority to frame the comparatist's work, dictating to him how to compare... Ah! The disciple's eagerness to abdicate the burden of individual responsibility... This ragbag of incautious formulations around method and universalism come early in the chapter, and there are kindred others on display, too. For instance, the VSI contends that 'a comparative understanding of alternative rules has been the way for pondering the best institutions' (67) — if one can take the measure of what this phrase should mean. The co-authors also maintain that '[w]e cannot compare the English term *contract* with the French term *contrat*' (69).

I want to enquire: how can such jejune pronouncements not stultify any urge any serious comparatist-at-law might feel to consider discussion? For my part, I am simply not willing to dignify this gibberish with my time. A 'universal

⁴¹⁰ Merryman, JH *The Civil Law Tradition* supra note 56 at 66. In case one should be wondering why Sacco is not read outside Italy, in particular in common-law countries, one need look no further than the following arch-positivist (and thoroughly puzzling) statement: '[M]any legal rules [...] do not represent any value, do not correspond to any ideology, are foreign to any moral system': Sacco, R (1991) 'Legal Formants: A Dynamic Approach to Comparative Law' (Gordley, J [tr]) (39) *American Journal of Comparative Law* 343 at 392. This article is the second instalment of a two-part series. I am moved to ask: how can any legal rule, foreign or otherwise, fail to be implementing a value, any value? Is there reason-less law? Is there any law that would be framed without a reason, that would not be enacted in order to achieve a certain goal? And once there exists a reason, a goal, is there not a value, any value, being ipso facto promoted?

language'? An 'objective framework'? A 'neutral referent'? The 'universality of problems'? An 'accredited methodology'? Honestly...! Yet, I stand mystified. Can these assertions (*political* statements all) actually have been inscribed in the VSI, black on white, some time in the course of 2023 — 2023? Can the co-authors actually have written that 'contract' cannot be compared with 'contrat', a comparison that I happen to have been conducting in my Sorbonne classes every year, for hours on end, during the past two decades or so — *my comparison*, of course, *my* own (encultured) comparison bearing *my* signature, *my* comparison assigning *my* (encultured) understanding to the significance of foreign contract law and inscribing the differences that *I* discern, that *I* elicit, between 'contract' and 'contrat', *my* ethnocentric, *my* juricentric comparison — *my* doomed attempt at staging the scene of incommensurability, at making a seen?

It is, I suppose, the VSI's unmitigated receptivity to the Italian mainstream discourse (relaying German propaganda), to which the co-authors have been exposed and have exposed themselves, that explains the regressive view being propounded to the effect that 'functionalism can still play a significant role in comparative legal enquiries' (89), not least by reference to such ill-conceived initiatives as the World Bank's thankfully defunct 'Doing Business Reports' (85–88).⁴¹¹ The established epistemic order is fittingly secure! What a relief: the masters will not be challenged, the orthodox teachings of the past century will remain safe, and the disciples will continue to nod appreciatively. In the event, to mobilize the principle of charitable interpretation yet again (a doctrine performing nothing short of yeoman service with respect to the VSI), one is arguably having to contend with a phenomenon along the lines of faith: the VSI's co-authors have been institutionalized into an order of belief and — a textbook example of voluntary servitude — they have wanted to be so institutionalized: no hard evidence will now be permitted to stand in the way of this willed process of alienation.⁴¹²

Little wonder that Günter Frankenberg (rightly) addresses functionalism as a 'transcendental moment' and also (correctly) observes how functionalists 'celebrate th[eir] analytical operation as a necessary reduction of complexity'.⁴¹³ The VSI thus dutifully hails functionalism as 'a simple way of looking at legal problems' (89), and the co-authors praise how 'oversimplified [...] functionalism [has] proved to be highly successful' (86). (In the process, the VSI sees fit to peddle pathetic recriminations that contrariwise, the culturalist critique would be 'overly demanding', 'elitist', 'obscur[e]', lacking 'clear directives', and bereft of a 'practical method' [88]. *En passant*, I find it interesting how the complaint within comparative law about culturalism's alleged esoterism is hailing from

⁴¹¹ For a thoughtful critique, see Mercescu, A (2021) 'Quantifying Law? The Case of "Legal Origins"' in Glanert, S; Mercescu, A and Samuel, G *Rethinking Comparative Law* Elgar at 250–75. See also Legrand, P *The Negative Turn in Comparative Law* supra note 73 at 128–91. Implausibly, the World Bank has now launched a successor scheme, 'Business Ready' (or 'B-Ready').

⁴¹² Cf Wittgenstein, L (1972) [1949–51] *Über Gewissheit/On Certainty* Anscombe, GEM and Wright, GH von (eds) Paul, D and Anscombe, GEM (trs) Harper & Row §170 at 24–25: 'I believe what people transmit to me in a certain manner. [...] And can it now be said: we accord credence in this way because it has proved to pay?' ['Ich glaube, was mir Menschen in einer gewissen Weise übermitteln. (...) Und kann man nun sagen: Wir messen unser Vertrauen so zu, weil es sich so bewährt hat?']

⁴¹³ Frankenberg, G 'Critical Comparisons: Re-thinking Comparative Law' supra note 7 at 443 and 437.

countries like Italy, of course, but also, to my knowledge, from Finland, France, Germany, and the Netherlands — the lamestream, indeed — but not in the least from Australia, England, or the United States, an empirical finding to be correlated, I suggest, with what I have styled the uneducability of civilians — unless, perhaps, with the help of cult deprogrammers.⁴¹⁴)

It is presumably the attractions of 'oversimplifi[cation]' (86) that prompt the VSI to praise Rudolf Schlesinger's comparative work on contract formation (72), Schlesinger himself having acknowledged that he was defending a comparatism 'in terms of precise and narrow rules' — a case, then, of suitably 'oversimplified' comparative work.⁴¹⁵ And I assume it is this identical aspiration for 'oversimplifi[cation]' that leads the co-authors to salute the university of Trento's telluric initiative from the 1990s as 'significant' (72). '[S]ignificant', say you? Pray tell: how so? What *impact* has any of the Trento books had on the understanding or practice of comparative law within the European Union? *Des livres pour rien...*

One can only pity, say, law students with a serious interest in comparative law who would unfortunately be mystified into reading the VSI. On account of the co-authors' shameless adhesion to 'oversimplified [...] functionalism' (86), such readers would find themselves coerced into a closing of the comparing mind and denied the intellectual benefits of the anti-functionalist critical work bravely and cogently undertaken by the likes of George Fletcher,⁴¹⁶ Günter Frankenberg,⁴¹⁷ and Richard Hyland.⁴¹⁸ Although the first of these authoritative critical writings was published nearly forty years before the VSI, none of the three texts has apparently made the slightest dent in the VSI's preconizations — and why not? Have the VSI's co-authors actually pondered Fletcher, Frankenberg, and Hyland's work? If so, in what specific ways have they found fault with their reasoning, with their counter-claims? I am genuinely curious.

Qua the proper civil servants that they are, the VSI's co-authors yearn for 'the precise model' (67) that will inform a theory and practice of comparative law and are apparently distressed at not being served on a silver plate with 'the settled direction' (67) for their comparative work to take. Unwilling (and in any event seemingly unable) to think for themselves, the co-authors need to be told what to do — hence, no doubt, the VSI's claim for an 'accredited methodology' (67) that I have indicated.⁴¹⁹ Incidentally, if culturalism is 'overly

⁴¹⁴ See Legrand, P 'Are Civilians Educable?' *supra* note 347.

⁴¹⁵ Schlesinger, RB (1968) 'Introduction' in Schlesinger, RB (ed) *Formation of Contracts: A Study of the Common Core of Legal Systems* vol I Oceana at 9.

⁴¹⁶ Fletcher, GP (1987) 'The Universal and the Particular in Legal Discourse' *Brigham Young University Law Review* 335.

⁴¹⁷ Frankenberg, G 'The Innocence of Method — Unveiled: Comparison as an Ethical and Political Act' *supra* note 76; Frankenberg, G 'Critical Comparisons: Re-thinking Comparative Law' *supra* note 7.

⁴¹⁸ Hyland, R (2008) *Gifts* Oxford University Press at 63–74 and 94–113. Specifically, Hyland opines how '[f]unctionalism has generally proven to be incompatible with comparison': *id* at 101. Please indulge my emphasis: *in-com-pat-i-ble*.

⁴¹⁹ The hankering for methodological authoritarianism emerges clearly from the VSI, where the co-authors refer to the need for 'the proper methodology' (17), indicate their preference for 'a shared methodology' (90–91), and maintain that a 'wide range of methodological approaches for comparative endeavours is [...] perilous' (91). (Quaere: what on earth is the 'peri[l]'?) As I read

demanding' (88) — if comparatists-at-law should not even be expected to prove conversant in a foreign culture and in a foreign language (88) — how can it make any sense for the VSI to be arguing in favour of interdisciplinarity (12–13)? Is it not bizarre to allow the comparatist-at-law to skip foreign-culture or foreign-language skills while expecting him to develop some competence in philosophy or anthropology, in literary criticism or sociology? Or is it that the VSI's interdisciplinarity is to take place at hedge-hopping intellectual level only? Harnessing charitable interpretation once more, let me try and surpass the VSI's incoherence to explain the culturalist case for indiscipline, as I see it, bearing in mind how the VSI is heavily invested in 'simple way[s] of looking at legal problems' (89).

Comparatists are able to agree, I assume, on three basic propositions animating the comparison of laws. First, they can accept that comparative law involves the interpretation of foreign texts, often written in a foreign language, which is to mean, philosophically speaking, that comparative law concerns a dynamic featuring the self (this comparatist, here, operating in this law and in this language) and the other (that foreign law-text, there, operating in that law and in that language). Secondly, comparatists can also admit that the prime purpose of any investigation into foreign law is to improve one's understanding, to reach a more enlightened understanding of foreign law. Thirdly, comparatists can further concur that a reasonable comparatist investing time and effort in his comparative endeavour wishes his work on foreign law to be taken seriously, to be received as persuasive, by those having an interest — and there does not seem to be any need to array the tenets of rational-basis theory or such like to defend this argument. While one might quibble regarding one word or other — and allowing for inevitable variations or permutations, qualifications or exceptions — I hold that sensible comparatists would acknowledge the gist of these three postulates as standing to obviousness. Must it not follow, then, that a responsible comparatist would spontaneously seek to improve his understanding of the dynamics of interpretation, to enhance his appreciation for the intricacies of the self/other interaction?

Now, the fact of the matter — *the easily empirically verifiable fact of the matter* — is that there are individuals who have spent years, sometimes decades, of their academic careers thinking and writing about these issues. To be sure, some such persons are jurists. However, many others are not. Amongst legal theorists, to limit myself to a handful of the most readily recognizable names, I have in mind writers like Kent Greenawalt (on interpretation),⁴²⁰ Jack Balkin (on understanding),⁴²¹ and Pierre Schlag (on epistemology).⁴²² Unsurprisingly, though, the realm of non-lawyers is infinitely larger and also features the not insignificant advantage of supplying alternative perspectives. Let me, then,

the VSI, I find that there is on display nothing short of a fetishistic passion for the One — and so much for the fact that comparatism structurally implies 'more than one'. It is Roger Dadoun, an influential psychoanalyst, who observes how 'the phantasm of the One charges the whole of the political with its furious, archaic, and terrorizing energy': Dadoun, R (1995) *La Psychanalyse politique* Presses Universitaires de France at 31 ['le fantasme de l'Un charge tout le politique de sa furieuse, archaïque et terrorisante énergie']. Yes.

⁴²⁰ Eg: Greenawalt, K (2010) *Legal Interpretation* Oxford University Press.

⁴²¹ Eg: Balkin, JM (2003) *Cultural Software* Yale University Press.

⁴²² Eg: Schlag, P *The Enchantment of Reason* supra note 384.

confine my list to three all-category influencers (to use a very contemporary term), three intellectuals whose reputation as investigators of interpretation or of the self/other dealings (or of both concerns) ranks each of them as a 'superstar' of the academic scene over the past one hundred years or so.

Consider Hans-Georg Gadamer, who devoted his entire philosophical career to interpretation. As it happens, in his most famous text, Gadamer has an entire section on law.⁴²³ Then, think of Clifford Geertz, long one of the twentieth century's most celebrated anthropologists and path-breaking intellectuals whose main preoccupation was understanding across cultures — who also happens to have written on law.⁴²⁴ And envisage Bruno Latour, a science studies specialist and cross-disciplinary thinker whose epistemic insights have proven as innovative as they have shown themselves to be disruptive. Latour has a book on law.⁴²⁵ What, then, am I expecting comparatists-at-law to do with Gadamer, Geertz, and Latour? Crucially, I am not inviting comparatists-at-law to engage in interdisciplinary work, that is, I am not expecting comparatists-at-law to turn themselves into philosophers or anthropologists or science studies experts. Such a demand would be unreasonable given the high 'cost of admission' (epistemological, psychological, and otherwise) into these worlds. But it is not at all exorbitant, I suggest, to form the view that comparatists-at-law ought to practice indiscipline. Indeed, such expectation is sound in as much as indiscipline stands to improve the merits and credibility of any comparison of laws. What am I saying? And how do I distinguish between interdisciplinarity and indiscipline?

My claim is simply that comparatists-at-law cannot close their eyes to the information pertaining to their theoretical concerns (interpretation, understanding, epistemology) only because it happens to have been developed beyond the corridors of a law school. Rather, comparatists-at-law are to draw on some of these beyond-the-law-corridor insights and import a selection of them into their comparative work in order to substantiate their own theoretical moves and conclusions. While, I repeat, it would be exaggerated to expect comparatists to turn into masters of one other discipline or more, the fact remains that the practice of indiscipline cannot materialize without a modicum of intellectual effort. And yes, it might even compel a consultation of the central library catalogue and possibly even a walk (or a public transit ride) from the law library. Indiscipline's intellectual rewards are easily demonstrable. And comparatists-at-law will not be content to be hacks, will they?

For example, when Zweigert and Kötz, evidently without the benefit of any in-depth reflection on the matter, peremptorily require that the description of foreign law should show 'scientific exactitude and objectivity',⁴²⁶ I find it decisive for a thoughtful comparatist-at-law to be able to countermand this foolish summons, say, through a reference to Gadamer, a philosopher who, with the evident benefit of an in-depth reflection on the matter, holds that 'one understands

⁴²³ See Gadamer, H-G *Wahrheit und Methode* supra note 15 at 330–46.

⁴²⁴ Geertz, C *Local Knowledge* supra note 104 at 167–234.

⁴²⁵ Latour, B (2002) *La Fabrique du droit* La Découverte.

⁴²⁶ Zweigert, K and Kötz, H *Einführung in die Rechtsvergleichung* supra note 87 at 44 ['wissenschaftliche Exaktheit und Objektivität'].

differently, when one understands at all.’⁴²⁷ I hasten to add that I do not assume any argument (of mine or anyone else’s) to be settled by the lemma ‘Gadamer says so.’ The postulate that Gadamer’s views are justified because they happen to be Gadamer’s — along the lines of ‘Gadamer dixit, ergo...’ — is evidently inadequate. What I contend, though, is that over many decades of painstaking and extensive consideration of the matter of interpretation of texts, Gadamer has produced conclusions that are widely regarded as proving particularly incisive and as heralding a more compelling theoretical and practical dividend than the bulk of other models on offer — which is no doubt why so many books and authors, corroborating the force of his discernment, have regarded his work as warranting heightened attention.⁴²⁸ It must be unnecessary to add that although Gadamer easily deserves to be recognized as one of the modern era’s most noteworthy philosophers, it is not that his template is unblemished.⁴²⁹

Another illustration of the need for comparatists-at-law to reach beyond the law-library stacks involves Patrick Glenn’s misapprehension of incommensurability as incomparability.⁴³⁰ Other disciplinary discourses agree that incommensurability differs from incomparability and thus show Glenn to be in error. I find it important for a thoughtful and rigorous comparatist-at-law to correct Glenn’s mistake through the mobilization of references to philosophy,⁴³¹ science studies,⁴³² translation studies,⁴³³ or religious studies.⁴³⁴

⁴²⁷ Gadamer, H-G *Wahrheit und Methode* supra note 15 at 302 [‘man anders versteht, wenn man überhaupt versteht’]

⁴²⁸ Eg: George, T and Heiden, G-J van der (eds) (2022) *The Gadamerian Mind* Routledge; Dostal, RJ (ed) (2021) *The Cambridge Companion to Gadamer* (2nd ed) Cambridge University Press; Warnke, G (ed) (2016) *Inheriting Gadamer* Edinburgh University Press; Malpas, J and Zabala, S (eds) (2010) *Consequences of Hermeneutics: Fifty Years After Gadamer’s Truth and Method* Northwestern University Press; Krawjeski, B (ed) (2004) *Gadamer’s Repercussions* University of California Press; Malpas, J; Arnsward, U and Kertscher, J (eds) (2002) *Gadamer’s Century* MIT Press; Hahn, LE (ed) (1996) *The Philosophy of Hans-Georg Gadamer* Open Court; Silverman, HJ (ed) (1991) *Gadamer and Hermeneutics* Routledge; Wright, K (ed) (1990) *Festivals of Interpretation: Essays on Hans-Georg Gadamer’s Work* State University of New York Press. Out of an abundant bibliography, I limit this list to noteworthy collections of essays in English.

⁴²⁹ Beyond the internal tensions and occasional aporias in Gadamer’s theory, there is a disturbing mystical streak traversing the work. It simply cannot do, for instance, to refer to the ‘miracle of understanding’ (‘Wunder des Verstehens’) as Gadamer does repeatedly: Gadamer, H-G *Wahrheit und Methode* supra note 15 at 297, 316, and 347. Elsewhere in his book, Gadamer also mentions the ‘miracle of art’ (‘Wunder der Kunst’): id at 63. And he refers more than once to the ‘miracle of language’ (‘Wunder der Sprache’): id at 423, 424, and 425. In my view, these three miracles are three miracles too many.

⁴³⁰ See Glenn, HP (2001) ‘Are Legal Traditions Incommensurable?’ (49) *American Journal of Comparative Law* 133 at 135: ‘Incommensurability is equivalent to incomparability.’

⁴³¹ Eg: Chang, R (2002) *Making Comparisons Count* Routledge at xvii: ‘[Incommensurability] does not entail incomparability. [...] [T]he two ideas are distinct.’ Ruth Chang refers to this difference as ‘a platitude of economic and measurement theory’: *ibid*.

⁴³² Eg: Kuhn, TS (2000) [1982] ‘Commensurability, Comparability, Communicability’ in *The Road Since Structure* Conant, J and Haugeland, J (eds) University of Chicago Press at 36: ‘No more in its metaphorical than its literal form does incommensurability imply incomparability.’

⁴³³ Eco, U (2003) *Dire quasi la stessa cosa* Bompiani at 41: ‘[I]ncommensurability does not mean incomparability’ [‘(I)ncommensurabilità non significa incomparabilità’] (emphasis omitted).

⁴³⁴ Sass, H von (2020) ‘Incomparability’ in Epple, A; Erhart, W and Grave, J (eds) *Practices of Comparing* Bielefeld University Press at 98: ‘[I]ncommensurability [...] is compatible with comparability.’

In sum, it is at once silly and arrogant, in my view, to assume that legal scholarship can somehow be autarkic and that jurists, in particular comparatists, should confine themselves to the reading of law monographs and law reviews without any need to supplement the information on offer in these materials by way of further enquiries into other disciplines. As my Zweigert and Kötz illustration proves,⁴³⁵ comparatists-at-law can easily urge epistemic ambitions on their fellow comparatists that an *au fait* disciplinary discourse reveals to be wholly unsustainable — and it is, of course, crucial to appreciate the fact that a given comparative-law incitement fully pertains to the realm of epistemic illusion. And, as my Glenn example shows,⁴³⁶ comparatists-at-law can also forcefully assert epistemic conclusions that are thoroughly erroneous — and it is key to realize the misleading character of such enunciations, too. I maintain that the argument from indiscipline is ultimately stating the obvious. Frankly, it is doing little more than claiming what ought to be evident for any modest and self-respecting comparatist-at-law, which is that comparative law cannot be disciplinarily self-sufficient. To paraphrase Kurt Vonnegut, a brand of comparative law that excludes other disciplinary discourses misrepresents comparison as badly as Victorians misrepresented life by excluding sex.⁴³⁷ I trust that I have managed to keep my explanation in favour of indiscipline uncomplicated enough so that it meets the VSI's test — to bring to bear 'a simple way of looking at legal problems' (89).

One of the difficulties arising from a fixation on reductionism seemingly at all costs in the manner of the VSI — from the expenditure of so much 'effort' to make comparative law so effortless — is that the commitment to elementariness can easily generate a frame of mind that will satisfy itself with the kind of superficial probing destined to veer into distortion. In their urge to establish the virtues of functionalism as 'a simple way of looking at legal problems' (89), the VSI's co-authors thus disfigure French law. The relevant passage reads as follows: 'Medical malpractice is treated as a breach of contract under French law. This means that a strict rule of liability applies, and the victim does not need to prove fault to get compensated' (75). Before all else, the excerpt must be rewritten in idiomatic English and the misleading expression 'strict rule of liability' replaced by 'strict liability rule' so that the quotation reads thus: 'Medical malpractice is treated as a breach of contract under French law. This means that a [strict liability rule] applies, and the victim does not need to prove fault to get compensated.' In these thirty-two words the co-authors are making two assertions, both of them misleading. Again, my point is about the attitude that a functionalist perspective begets: not so bemusingly, I should think, the wrong mindset gets the law wrong. What I contend is that if one's focus is systematically about the elimination of complexity — if the goal is relentlessly to 'dumb down' — the urge to engage in a deep investigation finds itself eroded with consequences potentially devastating in terms of the justness of the representation being designed, and quite predictably, too. How, then, does the VSI manage to misstate French law, twice?

⁴³⁵ Supra at 348–49.

⁴³⁶ Supra at 349.

⁴³⁷ I refer to Vonnegut, K (2005) *A Man Without a Country* Random House at 17: 'I think that novels that leave out technology misrepresent life as badly as Victorians misrepresented life by leaving out sex.'

First, the co-authors contend that in France '[m]edical malpractice is treated as a breach of contract'. While such was the situation as of 1936 on account of the famous *Mercier* decision,⁴³⁸ the legal position changed in 2002 because of a 4 March statute of that year regarding the rights of patients. This law-text introduced a unified regime of statutory or extra-contractual liability applying to all medical professionals and establishments in France.⁴³⁹ The *Cour de cassation* — France's highest adjudicative body with respect to matters of private law ('droit privé') — has since confirmed on two occasions the legal move from contractual to statutory or extra-contractual liability.⁴⁴⁰ The VSI's 'simple way of looking at legal problems' (89) thus finds itself to be more than two decades out of date.

Secondly, the co-authors claim that 'a [rule of strict liability] applies, and [that] the victim does not need to prove fault to get compensated'. However, under French law medical liability has never been based on a no-fault regime and continues not to be at this writing, both the relevant statute and the *Cour de cassation* being clear on this issue.⁴⁴¹ As it happens, the VSI's 'simple way of looking at legal problems' (89) finds itself to be devoid of any legal basis whatsoever.⁴⁴² (The analogy between orthodox comparative law and 'stamp collect[ing]' may be said to be collapsing at this point.⁴⁴³ If one is into stamp collecting, one values errors: it is the '9 Kreuzer Green' or the 'Inverted Jenny' that are priceless. If one is pursuing comparative law, however, errors like the VSI's on French law carry no value whatsoever, quite to the contrary.)

I have already indicated that the VSI's reader cannot trust the book's treatment of the common-law tradition, that the co-authors' coverage of the civil-law tradition is also lacking in noteworthy respects, and, according to the fellow comparatist I consulted, that the text's handling of Islamic law is likewise patently deficient.⁴⁴⁴ It now emerges that the VSI's analysis of French law is also undependable. How reasonable is it therefore to assume that this massive credibility deficit would mar only the VSI's exposition of the common-law tradition, of the civil-law tradition, of Islamic law, and of French law? How legitimate is it to expect that somehow, providentially, *mirabile visu*, the VSI's treatments of Talmudism, Hinduism, and Confucianism would be reliable (even as there is no evidence whatsoever that the co-authors have accessed documentary sources in Hebrew, Hindi, or Chinese)? I am happy to leave the

⁴³⁸ *Cour de cassation* Civ (Civil Law Chamber) 20 May 1936 in (1936) Dalloz Périodique I 88.

⁴³⁹ Statute no 2002–303 relative to the rights of patients and the quality of the health system (Loi no 2002–303 relative aux droits des patients et à la qualité du système de santé) <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000227015/>>.

⁴⁴⁰ *Cour de cassation* Civ 1st (First Civil Law Chamber) 28 January 2010 in (2010) Dalloz 1522 (with a comment by P Sargos); *Cour de cassation* Civ 1st (First Civil Law Chamber) 3 June 2010 in (2010) Dalloz 1484 (with comments by I Gallmeister and P Sargos).

⁴⁴¹ *Code de la santé publique* (Code of Public Health) art L 1142–1, I; *Cour de cassation* Civ 1st (First Civil Law Chamber) 14 December 2022 in Dalloz (2024) 34 (with a comment by O Gout).

⁴⁴² For an authoritative summary of the issues I discuss, see Fabre-Magnan, M (2025) *Les Obligations* (6th ed) vol II Presses Universitaires de France at 117–19. I am grateful to Muriel Fabre-Magnan, my colleague at the Sorbonne, for kindly agreeing to discuss with me the matters at hand.

⁴⁴³ Ewald, W 'Comparative Jurisprudence (I): What Was It Like to Try a Rat?' supra note 405 at 1892.

⁴⁴⁴ Supra at 328–40, 327–28, and 321–24, respectively.

ultimate determination to experts, but I do have my most serious doubts. If I may be allowed to invoke the ethics of comparative law — or is this subject-matter too heady or unduly complicated? — I find it very regrettable that the co-authors do not experience a stronger sense of the responsibility they are undertaking as they volunteer to write on behalf of other laws (if in Mediterranean English) in the absence of any assigned mandate to do so. To be sure, the translative power that the comparatist-at-law is wielding as he enables the speech of others in his words, as he gives voice to others in his language, was not, I daresay, a preoccupation of Sacco's.

As I explained, I have elected not to review the VSI's chapters on 'Methods and Approaches' (67–91) and 'Sameness and Difference' (92–106). However, I think that my non-review is in danger of overflowing its banks, and I must therefore discontinue my enterprise in short order. Before I do so, however — and overlooking the lack of explanation on the part of the VSI's co-authors justifying their choice to devote one full chapter (the fifth of the book) to 'Sameness and Difference' rather than, say, to 'Objectivity and Truth' or 'Culture and Language' — I have to enter four basic sets of observations regarding the heading on display, none of these four issues being so much as evoked in the VSI (presumably because they never even came to the co-authors' minds, possibly on account of their excessive complexity).⁴⁴⁵ My four remarks concerning the VSI's section on 'Sameness and Difference' show once more how unrealistic it can be for jurists, including comparatists, to theorize their practice without indisdisciplinedly seeking assistance from other disciplinary discourses — without being prepared to think outside of the positivist/formalist/textualist law-box. By way of my four contentions, I thus aim to acknowledge once more the merits of the non-law discourses that orthodox comparative law has consistently marginalized or denied — that it has repressed — as it was pursuing its oh-so-problematic epistemic deployment. In particular, I seek to emphasize the relevance of comparative law's withheld or outlawed theoretical configurations (the theoretical issues that comparative law has kept out of the law, out of the comparison also). As I proceed, I maintain that the recognition of the genuine depth — the complexity — of the epistemic challenges facing the comparatist-at-law must be a distinguishing mark of any laudable and creditable comparative practice. Yes.

First, I marshal Leibniz's argument — 'Leibniz's Law' — for the inevitability of differential co-presence in order to account for the fact that in *the co-presence of more than one law, which means that there is not one law only anymore, there cannot be commonality across them and there must be difference between them*.⁴⁴⁶ In Leibniz's words (which he wrote in French), 'by virtue of insensible variations, two individual things cannot be perfectly similar, and [...] they must always differ.'⁴⁴⁷

⁴⁴⁵ I draw on Legrand, P *Negative Comparative Law: A Strong Programme for Weak Thought* supra note 54 at 229–37.

⁴⁴⁶ I also rely on Derrida, J (1989) *Memoires for Paul de Man* (2nd English ed) Lindsay, C (tr) Columbia University Press at 15. The book's English translation was released before the French text and is more specific in terms of the passage that interests me, hence my reference.

⁴⁴⁷ Leibniz, GW (1965) [1764+] *Nouveaux essais sur l'entendement* in *Die philosophischen Schriften von Gottfried Wilhelm Leibniz* Gerhardt, CI (ed) vol V Olms at 49 [en vertu des variations insensibles, deux choses individuelles ne sauroient estre parfaitement semblables, et (...) elles doivent tousjours differer']. This text was written in 1704 and only appeared posthumously. Leibniz expresses his idea in some other work, too. Eg: Leibniz, GW (1965) [1686] *Discours de*

At the very least, this analytical principle stands for the proposition that the diverse is necessarily ‘other than’ (that distinct entities are never exact replicas of one another, that if there are A and B, A is at least minimally something that exists as not-B). Alfred North Whitehead, the famous mathematician and philosopher, extended Leibniz’s proposition to contend that ‘[n]o two occasions can have identical actual worlds’ — his claim being that no matter how faithfully situation Y purports to mimic situation X, the fact is that when Y comes along, X has already taken place, which entails that event Y features as one of its constitutive elements the pastness of event X and therefore, if on this ground alone, differs from event X.⁴⁴⁸ (Think with Whitehead, briefly: foreign law precedes the comparison, which therefore always intervenes retrospectively and accordingly cannot operate mimetically to produce a foreign law duplicating that preceding foreign law but rather must be content with a manifestation of xenophany, the work harbouring the *appearance* of the foreign while effectively being the comparatist’s.)

Both Leibniz and Whitehead — two great champions of pluralism — are showing that, structurally, two laws thus differ and must differ from one another. Laws are separated by a differend, which is *what there is*, which is *what is the case*: ‘In the beginning, difference; there is what happens, there is what has already taken place, *there*.’⁴⁴⁹ Yes. There is a differend that is embedded in the very factual ‘there-iness’ of the laws-in-co-presence. As such, this differend is properly ‘irreducible’.⁴⁵⁰ And it remains irreducible no matter how much a comparatist-at-law may (unaccountably) yearn after its effacement. Irrespective of how capricious the comparisons unfolding, then, and notwithstanding the dogma pertaining to comparative law’s theoretical orthodoxy, the immutability of difference means that comparatists-at-law find themselves constantly straddling the ‘crossroads of separations’.⁴⁵¹

Secondly, I maintain that samenesses or similarities, similitudes or semblances, resemblances or likenesses, equalities or equivalences — commonalities of all hues — *all* pertain to the realm of difference, which is *what there is*, which is *what is the case*, there, across laws. (Lest it should be felt that a Latin formulation is needed so as to inject suitable momentousness into my statement, let me solemnly assert, then, that *omne simile est dissimile*.) In this crucial sense, I contend that a sound theory of comparison to underwrite comparative law must interrupt any and all age-old routinized or ritualized dialectical claims: it must *negate* them. In other terms, and contrary to what the orthodoxy canonically contends, the comparison of laws is neither about similarities and differences nor about similarities or differences according to the whim of any given comparatist —

métaphysique in *Die philosophischen Schriften von Gottfried Wilhelm Leibniz* Gerhardt, CI (ed) vol IV Olms §IX at 433: ‘[I]t is not true that two substances resemble each other entirely’ [‘(I)l n’est pas vrai que deux substances se ressemblent entierement’].

⁴⁴⁸ Whitehead, AN (1978) [1929] *Process and Reality* Free Press at 210.

⁴⁴⁹ Derrida, J (1987) ‘Deux mots pour Joyce’ in *Ulysse gramophone* Galilée at 44 [‘Au commencement la différence, voilà ce qui se passe, voilà ce qui a déjà eu lieu, là’]. I borrow the word ‘differend’ from the English translation of Jean-François Lyotard’s *Le Différend*: Lyotard, J-F (1988) [1984] *The Differend* Abbeele, G Van Den (tr) University of Minnesota Press.

⁴⁵⁰ Derrida, J (1990) *Limited Inc* Weber, E (ed) Galilée at 253 [‘irréductible’].

⁴⁵¹ Artaud, A (1976) [1926] ‘Fragments d’un journal d’enfer’ in *Œuvres complètes* vol I Gallimard at 115 [‘carrefour des séparations’].

nor, what would be even less cogent, is it about what the comparatist is going to find (as if foreign-law research could ever involve merely a finding process). In the absence of commonalities across laws (cf Leibniz's Law *supra*), *there is and there can only be difference*. No matter how typical the statement, it is therefore erroneous to maintain that '[a]ll comparative work involves the exploration of similarities and differences' — unless, of course, one is thinking in terms of the exploration of small differences (perhaps eensy-weensy ones) and of larger differences.⁴⁵² And the absurd affirmation that '[i]n 1946, the average similarity score was 0.377' while '[a]s of 2006, it had declined to 0.352' can only mean — if it can mean anything at all — that '2006' differences across laws had become more important than '1946' differences across laws.⁴⁵³ (In my opinion, the motion that has devout numerists applying decimal digits to the thousandth, with a seemingly straight comparing face, to such an inherently open-textured term as 'similarity' must strike even the charitable interpreter as ludicrous in the extreme, an instance of 'arithmomani[a]' gone mad.⁴⁵⁴)

The primordial misunderstanding informing the standard predilection within comparative law in favour of *mêmeté* or *mesmidade* stands as the kind of basic fallacy prompting the urgent requirement for comparison-at-law to transform itself into *negative* comparison — and comparative law to change itself into *negative comparative law*: one must say no to any assumption that there is anything other than difference across laws. In particular, one must forcefully say no to the reprehensible bigram that is the 'præsumptio similitudinis',⁴⁵⁵ the nefarious formulation within comparative law of the misconception that '[t]here [is] nothing distinctively German, French or American about [German, French, or American judicial] decisions',⁴⁵⁶ that 'the problem of whether a boy is liable for injuring a playfellow or a seller is liable for defects in his merchandise is analysed in much the same way in Hamburg, Montpellier, Manchester, and Tucson, or for that matter in New Delhi, Tel Aviv, Tokyo, and Jakarta',⁴⁵⁷ or that 'Visigothic Spain, parts of post-mediaeval Germany and nineteenth century California could accept for a variety of reasons what is basically the same régime of matrimonial property.'⁴⁵⁸

⁴⁵² Nelken, D (2008) 'Comparing Legal Cultures' in Sarat, A (ed), *The Blackwell Companion to Law and Society* Blackwell at 119. For a similarly mistaken configuration of the matter, see Rohland, E and Kramer, K (2021) 'On "Doing Comparison" — Practices of Comparing' in Rohland, E et al (eds) *Contact, Conquest and Colonization: How Practices of Comparing Shaped Empires and Colonialism Around the World* Routledge at 3: 'The operation of comparing involves not only assumptions of difference but, crucially, also of similarity.'

⁴⁵³ Law, DS and Versteeg, M (2011) 'The Evolution and Ideology of Global Constitutionalism' (99) *California Law Review* 1163 at 1202n131.

⁴⁵⁴ Beckett, S *More Pricks than Kicks* *supra* note 12 at 60.

⁴⁵⁵ Zweigert, K and Kötz, H *Einführung in die Rechtsvergleichung* *supra* note 87 at 39. Following upon Zweigert and Kötz, Uwe Kischel is keen to preserve the 'præsumptio similitudinis' as a 'working hypothesis': Kischel, U *Comparative Law* *supra* note 201 at 168. For the German text, see Kischel, U *Rechtsvergleichung* *supra* note 201 at 181 ['Arbeitshypothese']. In both language versions, Kischel writes 'praesumtio similitudinis'.

⁴⁵⁶ Gordley, J (1995) 'Comparative Legal Research: Its Function in the Development of Harmonized Law' (43) *American Journal of Comparative Law* 555 at 563.

⁴⁵⁷ Gordley, J (1991) *The Philosophical Origins of Modern Contract Doctrine* Oxford University Press at 1.

⁴⁵⁸ Watson, A *Society and Legal Change* *supra* note 280 at 110.

All these enunciations manifest a ‘tendency, primary, precipitous, to reduce everything to the [...] homogeneous’,⁴⁵⁹ a propensity to settle for rough-and-ready conclusions (‘much the same’, ‘basically the same’) unbecoming to creditable scholarship, a penchant to establish a self-serving system of Rationality or Reasonableness that would be master of its own epistemic conditions in the ideological service of oneness-in-the-law — and in the psychological service of anxiety-reduction in the face of a redoubtable phobogenic situation (I have in mind Gordley’s ‘We will feel reassured when solutions are similar’, a sincere acknowledgement that orthodox comparative law is afflicted with infantile regression).⁴⁶⁰ The abiding ideological ambition is thus to achieve a unified law of civil procedure, a unified sales law, a unified administrative law, or — why not? — a unified planetary law, the express articulation of such ideas in Unidroit’s *Principles of International Commercial Contracts*, an ostensibly comparative endeavour, being exemplary: ‘The objective of the Unidroit Principles is to establish a balanced set of rules designed for use throughout the world *irrespective* of the legal traditions and the economic and political conditions of the countries in which they are to be applied.’⁴⁶¹

Notwithstanding how imaginative orthodox comparative law’s fantasizing, how domineering its precative thinking, difference across more than one law remains *what there is, what is the case*, there, and the serious comparatist is simply not at intellectual liberty to deny this epistemic condition — indeed, ‘[w]ithout acknowledging differences, comparison is partisanship.’⁴⁶² Consider Gadamer once more: ‘Each [being] that shows itself necessarily distinguishes itself from an other being that shows itself. It separates itself from the other [being] [...]. This is certainly correct.’⁴⁶³ Even ‘[t]he same lets itself be said only if difference be thought.’⁴⁶⁴ And *tant pis* for Gordley who finds convergence ‘reassur[ing]’,⁴⁶⁵ for Markesinis who would confine differences to the realm of ‘appear[ances]’,⁴⁶⁶ and

⁴⁵⁹ Jullien, F (2018) *Si près, tout autre* Grasset at 12 [‘tendance primaire, précipitée, à tout réduire à (...) de l’homogène’]. François Jullien is a leading sinologist whose comparative observations I find helpfully discerning.

⁴⁶⁰ Gordley, J (2006) *Foundations of Private Law* Oxford University Press at 3.

⁴⁶¹ Governing Council of Unidroit (1994) ‘Introduction’ in Unidroit *Principles of International Commercial Contracts* International Institute for the Unification of Private Law at viii, repr in (2016) 4th edn at xxix [my emphasis]. At an admittedly different level of intellectual sophistication, envisage Delmas-Marty, M (2005) *Vers un droit commun de l’humanité* Textuel. One has to laugh to keep from crying.

⁴⁶² Moyn, S (19 May 2020) ‘The Trouble with Comparisons’ *The New York Review* <<https://www.nybooks.com/daily/2020/05/19/the-trouble-with-comparisons/>> [on file]. For a critical exploration of the bias that Samuel Moyn fittingly denounces, see Legrand, P (2021) ‘The Guile and the Guise: Apropos of Comparative Law as We Know It’ (16) *Asian Journal of Comparative Law* 155.

⁴⁶³ Gadamer, H-G (1995) ‘Hermeneutik auf der Spur’ in *Gesammelte Werke* vol X Mohr Siebeck at 160 [‘Ein jedes, was sich zeigt, unterscheidet sich notwendig von anderem Seienden, das sich zeigt. Es gliedert sich vom anderen aus (...). Das ist gewiß richtig’].

⁴⁶⁴ Heidegger, M (2000) [1951] ‘... dichterisch wohnet der Mensch ...’ in *Vorträge und Aufsätze* Klostermann at 197 [‘(d)as Selbe läßt sich nur sagen, wenn der Unterschied gedacht wird’]. Already, Montaigne had been maintaining that ‘[r]esemblance does not so much make, one, as difference makes, another’: Montaigne (2007) [1595+] *Les Essais* Balsamo, J; Magnien-Simonin, C and Magnien, M (eds) Gallimard bk III, ch 13 at 1111 [‘(l)a ressemblance ne fait pas tant, un, comme la difference fait, autre’].

⁴⁶⁵ Gordley, J *Foundations of Private Law* supra note 460 at 3.

⁴⁶⁶ Markesinis, BS (1993) ‘The Destructive and Constructive Role of the Comparative Lawyer’

for Vicki Jackson who chooses to denigrate a 'focus on differences' as 'a position of "hyperparticularity"' and opines, cryptically (and self-interestedly), that 'hyperparticularity is too pessimistic a view of the possibilities of learning.'⁴⁶⁷

Thirdly, I want to refer to Nelson Goodman, the influential logician and aesthetician, who percipiently remarks that '[s]imilarity, ever ready to solve philosophical problems and overcome obstacles, is a pretender, an impostor, a quack.'⁴⁶⁸ In effect, there is nothing inherent about any form of semblance whatsoever. Rather, all purported commonalities exist only as attributes that are affixed to some entity or other by an interpreter. It follows that the quality of 'being like' is thoroughly contingent, that any alleged 'likeness' must depend upon an array of facts including the circumstances within which the interpreter is located. A reference to Michel Foucault may assist: 'There is no resemblance without signature. The world of the similar can only be a marked world.'⁴⁶⁹ Foucault's contention is that it does not inherently pertain to any entity (say, to any law) to be like another entity (say, another law). Far from constituting an essential characteristic that one would find, commonality is always ascribed by an analyst or commentator. Hence, Foucault's argument that there is 'no resemblance without signature', that every resemblance bears the signature of a given analyst or commentator. This crucial qualification is the sense in which Foucault affirms that '[t]he world of the similar can only be a marked world', that every resemblance carries the mark of a given analyst or commentator.

Jacques Derrida contributes an important deconstructive intuition on this issue. Seeking to probe the term 'resemblance' with a view to generating heightened understanding, he observes that '[t]he way in which resemblances constitute or stabilize themselves is relative, provisional, precarious'.⁴⁷⁰ If commonality is the product of a given analyst's or commentator's interpretive input, one can expect such interpretation to depend on its interpreter (it is therefore relative to him), to be liable to amendment (for example, it may be modified as the interpreter changes his mind over time), and to be fragile (not least in the way in which its success hinges on its reception by the interpreter's

(57) *Rebels Zeitschrift* 438 at 443. Shockingly — not that orthodox comparatists have taken the least exception — Markesinis argues, harnessing tort law (or rather 'tort' law) by way of illustration, 'how similar our laws [...] can be made to look with the help of some skilful (and well-meaning) manipulation': Markesinis, BS 'Why a Code Is Not the Best Way to Advance the Cause of European Legal Unity' (5) *European Review of Private Law* 519 at 520. The alarming operational word is 'manipulation'. The comparing mind recoils.

⁴⁶⁷ Jackson, VC (2010) *Constitutional Engagement in a Transnational Era* Oxford University Press at 179. I suppose Jackson would agree with the Beckett character castigating '[a]ll these demented particulars': Beckett, S (2009) [1938] *Murphy* Mays, JCC (ed) Faber & Faber at 11. Quaere: what can it *mean* to assert that, say, an insistence on the specificity of French law, that is, an attempt to enunciate as thoroughly as possible the singularity of French law, what makes French law *French* law, can be denying 'the possibilities of learning'? Does detailing a foreign law or deepening one's information about a foreign law — that is, enhancing the available insights with respect to a foreign law, thus augmenting the interpretive yield (or affordance) concerning a foreign law — not exemplify precisely a resolute commitment *to* learning, to the acquisition of useful and teachable information inspired by a resolute dedication to re-presentative justness vis-à-vis a foreign law?

⁴⁶⁸ Goodman, N (1972) 'Seven Strictures on Similarity' in *Problems and Projects* Hackett at 437.

⁴⁶⁹ Foucault, M (1966) *Les Mots et les choses* Gallimard at 41 ['Il n'y a pas de ressemblance sans signature. Le monde du similaire ne peut être qu'un monde marqué'].

⁴⁷⁰ Derrida, J (2011) [1993] *Politique et amitié* Springer, M (ed) Galilée at 112 ['(l)a manière dont se constituent ou se stabilisent les ressemblances est relative, provisoire, précaire'].

readers).⁴⁷¹ Given the severely limited epistemic value of commonality, Goodman is keen to draw attention to semblance's 'insidious' character and maintain that upon close reflection all attempts at explanation by way of the idea of similarity are abysmally deficient: commonality, quite simply, 'profess[es] powers it does not possess'; unsurprisingly, Goodman chastises 'addiction to similarity'.⁴⁷²

To contend that entity A (say, US judicial review or impeachment) is the same as entity B (say, the Mexican *amparo* or Brazilian 'impeachment') or that it is similar to entity B or that it resembles entity B or that it is like entity B — in sum, that it features a commonality with entity B — must mean, on every occasion, that entity A effectively differs from entity B, that it is singular vis-à-vis entity B. Again, this is *what there is, what is the case*. Only if entity A were identical to entity B would it not distinguish itself from entity B. But the only way in which entity A could be identical to entity B would be for entity A to be entity B.⁴⁷³ Now, if entity A were entity B, the very idea of a comparative study featuring entities A and B would become unsustainable. I insist: this logical demonstration is decisive for comparative law, and even the comparatists who would prefer not to have to reappraise the drivel they read in Zweigert and Kötz many years ago cannot readily dismiss this reasoning as sophistry. Again, consider Derrida: '[T]o compare[:] [t]hen again, there must be a difference permitting it.'⁴⁷⁴ To compare, there has to be more than one entity in co-presence. It follows that the assignment of a 'compare and contrast' essay is, in fact, the setting of 'compare and compare' work or, if you prefer, of a 'contrast and contrast' task. The fact of the matter is that if a law is said to be the same as another or similar to another, if it is regarded as equivalent or common to another, there must be more than one law being addressed, which means, in line with Leibniz's cardinal insight, that there has to be difference across these laws (cf Leibniz's Law *supra*). Any comparatist-at-law claiming otherwise has not been thinking straight. In Goodman's words, '[t]he flaw here went unnoticed for a long time, simply for lack of logical scrutiny.'⁴⁷⁵ For those of my readers who would welcome immediate comfort, I hasten to add that the contention concerning the necessary differend between entities A and B, the claim that all endeavours at 'commonalization' (or is it 'similarization'?) must ultimately stand as so many re-enactments of differentiation, does not prohibit connections — if as *irrelation* (or *disrelation*) — or even generalizations across the comparative compass. *The differend is not a hindrance to the comparison of laws; rather, it is a precondition of the comparison of laws.*

Difference being what there is, what is the case, there, across laws, comparatists can hardly find scholarly refuge in confutation or abjuration, unwitting or blindness. The only worthy intellectual strategy vis-à-vis the differend-at-law is to accept that, in principle at least, difference makes a difference — which means

⁴⁷¹ Cf Steiner, G *On Difficulty* *supra* note 134 at 158: 'Our own sight-lines to the work change with different personal circumstances, with age, and in relation to the open-ended aggregate of whatever else we have read or experienced.'

⁴⁷² Goodman, N 'Seven Strictures on Similarity' *supra* note 468 at 437 and 438.

⁴⁷³ Cf *id* at 443: '[N]o two things have all their properties in common.' Goodman adds that similarity is thus 'an empty and hence useless relation': *ibid*. In my language, what takes place is properly an *irrelation* (or *disrelation*).

⁴⁷⁴ Derrida, J (1978) *La Vérité en peinture* Flammarion at 429 ['(C)omparer(:) (...) (e)ncore faut-il qu'une différence le permette'].

⁴⁷⁵ Goodman, N 'Seven Strictures on Similarity' *supra* note 468 at 442.

that comparatists have to take a serious normative interest in the singularity of foreign law. Against the backdrop of incontrovertible empirical findings that, whether postcolonial or neocolonial or indeed excolonial, contemporary societies are of diasporic 'communities' and migrant groups, of exiles and refugees, and that the planet is generally and increasingly of cultural interfaces and interconnections, many of them legal, comparatists-at-law (not to mention other jurists), pinching their nose if they must, bracing themselves if need be, require forcefully to engage with Walter Benjamin's 'now of knowability', that is, to accept that the moment has come to awaken to otherness-as-difference.⁴⁷⁶

In this regard, I salute Mary Ann Glendon's chastisement of Justice Stephen Breyer's widely-circulated claim that '[j]udges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances', an unsubstantiated argument that she appositely discards as 'casual' and 'disquieting', an unverified contention that she aptly rebukes as not doing justice to the complexity of 'comparability'.⁴⁷⁷ (Note how the equivocation of Breyer's 'somewhat similar', a formulation he uses twice, recalls the looseness of Gordley's 'much the same',⁴⁷⁸ not to mention the imprecision of Watson's 'basically the same'.⁴⁷⁹) Benjamin's cryptic enunciation thus points to the tension within comparative law between an actuality (the fact of difference) and what remains for the time being a virtuality (the recognition of difference). I read the Benjaminian expression as soliciting a striving henceforth to know *what there is, what is the case*, there, what exists now, differentially or singularly. To apply Benjamin's statement to a foreign law — a law that is out-of-the-land, of the home-land, an out-landish law, a law that is outlandish also in the sense of being extravagant (etymologically, a wandering outside limits) or outrageous (that is, an *ultra-jus* or *outra-jus*) — his injunction wants foreignness becoming ascertainable on its own terms, now, as much as is interpretively feasible from the standpoint of a comparatist-at-law, an encultured interpreter situated elsewhere.⁴⁸⁰

Far from petrifying comparatists into the speechlessness too readily associated with otherness's estrangement or uncanniness, the acknowledgement of a legal 'heterotopia' existing in advance of any makeshift togetherness — and relucting against it, too — must serve to impulse a felicitous epistemic motion away from the production, propagation, and analysis of foreign law-texts of the autotelic and self-authenticating variety, of the kind that ultimately and haughtily clamours

⁴⁷⁶ Benjamin, W (1982) [1927–40] *Das Passagen-Werk in Gesammelte Schriften* Tiedemann, R (ed) vol VI/1 Suhrkamp at 591–92 (Convolute N9,7) ['Jetzt der Erkennbarkeit'].

⁴⁷⁷ Glendon, MA (2014) 'Comparative Law in the Age of Globalization' (52) *Duquesne Law Review* 1 at 16. Glendon refers to Breyer, S (2003) 'Keynote Address' (97) *American Society of International Law Proceedings* 265 at 266. Justice Breyer's imprisonment of singular modes of being-in-the-law into superficial patterns of standardization prompts him to assert also that there are to be found 'cross-country results that resemble each other more and more' and leads him to refer to 'growing institutional and substantive similarities' across constitutional laws: id at 267. Justice Breyer's constitutional simplism is far from being an isolated occurrence of reductionism. See eg Greene, J (2018) 'Rights as Trumps?' (132) *Harvard Law Review* 28. Jamal Greene writes that different countries would be facing 'similar problems' or 'similar social, political, and legal challenges': id at 36 and 132.

⁴⁷⁸ Gordley, J *The Philosophical Origins of Modern Contract Doctrine* supra note 457 at 1.

⁴⁷⁹ Watson, A *Society and Legal Change* supra note 280 at 110.

⁴⁸⁰ See Weber, S (2008) *Benjamin's –abilities* Harvard University Press 168.

‘here is my only elsewhere’ — as when a (distinguished) US comparatist writes how ‘[i]t can now be said that France has full fledged judicial review of the constitutionality of laws and of executive actions to the same degree as [...] the United States does’,⁴⁸¹ in other words, that ‘[i]n 2021, US style judicial review [...] [is] present in [...] France.’⁴⁸² I argue that the time is long overdue for otherness’s difference or singularity to be recognized and respected within comparison-at-law as a matter of the justness that the comparatist owes to the other law that he undertakes of his own volition to re-present — for example, to acknowledge that French constitutional review is not judicial (since it involves neither a court nor judges) and that it can only materialize according to modalities and processes that are differentially and singularly French and that can only make sense by being traced to French society, French history, French politics, French philosophy, and so forth. Yes.

Fourthly, I find it important to quarrel with the superficial statement that ‘the authority of the nation-states [...] [is] in decline’ (28), the sub-text clearly being that state differentiation is yielding to planetwide unification or uniformization processes. Even though this enunciation is formally inserted earlier in the VSI, its deprecation of the continued pertinence of difference across laws justifies that it should be addressed at this juncture — and at some length, too.

It is key to appreciate that terms like ‘globalization’ or ‘global’, no matter how widespread and how established (the OED notes an early occurrence of ‘global’ in 1835), are semantic charlatans (a point that the VSI fails to recognize at 7 and 15). Properly speaking, nothing is ‘global’ — no matter how planetarily or near-planetarily whatever strategy of dissemination of whatever phenomenon has been unfolding. There is thus no ‘global’ law, and there is no ‘global’ feminism or ‘global’ freedom of speech or ‘global’ animal law or ‘global’ cultural property law either: *there simply is not*. Even as the idea of the ‘global’ purports to dissolve particularism, as it seeks to move away from localism and singularity towards a paradigm of standardization or homogenization, as it earnestly gestures in the direction of a rationalized universalism (of one capital-R and capital-U Rationalized Universalism), the local withstands effacement, irreducibly: ‘[W]orking locally is all that can be done and, as significantly, all that is needed to be done.’⁴⁸³ I do not retain the term ‘irreducibly’ lightly: the local is an *irreduction*. It follows that the most purportedly ‘global’ occurrence (Starbucks? CNN? the World Cup? the English language? climate change? the Covid-19 pandemic? the rule of law? freedom of religion?) is more sophisticatedly grasped to be consisting in a series of *glocal* assemblages linking localities and thereby reconfiguring localism, every locale differentially and singularly refracting the would-be ‘global’ in a singular way.⁴⁸⁴ As it effectuates a crucial letter-shift from

⁴⁸¹ Calabresi, SG (2021) *The History and Growth of Judicial Review* vol II Oxford University Press at 178. ‘Heterotopia’ is indebted to Foucault, M (1994) [1984] ‘Des espaces autres’ in *Dits et écrits* Defert, D and Ewald, F (eds) vol IV Gallimard at 752–62 [‘hétérotopie’]. I lift the quotation ‘here is...’ from Beckett, S *The Unnamable* supra note 20 at 121. I generally draw on Melas, N (2007) *All the Difference in the World* Stanford University Press at 1–43.

⁴⁸² Calabresi, SG *The History and Growth of Judicial Review* supra note 481 vol I at 317.

⁴⁸³ Hutchinson, AC (2023) *Hart, Fuller, and Everything After Hart* at 47. For my own argument against universalism with specific reference to comparative law, see Legrand, P *The Negative Turn in Comparative Law* supra note 73 at 51–127.

⁴⁸⁴ For an insightful treatment of this theme, see Roudometof, V (2016) *Glocalization* Routledge. Local ‘refraction’ is a leitmotiv in Victor Roudometof’s argument. See generally Roudometof,

'b' to 'c', the term 'glocalization', a post-1990 neologism, appositely inscribes the ineliminability of local knowledge even in the face of the most insistently 'global' arrangements: there are flows, of course, but there continues to be uneliminable places ('[t]here exists no place that can be said to be "non-local"'),⁴⁸⁵ and 'global' ultimately means but several local places at once. Otherwise said, there are idioms, and there is no meta-language.⁴⁸⁶ Everything has (and must have) a local existence if it is, in the end, to have any existence at all — whether one is envisaging an intimate emotion, a virtual marketplace, or anything in between.⁴⁸⁷

The more meticulously a Chicago Starbucks is compared to a Paris Starbucks, the more scrupulously a CNN programme broadcasting in New York is compared to a CNN programme broadcasting in Beijing, the more punctiliously the *Weltmeisterschaft* on a German television channel is compared to the *Copa do Mundo* on a Brazilian television channel, the more conscientiously Cambridge English is compared to Mumbai English, the more rigorously climate change (and what is being done to mitigate it) in California is compared to climate change (and what is being done to mitigate it) in Provence, the more studiously the Covid-19 pandemic (and what was done to address it) in South Africa is compared to the Covid-19 pandemic (and what was done to address it) in New Zealand, the more laboriously the British rule of law (as it is understood by British courts) is compared to the Singaporean rule of law (as it is understood by Singaporean courts), the more assiduously US freedom of speech (as it is understood by US judges) is compared to French *liberté d'expression* (as it is understood by French *juges*), the more numerous and detailed differences must arise out of each comparative endeavour. Ultimately, '[d]ifference goes differing infinitely.'⁴⁸⁸ (For instance, '[w]e say "state" but the state in Morocco carries a different meaning than in France',⁴⁸⁹ which reveals how Beckett is yet again proving so percipient when he claims that '[t]he danger is in the neatness of

VN and Dessì, U (eds) (2022) *Handbook of Culture and Globalization* Elgar. Cf Nederveen Pieterse, J (2020) 'Global Culture, 1990, 2020' (37) *Theory, Culture & Society* 233 at 234: 'I have become more careful about using "global".' In particular, Jan Nederveen Pieterse, long a prolific scholar of 'globalization' and *quondam* chair of 'global' studies at his Californian university, has stopped believing in 'global convergence': *ibid.* For him, '[t]he global turn is a plural turn': *id.* at 237. He concludes: 'Goodbye centrism, universalism, convergence thinking': *id.* at 238. Whatever has happened on the planetary stage since Nederveen Pieterse wrote his retraction in 2020 can only have reinforced his commitment to a profoundly (and thoughtfully) amended view of 'globalization'.

⁴⁸⁵ Latour, B (2005) *Reassembling the Social* Oxford University Press at 179.

⁴⁸⁶ Cf Derrida, J (1996) *Le Monolinguisme de l'autre* Galilée at 43: '[A]bsolute impossibility of a metalanguage. Impossibility of an absolute metalanguage' ['(I)mpossibilité absolue de métalangage. Impossibilité d'un métalangage absolu'].

⁴⁸⁷ For a compelling demonstration of the encultured character of emotions such that Dutch pride is not North Carolina pride (and a simultaneous indictment of the superficiality animating the argument from universalism in matters emotional), see Mesquita, B (2022) *Between Us: How Cultures Create Emotions* Norton. I derive the illustration from the book's back cover. And for an explanation as to how Apple's App Store has to contend with local laws, how even a virtual space therefore has to localize itself, see Mickle, T (5 March 2024) 'Splintering a Monolith' *The New York Times* B1.

⁴⁸⁸ Milet, J (2006) *Ontologie de la différence* Beauchesne at 98 ['(l)a différence va différant à l'infini'].

⁴⁸⁹ Nederveen Pieterse, J (2021) *Connectivity and Global Studies* Springer at 57.

identifications.⁴⁹⁰) I repeat, deliberately: localization stands as an *irreduction* — any legal/cultural sign necessarily resolves itself locally.

I cannot conceptualize how glocalization could have prompted the emergence of a normative area that would exist independently from any and all states. Even in complex transnational situations — a Swiss bank being sued in the United States on account of its corporate behaviour in Sudan — state law, some state's law, is bound to apply. Incidentally, even as regards 'private international law', a misnomer, the tussle arises between two local laws since litigation involves a local judge deciding to apply this local law rather than that local law. But what of 'beyond-any-state' organizations like the Basel Committee on Banking Supervision or the Codex Alimentarius Commission on Food Standards — not to mention arguably better-known names such as the World Bank or the International Monetary Fund, the WTO or the International Olympic Committee (the list of these institutions being in fact seemingly endless)? For illustrative purposes, I shall be content to refer to the Basel Committee on Banking Supervision (BCBS), which I approach as a kind of Weberian ideal-type.

Established in 1974 and headquartered in Basel (Switzerland), currently consisting of representatives from forty-five central banks or financial institutions hailing from twenty-eight countries, the BCBS is tasked with the enhancement of financial stability through the improvement of banking regulation including cross-border operations. Specifically, it formulates standards and principles via the issuance of reports and agreements. A typical example of the BCBS at work concerns a 1988 Accord calling for a minimum ratio of capital to risk-weighted assets of eight per cent that required implementation by the end of 1992. To be sure, such decision-making notionally takes place 'beyond-any-state'. Yet, it remains that the success of any BCBS initiative is entirely dependent upon national reception. While banking practice may have sufficed for the formulation of the 1988 agreement so that no national legislation proved requisite, BCBS recommendations would remain devoid of normative impact without national implementation — that is, without application at state level. Until there takes place a local intervention, then, no BCBS recommendation can enjoy normative import. It follows that the BCBS, far from having effaced or surmounted localism, fully depends on local strategy in order to prove effective (different local approaches plausibly inviting a rewarding comparative study).

My brief re-presentation of the BCBS thus points to the continuous role of the state. I am very far from qualifying as a homeland fundamentalist, a disposition that would hardly become a comparatist like myself and would apply even less to a jurist having occupied full-time academic positions in four different countries over more than thirty years (which is what I have done). And I do not at all favour a reactionary economy of legal knowledge. But I claim that the local, not least in the form of the state, is at once much more of a challenge to 'globalization' and much more of a prerequisite for 'globalization' (which then assumes the character of glocalization) than the VSI at all acknowledges. To be sure, I accept that when it comes to 'global' capital markets (whether the foreign-currency market, the bond market, or the equity market), 'global' economic actors can exercise a disciplining function on states and make them accountable to their logic in terms of limits,

⁴⁹⁰ Beckett, S (1984) [1929] 'Dante... Bruno. Vico.. Joyce' in *Disjecta* Cohn, R (ed) Grove at 19.

say, on public spending or excessive borrowing.⁴⁹¹ However, 'there is no reason to think *in general* that legal globalization inherently involves a net loss of state authority. [...] [I]n important ways globalization may involve not a general loss of state authority but a *reconstruction* of the identity of states.'⁴⁹²

Leading sociologist and 'globalization' expert Saskia Sassen thus expressly opposes the idea that 'the state [i]s losing power due to globalization'; instead, she holds how 'the executive branch of government [...] and particularly powerful and strategic departments (notably central banks and ministries of finance) [a]re actually gaining power *because* of globalization.'⁴⁹³ The dualization whereby a would-be 'globalized' law must lead to a correlative decline of state law is simplistic. For his part, writing with specific reference to human rights, Christopher Thornhill observes that '[t]he global political system is very deeply embedded in national societies, and the fabric of rights around which it is constructed reflects its deep interwovenness with histories of national formation.'⁴⁹⁴ Contemplate the European Union, arguably the most pre-eminent contemporary illustration of a beyond-the-state political area. What can the European Union achieve without its Member States? Can it transpose its directives, implement its regulations, or apply its judicial decisions? Specifically, 'national legal systems remain as the major, or crucial, instantiation through which guarantees of contract and property rights are enforced.'⁴⁹⁵ In fact, '[t]he epochal transformation we call globalization is taking place inside the national to a far larger extent than is usually recognized. It is here that the most complex meanings of the global are being constituted, and the national is also often one of the key enablers and enactors of the emergent global scale.'⁴⁹⁶

Now, envisage international arbitration, often regarded as one of 'globalization''s most conspicuous achievements. On reflection, the state remains a key actor since neither the parties themselves nor their delegates, the arbitrators, are authorized to confer legality unto their own acts. Rather, attribution of legality remains a state prerogative: often, 'depictions of international arbitration ignore the crucial role of the states in these processes. After all, states were integral to negotiating, signing, and acceding to the New York Convention on the Recognition and Enforcement of Arbitral Awards in

⁴⁹¹ On 23 September 2022, the British Chancellor of the Exchequer delivered a Ministerial Statement announcing a set of economic policies and tax reductions. As world markets reacted distrustfully to the additional borrowing that would inevitably be compelled in order to finance these measures, there immediately followed a sharp fall in the value of the pound sterling and a steep rise in the bond market causing a substantial increase in the cost of government borrowing (and in the cost of mortgages). On 14 October, the Chancellor was dismissed. His replacement promptly cancelled all significant initiatives that the Statement had contained, which led to a favorable market response. On account of this ignominious retreat, the Prime Minister was forced into resignation on 20 October after having held office for all of forty-four days, the shortest prime ministerial tenure in British political history.

⁴⁹² Elkins, J (2011) 'Beyond "Beyond the State": Rethinking Law and Globalization' in Sarat, A; Douglas, L and Umphrey, MM (eds) *Law Without Nations* Stanford University Press at 52.

⁴⁹³ Sassen, S (2015) *Losing Control?* Columbia University Press at xi and xi–xii.

⁴⁹⁴ Thornhill, C (2016) *A Sociology of Transnational Constitutions* Cambridge University Press at 422.

⁴⁹⁵ Sassen, S *Losing Control?* supra note 493 at 27.

⁴⁹⁶ Sassen, S (2006) *Territory • Authority • Rights* Princeton University Press at 1. For a noteworthy review, see Chorev, N (2007) 'States Still Matter' (48) *European Journal of Sociology* 481.

1958 that provides the underpinning of the arbitral system. The number of state members rose from twenty-five at the end of 1958 to 153 countries [in 2021]. It is states that participate[d] in the [2021] UN Conference on International Trade Law (UNCITRAL) to create UNCITRAL's Model Law on International Commercial Arbitration, which provides for the enforcement of arbitral agreements and arbitral awards. It is states that increasingly have amended their national laws to adopt and adapt the UNCITRAL model code. The number of states that have done so rose from one in 1986 to thirty-five in 2000 to over seventy by 2016 (in effect comprising over one hundred jurisdictions when including subnational entities). And it is state courts that ultimately enforce arbitral awards if they are challenged. Empirical data shows that enforcement by state courts remains significant, and that state courts decline to enforce awards that they view to be contrary to state public policy.⁴⁹⁷ Indeed, 'in practice, private parties generally specify a particular state's law as the governing law in the vast majority of their contracts, and even when they do not, arbitrators generally look to national law for guidance.'⁴⁹⁸ In sum, 'states play a leading role in providing the foundations for the transnational commercial arbitration system.'⁴⁹⁹ And 'state institutions remain central for creating order and stability and advancing normative and instrumental aims.'⁵⁰⁰

There is more because arbitrators, who cannot exist as acultural beings, inevitably bring to bear encultured predispositions or predilections, not least as they draw on their knowledge and experience of encultured law (more precisely, of some encultured laws instead of others). Consider a seasoned Swiss international arbitrator like Pierre Tercier. This Fribourg law professor's long-standing arbitral experience on the international scene does not change the fact that Tercier perceives himself — and is perceived by his peers (I know: I asked) — as primarily a Swiss jurist, or in my language, as having been encultured into Swiss law and Swiss legal epistemology. Unsurprisingly, then, Tercier has consistently been keen to assert a significant local doctrinal presence in fields as diverse as Swiss construction law, Swiss business law, Swiss competition law, and the Swiss law of obligations (what common-law lawyers would style contract law, tort law, and the law of restitution). Unless Tercier were to prove profoundly schizophrenic — which, charitable interpretation *oblige*, I am not prepared to assume — it is inconceivable that he would not carry some of his Swiss-jurist

⁴⁹⁷ Shaffer, G and Halliday, T (2021) 'With, Within, and Beyond the State: The Promise and Limits of Transnational Legal Ordering' in Zumbansen, P (ed) *The Oxford Handbook of Transnational Law* Oxford University Press at 991. While I do no wish to belabour the point, it strikes me that this book offers an excellent example of 'the endogeneity trap that so affects the globalization literature': Sassen, S (2008) 'Neither Global Nor National: Novel Assemblages of Territory, Authority and Rights' (1) *Ethics & Global Politics* 61 at 68.

⁴⁹⁸ Shaffer, G and Halliday, T 'With, Within, and Beyond the State: The Promise and Limits of Transnational Legal Ordering' *supra* note 497 at 992.

⁴⁹⁹ Whytock, C (2010) 'Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration' (12/3) *Business and Politics* 1 at 16.

⁵⁰⁰ Shaffer, G and Halliday, T 'With, Within, and Beyond the State: The Promise and Limits of Transnational Legal Ordering' *supra* note 497 at 1004. Elsewhere, Gregory Shaffer refers to the 'considerable variation within national contexts in light of different institutional and socio-cultural legacies and configurations of power' and remarks that 'states remain central to the creation, implementation, and contestation of transnational legal ordering': Shaffer, G (2012) 'Book Review' (23) *European Journal of International Law* 565 at 579. Shaffer's reaction is to Krisch, N (2010) *Beyond Constitutionalism* Oxford University Press.

predispositions and predilections to his arbitral work, if unwittingly. What Tercier marshals as he sits on an arbitration tribunal is not a legal culture ascertainably existing beyond-any-state, but a personalized cultural bricolage featuring an amalgam of his Swiss epistemic ways and of not-so-Swiss epistemic attitudes derived from his international experience. I draw on this further illustration to contend that it is impossible to conceive of an international arbitration process that would not be meaningfully haunted by state law. Now, spectral presence is very much a significant form of presence (unless one falls into the metaphysical trap of the binary distinction between presence and absence). (The matter of spectrality evokes the BCBS. In advance of empirical study, it is hard to believe that the representatives of the Bank of Japan and of the Central Bank of Brazil would not deploy a Japanese or Brazilian enculturation on banking or finance that would involve a Japanese or Brazilian pre-understanding of the issues and a Japanese or Brazilian outlook on them. There is nothing essentialist about this claim: these two banks exist, and they are members of the BCBS. My point is simply that the delegates of national banking institutions cannot but be haunted by their national circumstances, which is therefore another way in which state normativity abides in Basel.) To return to Tercier, here also, the local proves irreducible; indeed, through incorporation or embodiment as Tercier, it travels. And while I am willing to accept that Tercier and others like him constitute a group of jurists operating on the international scene applying an international inclination to the task of dispute resolution, I repeat that it simply cannot be that such an attunement would have thoroughly displaced local enculturation. Local epistemology thus finds itself being supplemented: it is not cancelled. Even the legal 'globalizers' are accordingly, to an extent at least, constructed out of their own local legal culture's materials of meaning and expression and, to that extent at least, remain so encultured. Legal 'globalizers' are possessed by the local legal culture into which they have been thrown, that they have incorporated, that they embody. The alternative — that one would somehow shed one's local embeddedness, that one would operate sans local culture, from the moment one steps beyond national borders — defies plausibility.

My list of occurrences showcasing the pertinacity of the state and of state law can easily continue. Consider how Emily Kadens has persuasively exploded the myth of the *lex mercatoria*.⁵⁰¹ Over fifty pages or so featuring an impressive array of historical references including primary source materials, Kadens shows that the most widespread aspects of medieval commercial law arose from contract and statute rather than custom; moreover, what custom the merchants applied did not become uniform because no custom could be 'transplanted' and remain identical from place to place. Although custom persisted as a local manifestation, this fact did not hamper international trade since intermediaries such as local brokers ensured that medieval merchants had no need for a transnational law. To turn to current issues, 'the bite of [...] uniform anti-doping rules is geographically variable and highly dependent on each regulatory level's enforcement capabilities and willingness to implement [them]'; as a result, '[t]he world anti-doping fight is, thus, in practice still differentiated on national fault lines.'⁵⁰²

⁵⁰¹ See Kadens, E (2012) 'The Myth of the Customary Law Merchant' (90) *Texas Law Journal* 1153.

⁵⁰² Duval, A 'What Lex Sportiva Tells You About Transnational Law' in Zumbansen, P (ed) (2020) *The Many Lives of Transnational Law* Cambridge University Press at 285 and 286.

To summarize, ampliatively! Yes, there are Chicago clients sitting in a Starbucks coffee-shop just off Gran Vía in Madrid and drinking an Italian espresso made from Brazilian coffee beans served to them to the sound of Piaf's *La Vie en rose* by a Dutch barista enrolled at the Complutense by way of a European Union student exchange programme. But upon arrival at the Madrid state-built and state-controlled international airport, these Chicago clients had to present their state US passport to the Spanish police authorities and were only allowed direct entry on Spanish territory on terms set by Spain. For certification purposes, the hotels where they are staying — that they reached through modern motorways built and run by the state — are accredited by the Spanish *Ministerio de Industria, Comercio y Turismo* (Ministry of Industry, Commerce, and Tourism) and are regulated under Spanish law. And as they address their servers, the US clients experience the lag in local communication — there taking place a negotiation rather than a dialogue.⁵⁰³ Alas, the Madrid Starbucks features neither John's favourite 'Crispy Grilled Cheese on Sourdough' nor Mary's beloved 'Cinnamon Caramel Cream Nitro Cold Brew'. However, there is a 'Tarta Matcha' that they have never come across in Chicago. Also, the seating area is much larger than what they have experienced in Chicago — but then Spaniards do like to sit while drinking their coffee as they enjoy making the moment one of conviviality.

At the coffee-shop, the commercial lease is governed by state law as are employment contracts, all legal documents being official in Spanish only. The coffee-shop itself is subject to regular state inspections in order to ensure compliance with all manner of state-imposed health standards. Still on the matter of hygiene, in terms of its daily operations the coffee-shop uses water supplied under the supervision of state sanitary authorities. And upon import, the Brazilian coffee beans had to undergo state sanitary inspection quite apart from these goods being subject to taxes and customs duties enforced by the state.

As for the Dutch student, who is actually recovering from a brief emergency hospitalization in the local state hospital and who is on medication supplied by a state-accredited pharmacy, she loves cycling to work taking advantage of an expansive network of lanes recently constructed under the aegis of the *Ministerio de Fomento* (Ministry of Public Works and Transport). While at the coffee-shop, she likes reading from the Internet and sending electronic messages during her breaks, which she can do because the websites she uses have not been banned from operating in Spain by the Spanish courts (the way 'X' was banned in Brazil by the *Supremo Tribunal Federal* — the Brazilian supreme constitutional adjudicative body — for a month or so in August and September 2024). In time, the Dutch student will get a Spanish state university certificate as part of her state Dutch degree. All her full-time law teachers in Spain are typically accredited by the state, and they all teach one or other aspect of Spanish law (in the manner, incidentally, in which her full-time Dutch law professors in the Netherlands are typically accredited by the state and all teach one or other aspect of Dutch law). Meanwhile, the Piaf song is governed by copyright law enforceable in state courts where only lawyers accredited under state law can plead, in conformity with state civil or criminal procedural law, before judges who are themselves state judges. Oh! And the Dutch barista pays taxes in Spain at a rate set by the state authorities. Such is my claim about the enduring strength of the state — thus glocalization instead of 'globalization'. In addition to this scenario of my

⁵⁰³ See Derrida, J (with Labarrière, P-J) (1986) *Altérités* Osiris at 85.

own making, perhaps I can add three brief case studies in order to consolidate my argument that the state clings to law like bindweed (unless it is law clinging to the state).

My first example concerns the so-called 'rule of law', more precisely what has been styled '[t]he universalism of the rule of law ideology'.⁵⁰⁴ Envisage Bangladesh. Drawing on fieldwork that spanned a number of years, Tobias Berger's captivating account demonstrates that for 'rule-of-law' norms to harbour any hope of local effectiveness, as they travel from the desks of European Union bureaucrats to United Nation officials in Dhaka to local NGOs in Bangladesh's countryside and to the rural Bangladeshi themselves, they must be translated into language that resonates culturally, that is, locally. Indeed, this translation process must be so extensive — Berger talks of 'significan[t] alter[ation] [of] [...] meaning' — that the accultured discourse requires to be regarded as 'an original in its own right', a second original, if you will.⁵⁰⁵ Specifically, there takes place a fully-fledged re-creation of meaning from the neo-liberal script 'into the normative vocabularies of community harmony and Islamic law'.⁵⁰⁶ For instance, neo-liberal demands for gender equality are expressed in the language of Islam and Islamic law since in rural Bangladesh, 'the promotion of women's rights is only possible through the language of Islam and Islamic law'.⁵⁰⁷ All along, the human rights being fostered are therefore not cast in terms of entitlements against the state (according to the habitual neo-liberal template) but in the language of 'claims against one's own social context'; while human rights continue to be vaunted as ensuring the 'protection of individual autonomy against illegitimate outside interference', crucially the locus of 'outside interference' changes and instead of the state, 'the addressee of rights claims' becomes society.⁵⁰⁸ According to this approach, local NGOs activate the 'rule of law' not through the official state judiciary but by way of non-state institutions such as village courts enjoying optimal proximity with local people. In the process, '[t]hey [...] tolerate [...] non-adherence to procedural obligations', once more in breach of the neo-liberal rule-of-law model.⁵⁰⁹ Indeed, although 'the [...] rule of law insists on the impersonal application of legal principles to any given conflict', village courts favour 'context-dependent negotiations of disputes' where 'interpersonal relationships play a fundamental role'.⁵¹⁰ Holding that 'the global simply cannot overcome the local', that there must necessarily unfold 'the provincialization of the international', Berger resolves that '[w]hen norms travel, they never encounter empty islands'.⁵¹¹ Rather, they meet 'pre-existing concepts, categories, institutions, and practices'.⁵¹² Berger's conclusion is clear: the only way in

⁵⁰⁴ Hurd, I (2017) *How to Do Things with International Law* Princeton University Press at 44.

⁵⁰⁵ Berger, T (2017) *Global Norms and Local Courts* Oxford University Press at 118 and 28.

⁵⁰⁶ Id at 140.

⁵⁰⁷ Id at 143.

⁵⁰⁸ Id at 109.

⁵⁰⁹ Id at 156.

⁵¹⁰ Id at 129.

⁵¹¹ Id at 164, 165, and 25, respectively.

⁵¹² Chakrabarty, D (2008) *Provincializing Europe* (2nd ed) Princeton University Press at xii.

which NGOs are able to make the ‘rule of law’ work in Bangladesh is ‘precisely because they abandon “the rule of law” as it is imagined by international donor agencies’.⁵¹³

My second illustration wishes to introduce Lisbeth Zimmermann’s absorbing study of ‘rule-of-law’ glocalization in Guatemala. Zimmermann observes how ‘where norm promoters adopt a conditionality-oriented approach in order to secure full adoption of a norm, this in fact blocks further adoption into law.’⁵¹⁴ In effect, ‘every norm is made sense of in a specific socio-political context’; otherwise said, ‘[a] norm is something that has to be brought to life in its new context by a process of discursive interaction, negotiation and contestation.’⁵¹⁵ Zimmermann thus explains how in Guatemala the 1989 United Nations Convention on the Rights of the Child underwent ‘a “back-and-forth” process’, that is, an ‘interaction between external norm-promotion activities and domestic norm translation point[ing] to the formation of “feedback loops” in reaction to the activities of rule-of-law promoters’.⁵¹⁶ Specifically, ‘UNICEF promoted full legal adoption of the [Convention] in Guatemala and an initial code of rights for children was enacted. In the second step, however, major contestation erupted and the code never came into force. UNICEF then revised its interaction strategy.’⁵¹⁷ In 2003, by way of ‘third step’, the Guatemalan Congress enacted a new law ‘reshaping [...] the [Convention] standards in line with a “family-based” approach to children’.⁵¹⁸ Zimmermann’s research well illustrates not only what happens, but what must happen, as a purportedly universal norm like the ‘rule of law’ seeks to earn local recognition and respect, in practice, local legitimacy and efficacy.

For my third instance, I draw on the work of Jennifer Lander.⁵¹⁹ Quite apart from supplying a detailed narrative on mining development in Mongolia — ‘since the late 1990s, Mongolia has risen to international prominence as the “final frontier” of untapped mineral wealth, boasting some of the world’s largest reserves of high-quality coking coal, copper, gold, fluorspar and iron ore, in addition to recent discoveries of extensive natural gas and petroleum resources [...] constituting almost 17% of the world’s mineral reserves’⁵²⁰ — Lander offers a

⁵¹³ Berger, T *Global Norms and Local Courts* supra note 505 at 158. Concurring, Ridwanul Hoque remarks that ‘[t]he realisation of [the] rule of law is deeply tied with political and social culture, tradition, and practices’ and that ‘[i]n the context of Bangladesh, [...] seeing social and economic justice purely as a matter of political wisdom of the executive and legislative branches would render the rule of law an empty rhetoric’: Hoque, R (2018) ‘Rule of Law in Bangladesh: the Good, the Bad and the Ugly?’ in Siddiky, CIA (ed) *The Rule of Law in Developing Countries: The Case of Bangladesh* Routledge at 38 and 27.

⁵¹⁴ Zimmermann, L (2017) *Global Norms with a Local Face* Cambridge University Press at 197. Zimmermann expresses surprise that ‘in contravention of the prevailing paradigm of context sensitivity, this is still the first strategy opted for by international norm promoters’: *ibid*.

⁵¹⁵ *Id* at 207.

⁵¹⁶ *Id* at 53 and 61.

⁵¹⁷ *Id* at 83.

⁵¹⁸ *Ibid*. Zimmermann notes that in the 2003 law ‘[t]he text [i]s marked by its use of a strong, family-based vocabulary and the various freedoms [a]re subject to a greater degree of parental oversight’: *id* at 113.

⁵¹⁹ Lander, J (2020) *Transnational Law and State Transformation* Routledge.

⁵²⁰ *Id* at 51.

theoretical framework to assist in the understanding of the dynamics operating between transnational strategies and state transformation. One of the leading ideas informing Lander's argument concerns what she regards as the necessary 'reckoning with the ongoing significance of national jurisdictions as sources, targets and transit sites for transnational legal processes'.⁵²¹ In particular, Lander refers to 'rules and norms governing aspects of investment protection (eg non-discrimination, fair and equitable treatment, protections from expropriation, corporate liability, access to dispute resolution)'.⁵²² In sum, 'the national state — through its territorial jurisdiction — remains the authoritative locus through which transnational legal, economic, political and social processes must pass to become material (ie affecting lived reality)'.⁵²³ Importantly, '[g]lobal markets [...] depend upon legal forms and norms which construct, protect and promote market price mechanisms', and 'these legal forms and norms do not emerge from the ether, but are produced, legitimised, internalised and enforced through the legal and judicial systems of national states'.⁵²⁴ Think of the state as 'an effective facilitator and enabler of markets'.⁵²⁵ Meanwhile, the exclusive focus on the life of the law beyond the state, 'the resistance to some degree of methodological nationalism', Lander calls an 'overreact[ion]' since '[w]e cannot escape the national state'.⁵²⁶ Although I take exception to the expression 'methodological nationalism' — as Lander's book itself amply demonstrates, the issue is far more than merely 'methodological' — I concur in her conclusion. Otherwise said, '[t]he universal reality of the territorial nation-state cannot be ignored unless we are content to play with abstractions'.⁵²⁷

What takes place is not state 'erosion', but state 'transformation'.⁵²⁸ Specifically, '[mining] development is coterminous with transformation — rather than negation — of the role of the state in the value-laden framework of effective market management', hence 'the critical role of the state in securing broad-based constitutional conditions for the expansion of global markets'.⁵²⁹ For example, in her book Lander analyzes how 'the Mongolian government [...] made a series of political and legal reforms that sought to eviscerate political and legal risks to investment in the mining economy'.⁵³⁰ After all, 'the [...] outcomes of economic globalisation depend upon the capacity of the state to negotiate the discursive and psychological dimensions of capital investment (ie to maintain confidence) as well as its mechanisms (ie to maintain actual capital flows)'.⁵³¹

⁵²¹ Id at 6.

⁵²² Id at 5.

⁵²³ Id at 8.

⁵²⁴ Id at 22 and 22–23.

⁵²⁵ Id at 251.

⁵²⁶ Id at 8.

⁵²⁷ Ibid. I hold that the substitution of the word 'planetwide' for the incautious term 'universal' would make this sentence impeccable.

⁵²⁸ Id at 11.

⁵²⁹ Id at 41 and 243.

⁵³⁰ Id at 55.

⁵³¹ Id at 245.

Note that '[t]he law mediates the relationship not only between the investor and the state, but also between the Mongolian public and the state, in addition to the multiple interests and institutions within the domestic milieu (eg civil society organisations, sub-national governments).'⁵³² If one focusses on Mongolia, 'the trajectory of change in terms of constructing a state apparatus to support private investment appears to be moving from strength to strength when one looks at the substantive commitments of the mining regime.'⁵³³ In conclusion, Lander holds that 'the Mongolian case study is not unique.'⁵³⁴

To quote Alexander Cooley, 'the state is not so much "retreating" as it is forging new types of relationships with new global actors, sometimes in partnership, other times delegated, and other times more adversarial.'⁵³⁵ For Bob Jessop, who considers 'the state as a site of strategic action',⁵³⁶ 'a restructured national state remains central to the effective management of the emerging spatio-temporal matrices of capitalism and the emerging forms of post- or transnational citizenship.'⁵³⁷ Actually, '[national states] have become even more important meta-governors of the increasingly complex multicentric, multiscalar, multitemporal, and multiform world of governance.'⁵³⁸

Not unlike the way in which Sassen maintains how 'as institutions, national states are becoming deeply involved in the implementation of the global economic system',⁵³⁹ Jessop contends that '[national states] are actively involved in shaping the forms of international policy regimes.'⁵⁴⁰ Marc Redfield adopts a converging view: '[T]he developments and processes we summarize as "globalization" operate in mingled synchrony and tension with the political form of the nation-state.'⁵⁴¹ Is it necessary to add that my point is emphatically not to defend the state — why would anyone want to engage in such exercise? — but to provide a suitably well-attuned account of *what there is, what is the case*, there, what exists now, which the VSI abysmally fails to do. It is not at all necessary to deny the existence of enhanced transborder interaction — whether informational, technological, military, ideological, or economic — in order to ascertain how woefully inadequate it is to claim without further ado, even in the context of such a short work as the VSI, that 'the authority of the nation-states [...] [is] in decline' (28).

⁵³² Id at 248.

⁵³³ Id at 59.

⁵³⁴ Id at 243.

⁵³⁵ Cooley, A (2015) 'The Emerging Politics of International Rankings and Ratings' in Cooley, A and Snyder, J (eds) (2015) *Ranking the World* Cambridge University Press at 12.

⁵³⁶ Jessop, B (1990) *State Theory* Pennsylvania State University Press at 10.

⁵³⁷ Jessop, B (2008) *State Power* Polity at 196.

⁵³⁸ Ibid.

⁵³⁹ Sassen, S (2007) *A Sociology of Globalization* Norton at 33.

⁵⁴⁰ Jessop, B *State Power* supra note 537 at 196.

⁵⁴¹ See generally Redfield, M (2003) 'Imagi-Nation: The Imagined Community and the Aesthetics of Mourning' in Culler, J and Cheah, P (eds) *Grounds of Comparison* Routledge at 75. For a detailed argument on the persistence of nationalism despite 'globalization', see id at 75–105.

Taking Westphalia as a convenient point of departure, over the past 350 years or so the state has supplied the institutional framework for democracy; warranted security (whether addressing internal strife or threats from outside by way of defence); financed welfare through the provision of a social safety net (variously understood in Denmark and the United States) and other public goods like education or public services (think of driving licences); developed public accountability; and enabled or facilitated individual creativity, entrepreneurship, and wealth accumulation via the fostering of investment infrastructure, the enforcement of contracts, the protection of property rights, and the safeguarding of personal integrity (from crime). Lately, the state has ensured the protection of minorities howsoever understood (not to mention children and the elderly). Even as there *is* a reconfiguration of spatial boundaries — a restructuration informed, incidentally, by a temporal process that the instantaneity of networked communication readily illustrates — the unfurling of what would be 'globalization' finds itself interrupted along its homogenizing trajectory as the allegedly 'global' is compelled to attend to a ramifying range of local processes such as the ones I indicate, with which it must blend or mix as a condition of its successful implementation in any particular place.

In every location, then, the *soi-disant* 'global' thus encounters the local, with which it must link through a complicated intertwinement generating on every occasion a specific heterogeneous configuration — a glocalizing interlacement that may actually prove so intricate as to make disentanglement of one facet from another implausible. While the concatenation of complex interactions between standardization and (inevitable) indigenization reveals a seemingly infinite array of customized and differentiated assemblages, each construction singular, glocalization stands as a sophisticated answer empowering resistance to the simplistic view that 'globalization' strategies are dissolving local settings and structures, absorbing local lifeworlds more or less automatically, and replacing local cultures with a smooth and continuous universal or near-universal patterning. There is 'the irreducibility of idiom', which must mean that there is the irreducibility of the glocal, too.⁵⁴²

Notwithstanding the emergence of centres of normative authority other than state institutions, then, any law that matters as a matter of law, any posited law, is ultimately grounded and foregrounded as state law, which means that the role of the state on the legal stage remains at least as central as it has ever been. Given the exponential and ongoing increase in regulation over the course of the last one hundred years or so, the state is arguably *more* central than it has ever been.⁵⁴³ Contemplate also the fact that legal culture is transmitted through socialization and institutionalization into the law on account of a process of epistemologization, a pursuit taking place at university and starting in earnest during induction week, which means that the diffusion at stake occurs locally and concerns local law, that is, state law (law schools are implanted in France, Brazil, or India, and they teach French, Brazilian, or Indian law — even European Union law or international law ultimately and inevitably resolving

⁵⁴² Spivak, GC (2012) *An Aesthetic Education in the Era of Globalization* Harvard University Press at 472. See generally Roudometof, V *Glocalization* *supra* note 484.

⁵⁴³ For an apt reminder of the significance of the state as a producer of regulation, see Catá Backer, L (2012) 'Governance Without Government: An Overview' in Handl, G; Zekoll, J and Zumbansen, P (eds) *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* Nijhoff at 111–12.

itself as French, Brazilian, or Indian law, that is, as state law). Statistically, the very large majority of law teachers will have received their basic legal training in the state where they teach and in the state law that they teach, and a substantial number of them actually teach in state law schools (in France, all law schools are state law schools) having been accredited to teach by the state (in France, no one can teach law on a full-time basis without the state's warrant), and being paid by the state no matter how badly (in France, a top academic salary is roughly on a par with that of a fast-train driver) — which means that the presence of the state can loom very large within legal culture. In fact, legal culture — thus characteristically state legal culture taught by state employees — operates as a mechanics of epistemic governance whereby law students are forcibly inducted into the good local/state manners of the law that they are taught to respect and love while finding themselves coercively prohibited from living the law in other ways (not least foreign ones) through willing self-alienation, the law student effectively relinquishing independent thought in order to be taught to think instead like a lawyer, that is, like a *local* lawyer.⁵⁴⁴

The continuous strength of the state can be addressed from another angle also, which concerns the development of state capitalism. In this regard, the focus is on 'an extremely wide constellation of political and institutional forms, including sovereign wealth funds, state enterprises, state-controlled pension funds, state asset management companies, national policy and development banks, and other state-sponsored economic vehicles', not to mention 'the concomitant development of more assertive and muscular forms of statism (encompassing techno-industrial policy, spatial development strategies, economic nationalism, and trade and investment restrictions)'.⁵⁴⁵ Out of a very large number of illustrations, Ilias Alami and Adam Dixon offer by way of supporting case study 'the increasingly ambitious state-led plans to incentivize investment in the design and manufacturing of next-generation semiconductors'.⁵⁴⁶ While the most striking case of state capitalism is China, the concept extends to countries as diverse as Algeria, Brazil, Egypt, Hungary, Indonesia, Iran, Japan, Mexico, Morocco, Norway, Russia, Senegal, Singapore, Taiwan, Turkey, and Vietnam. At this writing, '[s]tate-owned enterprises [...] ma[k]e up 132 of the world's 500 largest companies' and 'now dwarf even the largest privately owned transnational corporations'.⁵⁴⁷ Meanwhile, there are 176 sovereign wealth funds (SWF), and '[t]he assets controlled by these funds [...] [are] more than hedge funds and private equity firms combined'; for example, Norway's SWF 'control[s] assets upwards of \$ 1 trillion' — which makes it one of the world's largest investors.⁵⁴⁸

As they emphasize 'the state's role as promoter, supervisor, and owner of capital across the spaces of the world capitalist economy', Alami and Dixon insist

⁵⁴⁴ In this regard, the critical work of Pierre Legendre remains paramount. In particular, I have in mind Legendre, *P L'Amour du Censeur: essai sur l'ordre dogmatique* supra note 10. While Legendre discusses France, his conclusions range much more widely. With specific reference to the United States, see Schlag, *P The Enchantment of Reason* supra note 384.

⁵⁴⁵ Alami, I and Dixon, AD (2024) *The Spectre of State Capitalism* Oxford University Press at 3 and 11.

⁵⁴⁶ Id at 11.

⁵⁴⁷ Id at 8.

⁵⁴⁸ Id at 7.

how '[they] certainly do not mean that [...] state capitalism is undifferentiated, nor that every country or region is equally concerned or affected'; indeed, they observe an 'uneven[ness] across territorial borders' that depends, for instance, on '[the] state's position in international and regional divisions of labour and in a world market structured by highly unequal geopolitical relations'.⁵⁴⁹ Without theorizing the matter at any length, it seems useful to mention that state capitalism challenges somewhat frontally a number of well-established binaries such as state/market, national/transnational, public/private, social logic/commercial logic, and liberalism ('left' politics)/conservatism ('right' politics).⁵⁵⁰ Recall that for the VSI, contrariwise, 'the authority of the nation-states [...] [is] in decline' (28). I can only assume that the VSI's co-authors have not heard of state capitalism.

While I therefore reach the diametrically opposite conclusion from the VSI's — I hold that the authority of the nation-states is evidently *not* in decline — and although I accept that one is ultimately operating in the realm of interpretation, I maintain that there is an important difference between the two stances as regards the matter of credibility: one appears to be based on a throwaway sentence seemingly produced in advance of any thoughtful study, while the other (mine!) is researched and argued. I accept, of course, that the VSI's format cannot allow for a demonstration nearly as detailed as the one I am offering by way of negative critique. Yet, it cannot do simply to inscribe approximately ten words of considerable import without the slightest hint of a rationalization about them. To return to my threshold claim, I consider 'globalization' to be non-existent. The word is a fraud, its purported referent a trickster. There is no 'globalization', and there cannot be. All there is — and all there can ever be — is *glocalization*. The distinction between the two terms is neither superficial nor epiphenomenal. Instead, it is structural and profound. State sovereignty may have experienced a measure of liquefaction,⁵⁵¹ but it has certainly not evaporated.

Along with other claims such as my preceding contention regarding legal 'transplants', my four arguments on difference show that there is difference *partout*.⁵⁵² Indeed, there is 'différen[ce] up to the monstrosity of the uncognizable, of the un-sembling, of the unverisimilous, of the non-sembling, of the non-resembling or ressemblable, of the non-assimilable, of the untransferable'.⁵⁵³ Such is *what there is, what is the case, there, what exists now, what must exist also, un*

⁵⁴⁹ Id at 12 [emphasis omitted].

⁵⁵⁰ See also Kurlantzik, J (2016) *State Capitalism* Oxford University Press; Musacchio, A and Lazzarini, SG (2014) *Reinventing State Capitalism* Harvard University Press. See generally Wright, M et al (eds) (2022) *The Oxford Handbook of State Capitalism and the Firm* Oxford University Press.

⁵⁵¹ The term refers, of course, to Zygmunt Bauman's scholarship. See eg Bauman, Z (2000) *Liquid Modernity* Polity; Bauman, Z (2003) *Liquid Love* Polity; Bauman, Z (2006) *Liquid Fear* Polity; Bauman, Z (2007) *Liquid Times* Polity; Bauman, Z (2011) *Culture in a Liquid Modern World* Polity; Bauman, Z and Lyon, D (2013) *Liquid Surveillance* Polity; Bauman, Z et al (2015) *Management in a Liquid Modern World* Polity; Bauman, Z and Donskis, L (2016) *Liquid Evil* Polity; Bauman, Z and Leoncini, T (2018) *Born Liquid* Polity.

⁵⁵² For my discussion on transplants, see *supra* at 303–19. For my four arguments on difference, see *supra* at 352–72.

⁵⁵³ Derrida, J (2010) [2002] *La Bête et le souverain* Lisse, M; Mallet M-L and Michaud, G (eds) vol II Galilée at 367 ['différen(ce) jusqu'à la monstruosité du méconnaissable, de l'in-semblable, de l'in vraisemblable, du non-semblable, du non-ressemblant ou ressemblable, du non-assimilable, de l'intransférable'].

point c'est tout. If I thought description possible, I would assert that I am merely engaging in description. But since one cannot merely engage in description, I must be satisfied to be arguing interpretively contra the VSI and to be doing so, I trust, immeasurably more convincingly than the VSI.

Stirrings Still

Once more, I wilfully acknowledge Beckett in my heading.⁵⁵⁴

While negative critique can be easy to dismiss as an exercise in capricious narcissism driven by a vaulting ego, I still believe in the worth and indispensability, in the nobility even, of the reactive endeavour even as I must accept that to engage in unfeigned riposte will win one few friends (then again, friendship obfuscates scholarly integrity so that in order to keep one's appraisal *hardcore*, one must effectively accept not to be loved by one's fellow comparatists — 'and somewhere the vague wish I could mind').⁵⁵⁵ In an arresting panorama, well worthy of (un)translation, Georges Didi-Huberman reminds one that the critical deed is arguably 'what occidental thought will have done best': '[I]t is when Antigone contests the short-term political ordinances of the tyrant Creon in the name of a more elevated ethical exigency; it is when Montaigne, at the moment when the great colonial enterprise is putting itself into place, dare affirm that the Amerindian "savages" reveal themselves much less "barbaric" than their *conquistadores*; it is when Kant puts the question — called *critical*, actually — of the subject of knowledge at the very moment when objective science puts into place its greatest certainties; it is when Marx, at the moment of European industrial development, deconstructs — while analyzing them — the very foundations of the capitalist economy; it is when Freud dislodges the "self" from its dominant position in the human psyche.'⁵⁵⁶

Negative critique, as an articulated deconstruction of what would be a dominant or imperial thought — as an attempt therefore to understand a range of symptoms and consequences, effectively an unthought — proves necessary and urgent with a view to starting afresh certain theoretical operations fossilized into conformism, designing a new topography of what is possible as heterogeneous discourse, and therefore reformulating certain enunciations now taken to be so classical as to be approached as intangible. A gesture of evasion away from the intellectual carcan — the psychological and social prison — wherein the old

⁵⁵⁴ Beckett, S (2009) [1989] *Stirrings Still* in *Company/Ill Seen Ill Said/Worstward Ho/Stirrings Still* Hulle, D Van (ed) Faber & Faber at 105–15.

⁵⁵⁵ [Beckett, S] (2011) [2 November 1955] [Letter to N Montgomery] in *The Letters of Samuel Beckett* Craig, G et al (eds) vol II Cambridge University Press at 561. Cf Beckett, S (2006) [1931] *Proust* in *The Grove Centenary Edition* Auster, P and Coetzee, JM (eds) vol IV Grove at 539: 'For the artist, who does not deal in surfaces, the rejection of friendship is not only reasonable, but a necessity.'

⁵⁵⁶ Didi-Huberman, G (2024) *Gestes critiques* Klincksieck at 11 ['ce que la pensée occidentale aura fait de mieux'; '(C)'est lorsque Antigone conteste les ordonnances politiques à court terme du tyran Créon, au nom d'une exigence éthique plus élevée; c'est lorsque Montaigne, au moment où se met en place la grande entreprise coloniale, ose affirmer que les "sauvages" amérindiens se révèlent bien moins "barbares" que leurs *conquistadores*; c'est lorsque Kant pose la question — dite *critique*, justement — du sujet de la connaissance au moment même où la science objective met en place ses plus grandes certitudes; c'est lorsque Marx, au moment du développement industriel européen, déconstruit — tout en les analysant — les fondements mêmes de l'économie capitaliste; c'est lorsque Freud déloge le "moi" de sa position dominante dans le psychisme humain']. Georges Didi-Huberman's encyclopaedic book offers a rich overview of the European history of critique.

forms would hold one, the expression of a desire not to submit oneself to what has long been but to allow oneself the scope to imagine what remains possible, even if the possible should prove 'orangeous',⁵⁵⁷ negative critique inscribes a deed that pertains at once to emancipation and marginalization (as one frees oneself, one dooms oneself to ostracism), thus a gesture of *exile*.

In the case of the VSI, negative critique is both necessary and urgent because of the need to suspend/to interrupt/to rectify the very considerable damage that the co-authors cause to what they claim to be their concern — comparative law — that they are treating, in my view, reductively, contemptibly, oppressively. The abiding idea is therefore to refute positivism's refutation — to cancel positivism's cancellation of culture within comparative law. To replace positivism with culturalism is moreover to introduce an incisive and rebellious maieutics within the motion that consists in interpreting foreign law — which actively acknowledges the active involvement of the comparatist as he proceeds to make sense of foreignness-as-culture. Note how the expression 'to make sense' indicates an actual and forceful interpretive input: it is the comparatist, through a process of 'meaning in', who ascribes meaning to a foreign law-text — which therefore does not mean for comparative purposes until the comparatist has come along to make it mean. Analogies may assist. One does not suffer from hypertension until a physician 'means in' to name the disease, and one can be found to have the affliction in the United States and not in France because the physician's 'meaning in' depends on systolic and diastolic benchmarks that differ in the two countries. In baseball, the pitcher's throw is neither a strike nor a ball until the umpire 'means in' to name the throw.⁵⁵⁸

Along the way, negative critique injects culture within comparative law twice: it resignifies the comparatist as a cultural entity, and it resignifies foreign law as a cultural entity, too. Meanwhile, the VSI fails on both counts, abysmally so in my view — hence 'Comparative Law's Shallows and Hollows...', the exigency of 'Comparative Law's Shallows and Hollows...'. Even bearing in mind its initiatory remit, the VSI's 'simple way of looking at legal problems' (89) is emphatically too facile, quite apart from being so immaturely derivative and comprehensively distorting. 'Comparative Law's Shallows and Hollows...' purposefully aims to difficult, to responsabilize, and to repair what I argue is a most ill-fated text. Without feeling the need to make any apology, quite to the contrary, negative critique seeks to raise the intellectual bar.

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In advance of empirical verification, I find it unthinkable that the publishers would have solicited the co-authors for the writing of the VSI. I do not know, of course, and I do not care to ask. But the very idea strikes me as implausible in the extreme. Rather, having formed the view that the Oxford University Press series afforded an excellent opportunity to earn instant international credentialization, the co-authors would have hubristically volunteered a book proposal. This writing enterprise would have proved particularly attractive since the per capita 'tariff' had to consist in a modest investment of approximately 25,000 words only

⁵⁵⁷ I evoke the connection that Michel Foucault draws between 'critique' and 'possible oranges' ('orages possibles'): Foucault, M (1994) [1980] 'Le Philosophe masqué' in *Dits et écrits* Defert, D and Ewald, F (eds) vol IV Gallimard 104 at 107.

⁵⁵⁸ I address this matter at greater length in Legrand, P (2019) 'What Is That, To Read Foreign Law?' (14/2) *Journal of Comparative Law* 294.

— and at introductory level, to boot. However, as is now pellucidly clear — to me, at any rate — the co-authors could not achieve their self-aggrandizement in the least competently, the billowed sails of their ambition irrefutably (and, I find, embarrassingly) incapable of bringing about attainment. It so happens that the co-authors were also unable to write in idiomatic English. Now, the publishers are to blame for failing their readership on account of the extraordinary laxness of their editorial standards. It is nothing short of indecent that they should be huckstering the unmoderated VSI as an authoritative text when it is, on the most charitable interpretation possible, more akin to a thoroughly outmoded feretory. In addition to betraying their readers, the publishers fail both themselves and their co-authors as they damage both their own reputation (such as it is) and their co-authors' standing (ditto).

Yet, it is the co-authors who must admit responsibility for the incessant flaws marring their text, many of them serious — not to mention an intellectual clannishness and nationalism that I, for one, find unthinkable to reconcile with the pluralist ethos that ought to animate comparative law. While I cannot see how to circumvent this ascription of liability, even if I were minded to try, I accept the fact that there is an important sense in which the co-authors are victims — victims having agreed to their harm, willing victims, to be sure — of a reproduction system that ensnares early-career, civil-law academics into the trappings of a stifling discipleship structurally making the emergence of personal and critical thought — the breaking of new intellectual ground — well-nigh impossible. I am therefore prepared to countenance the fact that, to a substantial extent, the co-authors are not in a position to appreciate how their VSI is at once so *exiguous* and so *scant* (in this sense, bad scholarship is like bad breath: one does not notice one's own).

Discipleship is one of the curses plaguing legal scholarship in continental Europe (I leave to one side European intellectual colonies.) Consider how in every part of the VSI the co-authors reflexively mimic and shelter at all costs the views that have been transmitted to them no matter how outdated these happen to be, irrespective of the fact that these positions have convincingly been shown ages ago to be epistemically untenable, despite the lack of even minimal international impact, and notwithstanding the extent of the censorship that had to be implemented in order to protect the fortress. In the event, the VSI promotes a brand of comparative law that features the unifying authoritarianism of would-be scientificity, commonality, familiarity, functionality, and transplantability — the orthodoxy's epistemic quintet, so to speak, in effect archaic comparative law's grammatical tenets. Consider in particular the manner in which the VSI is almost fully echoic, how it so much stands as the text of others ('as John Langbein advocated' [85], 'As William Twining declared' [89]...), and of some Italian others especially, and of one Italian other specifically, the co-authors having long ago relinquished individual thinking responsibility, their alienation happily (and, to their minds, freely) bartered away in exchange for their masters' validation or anointment of their institutional existence. And consider the co-authors' unwillingness — at any rate, their inability — to tap into other disciplinary discourses with a view to supplementing their theorization and practice of comparative law despite the fact that comparison inevitably demands such epistemic bolstering, an intransigent refusal of any disciplinary fluidity very obediently Kelsenian, of course.

When I think of the 'cost of admission' that one must pay in order to become a bona fide anthropologist (extended fieldwork, perhaps the apprenticeship of a new language, possibly the elucidation of an archive heretofore unknown or under-exploited), I am struck by the fact that at no point does the VSI address the felicity conditions — the pragmatic requirements possibilizing creditable comparative research — within which one ought to operate in order to be regarded as doing laudable work qua comparatist-at-law in a context where, as far as I can discern, the self-regulating 'community' of comparatists is enthusiastically prepared to greet as a fully-fledged comparatist anyone willing to sprinkle his work with a few foreign references in English translation only.⁵⁵⁹ Apparently, perhaps as an application of the startingly unavailing saying 'the more the merrier', it would simply be a question of wanting to do it... The VSI itself shows exceedingly well that such mindset entails the production of *incurious* work (in all of the OED's five senses of the term): not precise or not careful; coarse; negligent or heedless; not remarkable or deficient in interest; and uninquisitive or devoid of curiosity.

In a passage that I value quoting on account of its perspicacity, Pierre Schlag writes that 'to be really good at "doing law", one has to have [...] a stunningly selective sense of curiosity.'⁵⁶⁰ This insight's pertinence with respect to comparative law cannot be in doubt as the VSI's cognitive inertia readily confirms. The co-authors' strategic ignoring — what I regard as their decision to close their eyes to uncomfortable knowledge, to information that might undermine the existing power structure to which they are indebted and from which they benefit — suggests that even as Michel Foucault wrote at length on power/knowledge, within comparative law it has become necessary to reflect on power/ignorance. The situation is particularly dire if one comes to assess the VSI from other disciplinary standpoints because the text then looks shatteringly mortifying.

What linguist nowadays would teach his students that '[translations] are not always [...] reliable' and yet that they could be 'exact' (14)? What philosopher nowadays thinks that there could be any sense to the expression 'objective law' (56)? What sociologist nowadays considers that '[s]ocietal needs and problems [...] are [...] universal' (71)? And what historian nowadays would feel the need to remind his students that '[t]ime plays a role in the construction of traditions' (38)? In these various ways and in many more, too, the VSI strings together statements either so simplistic or so untenable that only comparatists-at-law totally oblivious to intellectual developments unfolding beyond their narrow precinct can think there is the slightest warrant to such gimcrack writing.

And then, there is the issue of politics, which the VSI barely addresses despite its obvious significance and notwithstanding what it claims to be advocating. (Recall that the VSI includes two express calls for politics to enter comparative law at 12 and a further invitation at 13.) Of course, comparative law can deliberately

⁵⁵⁹ Cf Austin, JL (1975) [1962] *How to Do Things With Words* (2nd ed) Urmson, JO and Sbisà, M (eds) Oxford University Press at 14, where John Austin refers to 'the doctrine of the *Infelicities*'.

⁵⁶⁰ Schlag, P *The Enchantment of Reason* supra note 384 at 140. In a review of Schlag's book, Peter Goodrich castigates 'legal non-knowledge' and observes how 'both structurally and sociologically law does not know the objects of its regulation': Goodrich, P (2000) 'Law-Induced Anxiety: Legists, Anti-Lawyers and the Boredom of Legality' (9) *Social and Legal Studies* 143 at 147.

impact political decision-making, whether legislative or judicial, and thus partake of a strategy of governance: '[C]omparing is an activity that helps to (re-)order the world, and hence may set into motion dynamic societal and epistemological changes.'⁵⁶¹ And political thought may consciously inform the comparatist's theoretical/practical elections. Apart from these straightforward interactions, there arises the matter of disciplinary profile. Basically, is comparative law a form of domination or a service? Can comparative law be considered inherently anti-imperial and structurally supportive of pluralism? In the way in which it articulates itself, does comparative law intrinsically favour the promotion of collective identities thereby ipso facto challenging rationalist individualism? Meanwhile, to what extent, as it upholds agonism — as it emphasizes strife across laws — ought comparative law to foster public deliberations aiming for reasonable discussion and conciliation (assuming, of course, such consensual project to make any sense in the first place)? And must comparative law take a stand vis-à-vis neo-liberalism and pronounce, say, on IMF conditionalities? How minimally technocentric must comparative law remain in order to retain its scholarly credibility (and yet to continue as an emancipatory discourse)? To what extent, if at all, ought comparative law seek to divorce technique from political argument?

To turn to the comparatist, and leaving to one side at this juncture any deliberate investment of political value on his part, is the comparative inclination intrinsically the expression of a 'cosmopolitan' or ecumenical will by the self to adjudicate upon otherness? If so, is this motion acceptable? If not, how could it be tamed? And what changes if one's comparative penchant is the result of a dissatisfaction with one's own law or one's own legal training? Is it legitimate, for instance, for the comparatist to enlist foreign law with a view to improving his own law or his appreciation for his own law — or is such instrumentalization politically reprehensible? And how far can the comparatist permissibly take his depreciation of foreign law?

Quite apart from such general or all-embracing questions, there are at least four crucial ways in which comparison stands forcefully to apply qua political statement as act or intervention — a comparison *is* an act, and it *is* an intervention (indeed, comparison typically consists of two simultaneous acts or interventions as one's foray into foreign law reverberates into one's disposition vis-à-vis one's own law). The fact that the naive comparatist, and his no less naive reader, mistakenly understands the intrusion within foreign law to be purporting to achieve a veracious description, to be therefore alluringly unfolding within 'the debilitating effects of the objective/subjective framework'⁵⁶² — the residual Cartesian mythology still pervading so much of orthodox comparative law and serving the comparison of laws so very poorly — does not, of course, make the comparatist's interposition any less political than it structurally is: a highly value-laden intercession revolving around the ideas of recognition/respect and justness/justice, that is, of hospitality, which in its turn cannot be dissociated from an exercise of authority.⁵⁶³ (Observe the tension informing the idea of hospitality

⁵⁶¹ Eppler, A and Flüchter, A (2021) 'Modes of Comparing and Communities of Practice' in Rohland, E et al (eds) *Contact, Conquest and Colonization: How Practices of Comparing Shaped Empires and Colonialism Around the World* Routledge at 332.

⁵⁶² Hutchinson, AC Hart, Fuller, and *Everything After* note 483 at 47.

⁵⁶³ For a connection between the hospitality that the self grants the other and the authority that

since etymologically '*hostis*' is at once 'host' and 'enemy' — think 'hostility'.) As I proceed to consider the four clusters of political questions that I have identified as pertaining to any comparison no matter how unappreciated by orthodox comparatists — envisage the VSI's abundant omissions or misapprehensions, its paralipomena or phantasmagorias — I take the opportunity to revisit some issues that I have addressed in this review and that I deem well deserving of iteration or re-iteration. (It occurs to me that the inclusion of these four rubrics in a comparative-law primer such as the VSI would have been sensible, relevant, and rewarding.)

To Choose a Topic

What does it mean politically for a US comparatist to elect to address clitoridectomy in Kenya or for a French comparatist to allege a sham constitution in Sudan? On the assumption that a just interpretation is a threshold requirement undergirding the credibility of any account of foreign law (no serious comparatist would actually demand exactitude or correctness), how does one's situation impinge on the justness of the report on foreignness being fashioned? How dissociable is the comparatist's existential condition from the tenor of his comparative account? And if justness must be the relevant epistemic benchmark, what epistemic consequences follow? For example, must the commitment to justness entail a withholding of all critique of foreignness beyond the critical input that necessarily visits even the barest purported description? Contrariwise, if such critique should be allowable, what epistemic resources can it legitimately mobilize? Is it acceptable for critique to tap into a comparatist's own encultured assumptions at the risk of imposing one's model unto the foreign? Is epistemic militancy legitimate? Surely, the comparatist's critique cannot marshal non-existent 'universals' — extraordinarily, though, *ex-traor-di-nar-i-ly*, the VSI thinks so as it maintains that 'comparison is a way to see [...] universal traits' (98). In any event, any so-called 'universals' would be deployed at someone's behest and at someone's expense. If you will, every 'universal' is someone's 'universal' being visited upon someone else. Without question, then, alleged 'universals' would obligatorily resolve themselves in the form of plural local realizations, no insulation from local cultural affiliations being possible, any putatively universalizing argument being inevitably a local argument, any claimed universal ground having to be revealed as the local soil of contingent cultural practice.⁵⁶⁴ How, then, can a comparatist be able creditably to mobilize 'right' and 'wrong'? (Presumably, 'right' and 'wrong' cannot ultimately be forfeited. But

the self exercises over the other (a strain evident in the dynamics informing comparative law), see Derrida, J (2021) [10 January 1996] *Hospitalité* Brault, P-A and Kamuf, P (eds) vol I Editions du Seuil at 132. This text is a transcript of a lecture that Derrida delivered at the *Ecole des hautes études en sciences sociales* in Paris.

⁵⁶⁴ Heidegger thus acknowledges that even 'the ontological investigation that [he] is [...] conducting is determined by its historical situation': Heidegger, M (2005) [1927] *Die Grundprobleme der Phänomenologie* Herrmann, F-W von (ed) Klostermann at 31 ['die ontologische Untersuchung, die wir (...) vollziehen, ist durch ihre geschichtliche Lage bestimmt']. Cf Hutchinson, AC Hart, Fuller, and *Everything After* supra note 483 at 47: '[T]here is no escape from the messy and contingent facts of social living.' Incidentally, a comparatist prepared honestly to acknowledge that his interpretive investment is perforce situated would be ill-advised to draw on Joseph Raz's unconvincing analytics and pretend that just as there can be a view from nowhere and therefore objectivity, there can be a view from everywhere and accordingly universalism. For an apt critique of Raz's ensnarement, see id at 49–55.

whose ‘right’ and whose ‘wrong’ is the comparatist harnessing?) Meanwhile, is comparative law — despite the strong commitment it must harbour in favour of plurality — ever in a position to eschew the application of hegemonic epistemic power as it narrates its chosen foreign problematization? Can foreign law ever avoid the comparatist’s arraignment whereby it is appropriated or domesticated as the comparatist’s view of foreign law, that is, effectively, as the comparatist’s (own) foreign law?

To Choose a Law

Comparative law assumes more than one law. What does it mean politically, then, for a US comparatist to write on Iranian law or for a German comparatist to write on Russian law? Ought the choice of a law entail a measure of recognition of its politics or of respect for its official values? If so, must comparative law therefore confine itself to laws conventionally regarded as pertaining to democracy (allowing, perhaps, for inevitable borderline cases)? Indeed, should comparative law be promoting democracy? Besides, to what extent is it possible for a Brazilian comparatist to write on Portuguese law or for a Québec comparatist to write on French law without falling prey to a form of colonial epistemic entrapment — or vice versa (I have in mind a Portuguese comparatist writing on Brazilian law or a French comparatist writing on Québec law)? And what does it mean for a British comparatist to write on (poverty in) Colombia, on (infectious diseases in) Cambodia, or to engage (WTO compliance in) China? Can such decisions — and others within law-and-development broadly understood — circumvent the charge of condescension or imperialism? What of the Australian comparatist’s selection of Indonesia with a view to enhancing the export of Australian bankruptcy law or of the Australian law of criminal procedure? Are there situation-independent arguments justifying the dissemination of a given legal model? Who would so determine and on what basis? Politically, is the occidentalization of the legal an acceptable pursuit, or must the comparatist further the epistemic valorization of the Global South? Or ought the comparatist to uphold an assiduous agnosticism? Now, is rational agreement across laws possible? Is it desirable? If so, does this mean that comparative law’s ambition must be to achieve legal convergence or oneness — that is, ultimately to undermine itself (again, the comparative demands more than one)? Contrariwise, what are the political consequences of implementing a differential (and deferential) comparison, that is, a brand of comparative work acknowledging, understanding, and esteeming differences across laws? And can a German comparatist fervently persuaded that ‘German doctrinal scholarship will always be superior to that of other countries’ claim to be advancing decoloniality (beyond virtue signalling of an irresponsible sort, that is) while preserving the ‘meremost minimum’ of credibility?⁵⁶⁵

⁵⁶⁵ The quotation on German legal scholarship is from Ralf Michaels’s: see *supra* note 89. For the expression of Michaels’s decolonial turn, see Salaymeh, L and Michaels, R (2022) ‘Decolonial Comparative Law: A Conceptual Beginning’ (86) *Rebels Zeitschrift* 166. For the excerpt on minimalism, see Beckett, S *Worward Ho* *supra* note 43 at 82. To my knowledge, comparative law’s precursive text on the subject of decoloniality is Munshi, S (2017) ‘Comparative Law and Decolonizing Critique’ (65) *American Journal of Comparative Law* 207 (which appears as a cool reference in the VSI’s *distressing* bibliography at 140). My research suggests that the term ‘decolonial’ would have begun to circulate in the mid-1960s. Eg: Mannoni, O (1966) ‘The Decolonisation of Myself’ (Pace, C [tr]) (7) *Race* 327; Berque, J (1967) ‘Quelques problèmes de la décolonisation’ (5) *L’Homme et la société* 17.

To Choose a Theory

I very much think that the comparatist-at-law needs to undertake some serious thinking about thinking. Must, then, the theory necessarily informing comparative-law practice openly aspire to as much political neutrality as it can muster? What does it mean politically to pursue a positivist comparatism and therefore to assume the autonomy or quasi-autonomy of law? Are there political values inhering to positivism — to the limitation of the semantic extension of the legal to normative bindingness, to the investment in method, to the postulate that there are commonalities across laws, or to beliefs in impartiality and veridiction? What of the assumption that comparative law should operate 'scientifically' or foster the so-called 'unification' or 'globalization' of laws? For its part, in what characteristic ways does the culturalist alternative partake of the political? What does it mean politically to claim to be researching foreign law as an encultured being studying an encultured law? Does culturalism, whether focussing on the comparatist or foreign law, problematically tap into atavism and archaic forms of identification? And what are the political consequences of substituting, say, protocols for method or of using a *principium individuationis* — the primary investigation of difference — in preference for the *præsumptio similitudinis*, of deploying glocalization instead of 'globalization', of advocating for interpretation rather than objectivity and truth? If the conceptualization of comparative law as cultural analysis is structurally charged with political commitments, do these encumberments discredit the comparative work as a legal or scholarly undertaking? Also, how conducive are positivism and culturalism, respectively, to the democratization of comparative law? Or is comparative law inherently an elitist practice for jurists trained in foreign languages and cultures — and would such elitism matter? (Then again, is comparative philology meant to be readily accessible?) How concerning are positivism and culturalism's epistemic exclusions? What are the comparatist's epistemic entitlements and responsibilities vis-à-vis the laws that he purports to re-present? What are the epistemic vulnerabilities pertaining to the comparison of laws that he must address? Is the fact that the comparatist's comparison must stand as his *re-presentation* (given that description is impossible) ultimately decedibilizing or empowering?

To Choose a Language

What does it mean politically for a German comparatist to write an account of Austrian law in English instead of doing so in German? And what does it imply politically for a French or Brazilian comparatist to write on French or Brazilian law in English within the broader framework of a comparative study? Meanwhile, what does it entail politically for a US comparatist to quote from published English translations of Italian or German law rather than refer to source-texts in Italian or German? Contrariwise, what does it involve politically for an Italian comparatist writing in English to decide to shun published English translations and rather refer to source-texts in their primary language? And what does it assume for one to choose to write on Islamic law (and to claim to be doing so authoritatively) without any knowledge of the Arabic script? Beyond these scenarios, what does it mean politically for a leading textbook purporting to offer a theoretical model for the practice of comparative law to remain silent over thirty years or so on language and translation? And what does it suggest politically for a textbook wanting to be identified as the leading text in the field

to put on a par the mastery of the source-text's language, on one hand, and the resort to translation in the absence of such mastery, on the other? At a higher level of abstraction, is dialogue across languages and languages-of-the-law possible? Is it desirable? Is it not the case that the comparatist, even as he writes foreign law, is monologuing in his language?

Apart from the compelling decisions that a comparatist must make as regards topic, law, theory, and language — irrespective of the anxiety of choice, then — is there not a primordial way in which a comparatist's comparatism is inescapably political, that is, in advance of any political project or political values being purposefully defended? For instance, does the very fact of taking the comparative turn for a jurist not operate as a basic political commitment even before any delineation of one's research topic, law, theory, and language — even in advance of any deliberate investment of values in one's enquiry? Is the comparatist's signature not always-already a counter-signature, that is, a subversive or negative signature — a signature that forcefully says no to assumptions informing the age-old totalization and territorialization of the legal? Is not any meaningful comparatism ipso facto anti-totalizing and anti-territorializing?

What are the political implications locally for a jurist choosing to 'go' comparative, to take the comparative 'turn'? Must the comparative option prompt a degree of local marginalization — who amongst US experts in US contract law is at all interested in the Italian *contratto*? Would the comparative engagement therefore entail a form of willing local political abdication? And what would it mean politically for a comparatist deliberately to renounce a heightened local profile in favour of the development of foreign legal expertise on the local legal community's periphery? Is there political significance attaching to self-marginalization? Or can comparatism ultimately enhance the aura of a jurist — and perhaps, counter-intuitively, his political influence locally — by investing him with additional credentials deemed worthy of local esteem on account of what would ultimately be perceived locally as the sophisticated and exceptional character of his work because the comparatist would then be envisaged as someone advantageously distinguishing himself from the national lawyers 'not hav[ing] to face, with greater or less success, outlandish ways, tongues, laws, skies, foods'?⁵⁶⁶

In all such manners, and in quite a few more also, the VSI's degradation of comparative law's possibilities stands, I repeat, as a damning indictment of the antiquated training model of discipular subservience that continues to prevail in continental Europe, not least in Italy. Try as I may, I cannot find merit in an institutional structure impalling one on dogmatic inertia not of one's own making, coercing one into what is effectively intellectual psittacism (if I can indulge the oxymoron). For my part, I loathe institutional conformism, groupthink, and I encourage idiosyncratic subversion. I champion individuality, the nonpareil — difference, then, not deference. I regard university life as having to be informed by the freedom to imagine, to signify, and to express (in language that makes basic grammatical sense, please). I uphold radically new patterns of consciousness, daring (and derring) new styles of writing, too.⁵⁶⁷ I value

⁵⁶⁶ Beckett, S (2010) [1974] *Mercier and Camier* Kennedy, S (ed) Faber & Faber at 3.

⁵⁶⁷ Eg: Legrand, P (2025) 'Derring Literarity: The Case of *Negative Comparative Law*' (37) *Law &*

freshness of perception, freedom from conventional thinking, renewal of thought whose directness challenges immobility and defies expectations. Not only do I not care for discipleship, but I abhor the very idea. I prohibit my students from acting as votaries. Concretely, I forbid them from referring to my work in their theses and dissertations as I want them to escape from the institutional edict, to proceed edifyingly from the *maître* to the *contremaître*, thus leaving me outside mastery.⁵⁶⁸ I urge my students to supply a counterpoint, a counter-signature, *theirs* (their encultured ones). I encourage my students to constitute themselves as intellectual renegades.

I am, uncompromisingly, an irreverent heretic, my contrarianism being neither staged nor calculated, neither a pose nor a role. I hugely treasure authenticity — which is why I hold that a new way of theorizing and practising comparison, hewing much more closely to epistemic realism, is so sorely needed, which is why I maintain that it is past time for comparative law to jettison its epistemic imposture, its rots (representativity/objectivity/truth/subjectivity). The comparatist does not — and cannot — reproduce foreign law: identity is impossible, not least across languages (as any first-year teaching assistant in linguistics will confirm without the least surprise or worry), which means that the comparatist is ultimately offering a variation on foreign law, therefore an alternative to it, his statement of it, thus his re-statement, what conveniently goes under the label 'interpretation' (not a description, then, but an *interpretation*, a *signed interpretation*, for no comparatist can produce an account of foreign law that would be the foreign law itself). Moreover, any comparatist's interpretation must be defeasible for 'the eye is embodied, fallible and subject to damage and decay'; indeed, cognition is active, *embodied* cognition.⁵⁶⁹

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As a comparatist, I could hardly have been a fan of the late Justice Antonin Scalia, at least not during his thirty-year US Supreme Court tenure from 1986 to 2016. The situation might have differed early in his legal career since he then taught comparative law at US law schools.⁵⁷⁰ (Interestingly, Justice Scalia continued

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⁵⁶⁸ Derrida thus referred to Heidegger as his 'contremaître' or 'foreman': Derrida, J (with Malabou, C) (1999) *La Contre-allée* La Quinzaine littéraire at 57. The French word connotes the idea of a 'master' (as in 'maître') but also, and more insightfully, the notion of a master against whom ('contre') one is thinking and writing. This clever double entendre is lost in translation. For his part, Barthes expressly refuted the role of master. I refer to Barthes, R (2002) [18 March 1978] *Le Neutre* Clerc, T (ed) Éditions du Seuil at 97: 'I am outside mastery, I have no mastery whatsoever' ['(J)e suis hors maîtrise, je n'ai aucune maîtrise']. This text is a transcript of a lecture that Barthes delivered at the *Collège de France* in Paris.

⁵⁶⁹ Maude, U (2009) *Beckett, Technology and the Body* Cambridge University Press at 46. Thus, Damion Searls solicits a 'return to [...] the living, breathing, embodied person': Searls, D *The Philosophy of Translation* supra note 68 at 184–85. While Searls's judicious observation concerns the translator, it applies *pari passu* to the comparatist. Now, it is not only the comparatist's cognition that is active but also the foreign law. Cf Steiner, G *On Difficulty* supra note 134 at 158: 'Both halves of the equation — [the act of reading and the text] — are, as it were, in motion.'

⁵⁷⁰ I refer mainly to the fact that Scalia taught comparative law at the University of Virginia School of Law from 1967 to 1974 (although he was on leave as of 1971). This information is the University of Virginia School of Law's at <<https://www.law.virginia.edu/news/201602/remembering-supreme-court-justice-antonin-scalia>> [on file]. Scalia also taught at the University of Chicago from 1977 to 1982. Complementary information comes from Mary Ann Glendon. On 24 February 2020, Glendon delivered the annual Harvard Law School Antonin Scalia Lecture that she entitled 'Who Needs Foreign Law?'. In *Harvard Law Today* dated 4 March 2020 [on file], one Jeff

to refer approvingly to the civil-law tradition in some of his most famous extrajudicial writings on originalism.⁵⁷¹) To return to the Supreme Court years, I always approached Justice Scalia's *Lawrence v Texas* dissent with particular suspicion. In this minority opinion, Justice Scalia vehemently disapproved of the Court's references to foreign law that were designed to help sustain an innovative reading of the US Constitution and the correlative overturning of one of the Court's own decisions from seventeen years earlier.⁵⁷² For Justice Scalia, references to foreign law had no role whatsoever to play in US constitutional adjudication. Only a few months later, speaking in an extrajudicial setting, he would frame his claim in compelling language: 'It is my view that foreign legal materials can *never* be relevant to an interpretation of — to the *meaning* of — the US Constitution.'⁵⁷³ In his *Lawrence* dissent, he had qualified such references as being at once 'meaningless' and '[d]angerous'.⁵⁷⁴ Now, I have long drawn my students' attention to the tension I thought I could discern between these two terms: how could something 'meaningless' be 'dangerous' and vice versa? I stand corrected. Having read the VSI, I have finally acquired an intimation of Justice Scalia's point. At any rate, I can see how an inept text can prove simultaneously meaningless and dangerous. It is meaningless because it is egregiously erroneous. But since unseasoned readers may not realize that it is egregiously erroneous, the text is dangerous (think tiger mosquito or untreated water). Please lend a shredder, anyone — any shredder will do very well I should think (it is a small book).

Although showing no awareness of the cognitive or neural framework within which any interaction with foreignness must necessarily operate and inevitably limit the scope of such dynamic — taking no interest in the epistemic pragmatization of comparative law — the VSI situates itself at the intersection of what the co-authors think they know but do not, what they do not care to know, and what they do not want to know. 'Tomorrow everything will be better', claims one of Beckett's most famous characters.⁵⁷⁵ It is 16 October 2024 and, sitting on Sollers's red bench of choice in Campo Sant' Agnese, I seriously wonder. Given the extent to which epistemically weak orthodox comparative-law thought has metastasized over the years, it is clear that only a strong negative programme

Neal reported on the lecture and, adverting to Glendon's observations, wrote as follows: 'Prior to his time on the bench, she noted, Scalia had taught comparative law and private international law for 12 years at the University of Chicago and the University of Virginia. He had also said that "comparative law should be a mandatory subject in every American law school".' In private correspondence, Glendon confirmed that her lecture remains unpublished as of 2025 [on file]. But it is easily available on the Internet to watch. Researching the Internet, I have come across further (unsourced) information that comparative law was in fact Scalia's primary teaching and research interest while at Virginia (interestingly, the University of Virginia School of Law enters comparative law first in the list it draws of the five courses that Scalia taught while on faculty: *supra*). To my knowledge, the only Scalia biography that addresses his law teaching is Rosen, J (2023) *Scalia: Rise to Greatness 1936–1986* Regnery. This book is silent on comparative law.

⁵⁷¹ Eg: Scalia, A (1997) *A Matter of Interpretation* Gutmann, A (ed) Princeton University Press at 3–47.

⁵⁷² For the Scalia dissent, see *Lawrence v Texas* (2003) 539 US 558 (USSC) at 586–605. The earlier decision is *Bowers v Hardwick* (1986) 478 US 186 (USSC).

⁵⁷³ Scalia, A (2004) 'Foreign Authority in the Federal Courts' (98) *American Society of International Law Proceedings* 305 at 307.

⁵⁷⁴ *Lawrence v Texas* (2003) 539 US 558 (USSC) at 598.

⁵⁷⁵ Beckett, S (2010) [1954] *Waiting for Godot* Bryden, M (ed) Faber & Faber at 50.

can make theoretical and practical sense. Yes. Alas, the idea of an alternative model raises the issue of educability, and the VSI suggests precious little cause for optimism in this regard. No matter how salvific comparison can potentially prove to be, the VSI offers further arresting evidence that, for all intents and purposes, a civilian cannot emancipate from the civil-law tradition (an innately conservative, ultimately monarchico-theological, legal configuration): one might as well be waiting for the ever-elusive Godot. The civil-law horizon thus remaining the very extent of a civilian's vision, 'civilianization' could be regarded as an accursed inclination worse than religion.⁵⁷⁶ While one must be inclined towards the idea of comparison as incessant experimentation, one would prove dupable in the extreme if one expected anything along the lines of Damascene conversions amongst civilians. And yet...

As I am writing this review (and not rejoicing in my self-inflicted task), Yves-Marie Laithier is releasing his *Droit comparé*,⁵⁷⁷ a salutary reminder, I readily admit, that one must stubbornly cling to the wreckage and recall how the VSI must not be allowed to obliterate the fact that there can still be occasional sightings of comparative life within the civil-law tradition — how there can be *stirrings still*. I confess that on the basis of my twenty-five years of teaching at the Sorbonne — and therefore of my long familiarity with French legal culture and with French legal education in particular — I had reached the firm conclusion that no worthy primer on comparative law could possibly appear on the French editorial scene. To my mind, the matter is structural. Not only does it have to do with the exceedingly strait epistemic range pertaining to a French legal education, but it concerns René David's legacy that seemingly makes it impossible for the small number of French comparatists there are to surmount the *Grands systèmes* model. Amongst the civil-law jurisdictions with which I am acquainted, France is arguably the last place where I would in fact have expected a quality comparative-law textbook to emerge. By way of explanation, I have mentioned French legal education and the French approach to comparative law, both crudely self-congratulatory. But I must also refer to French legal culture and French culture *tout court*. François Cusset, a prominent French literary critic, thus identifies '[a] tenacious tradition of intellectual isolationism', which he styles 'French cultural isolation'.⁵⁷⁸ For his part, the German philosopher Peter Sloterdijk, although committedly Francophile,⁵⁷⁹ observes with pardonable exaggeration that 'France has become the most hermetic country in the world, [so that] even Tibet is of a total transparence in relation to [France]'; in fact, France has generated a sort of 'psycho-political exception' by trying to create 'a protected space, [...] [a] kind of unique micro-climate, a preserved bubble'.⁵⁸⁰ Yes. (I can personally vouch for Cusset's and Sloterdijk's insights: France is

⁵⁷⁶ See Legrand, P 'Are Civilians Educable?' supra note 347.

⁵⁷⁷ Laithier, Y-M (2024) *Droit comparé* LGDJ. The book numbers nearly 650 pages.

⁵⁷⁸ Cusset, F (2003) *French Theory* La Découverte at 336 ['(u)ne tradition tenace d'isolationnisme intellectuel'; 'l'isolement culturel français'].

⁵⁷⁹ Eg: Sloterdijk, P (2013) *Mein Frankreich* Suhrkamp.

⁵⁸⁰ Sloterdijk, P (5–6 August 2006) 'La France est une exception psycho-politique, une bulle préservée' (Interview with A de Baecque) *Libération* 30 at 31 ['La France est devenue le pays le plus hermétique du monde, même le Tibet est d'une totale transparence par rapport à (la France)'; 'exception psycho-politique'; 'un espace protégé, (...) (u)ne sorte de micro-climat propre, une bulle préservée']. The words are Sloterdijk's.

where I live.) The idea, then, that French *droit comparé* could move away from French *droit comparé* heralded minimal plausibility only.

Yet, as I have always maintained, no culture is uniform, and every culture features its dissenters. I am ultimately delighted to acknowledge that as far as comparative law *à la française*, even as I sat on my Venetian bench, I had reckoned without Laithier's bracingly discordant stance being published athwart the ominous sibilance — his daring French dance overcoming the dogmatisms that have so palimpsestically stifled *droit comparé* in favour of a let's-try-it spirit at long last broadening the exceedingly narrow French epistemic aperture. As foreignness is relentlessly coming under attack from parochial and anachronistic political agendas all over the planet, comparatists-at-law cannot ignore the redeeming role they must play in order to vindicate foreignness-at-law, no matter how modest the scale on which they operate. I am moved to scream: compare, compare — otherwise we are lost. Laithier's book is thus excellent news indeed.

Why Worry? (A Professedly Biographical Excursus)

This review's wide-ranging observations beg at least two overarching questions. First, if the VSI is as bad as I claim, why would Oxford University Press release it under its historically reputed imprint? Secondly, why would I invest time and effort into an extensive appreciation of a report on comparative law that I regard as so shoddy?

In order convincingly to address the first interrogation, I must at the outset remark that for a number of years many publishers exhibiting a marketing interest in comparative law, even some of the most established academic houses, have seemingly been prepared to entertain the release of whatever submission happened to come their way, whoever happened to be the author of the text, and whatever the species of English into which the typescript happened to have been written (the decision to save on the cost of freelance copy-editing presumably explaining the demise of editorial literacy). Having overheard on more than one occasion musings to the effect that such democratization had been long overdue (I refer to the deskilling argument whereby all comers should be able to identify themselves as comparatists), it strikes me that this egalitarian contention is also circulating in favour of TikTok — although, I gather, there is no exhortation that everyone who so wishes should more or less instantaneously qualify as an airliner pilot or a cardiologist. Be the argument from accessibility as it may, the looser editorial criteria — the *standardlessness* — now obtaining more or less as a matter of course, and empirically verifiable as a matter of fact, entail that it is barely an exaggeration to maintain that within comparative law (at least from the standpoint of exigent comparatists) the Oxford University Press logo has come to carry the kind of low-level respectability suggestive of the Nike swish or the Starbucks mermaid, a very long way from the assumed imprimatur of academic legitimacy that used to be associated, say, with the austere, orange-clad 'Clarendon Law Series'. (*Anecdotaly*, I was complaining to a fellow US comparatist in March 2024 about the editorial ordeal that I was then undergoing on account of the publication of a modest 5,000-word book review. 'Who is the publisher?', my interlocutor asked. 'Oxford University Press', I replied. 'Oh, she retorted, they're terrible.' *Sic transit gloria editori*.) For my money, to frame the

matter colloquially, the VSI readily confirms the fact that the Oxford University Press comparative-law list is currently available to the comparing *tout-venant*.

In the process, the much vaunted peer-review model (but who is a peer and what is a review?) showcases more than somewhat starkly its structural and disquieting inadequacies, a general deficiency most everyone appreciates and a predicament that many academics are prepared openly to admit (at least privately). While this reproving pronouncement easily traverses disciplinary boundaries, I must confine my remit to comparative law, which I approach on the basis of long-standing first-hand and second-hand experience (my own books, book chapters, and articles; my proximate colleagues' or friends' books, book chapters, and articles). Quite apart from the fact that upon submission the author of a typescript is customarily invited to suggest preferred reviewers (the glaring conflict of interest notwithstanding), the individuals whom the publisher ultimately appoints as assessors generate decisions that are well-nigh inevitably marred by complacencies and connivances — a situation indicating that student-run law journals in the United States may have more to recommend themselves than might be assumed, say, from a European vantage point. (Defending student editorial responsibility in the face of self-affirming professorial cliques, a Chicago law professor bluntly tells me: 'I do not trust my colleagues.')

Leaving to one side the fact that the supposedly anonymous evaluation operation often allows the identity of the author to be ascertained (a flaw that exacerbates both the danger of abetment and the risk of ultion), a reviewer is bound to be heavily swayed by his perception, at some level of consciousness or other, of his intellectual or personal affinities with the work's argument and apparatus (specifically, as regards the references and quotations). It is as clear to me as anything can be that an assessor who feels congruence with the ideas being defended and the authorities being marshalled will be very well disposed towards the text under consideration and can consequently be expected to recommend acceptance to the publishing powers that be irrespective of identifiable lacunae (then rated as salvageable). Given perceived intellectual affinities, it is in the reviewer's own interest to promote the author's writing. Contrariwise, an appraiser who disvalues the claims being propounded, who is uneasy with the authorities having been enlisted in support of the argument, will be prone to express reticence as regards the merits of the work under evaluation. And, as sure as night follows day, such reviewer will advise revision or rejection to the publishers, this outcome aligning with the reviewer's own interest in not facilitating the author's work, perhaps because the author is defending ideas opposed to the reviewer's fidelities, possibly even attacking the reviewer's own opinions. As a result, one evaluation can well maintain that the text 'must be published immediately without revisions' while another appraisal (of the identical typescript) holds forth just as confidently that the submission 'does not qualify as legal scholarship' — such a striking contradiction not being in the least unusual and revealing the structural waywardness of the entire assessment process.⁵⁸¹

⁵⁸¹ I quote from two reviews that Cambridge University Press invited in 1997 in response to a 125,000-word submission that I had been encouraged to present. In light of the evaluations, the timorous commissioning editor of the day told me how she felt unable to take a proposal to the all-powerful Syndicate that, at the Press, is entrusted with ultimate decision-making authority regarding the acceptance of a text for publication [all correspondence on file]. After a few years, Peter Goodrich encouraged me to send him a copy of my typescript for possible release in a

Still on the general theme of proneness, I suggest that peer reviewing is inherently resistant to insurgent scholarship as such research characteristically disputes the work that the reviewers themselves have been conducting and that has led them in time to assume authority within their field and to be asked to act as reviewers. (I have focussed on bias, but there are other problems plaguing peer review such as slowness and precipitation. There is no inconsistency: on account of the fact that they are overwhelmed and since their commitment carries a substantial opportunity cost, reviewers typically procrastinate until they face their final deadline whereupon they move as expeditiously as possible thus compounding their lateness with the risk of serious oversight. I shall refrain from dwelling on further woes such as mismatching on the publisher's part — the most spectacular example of *mésalliance* involving the summons of a reviewer who is conducting a *sotto voce* scholarly vendetta against the author — or sheer reviewing incompetence.) Allowing for the statistical margin of error to mitigate my coarse dichotomies, the position that peer reviewing within comparative law would be operating with the demanding integrity that ought to prevail (and that naive authors expect to obtain) is simply unsustainable. In particular, if peer review was not so badly broken, the plangent and preposterous, the desiccated and lugubrious VSI now in circulation would simply not have been printed.

The second threshold interrogation that I raise — why would I write about a book that I deem slovenly and caught in the viscous substance of arrested epistemology — demands a more individualized answer. In this regard, some reminiscence is in order, with apologies to all comparatists of positivist obedience who believe à la Tom Ginsburg — the issue *is* belief — that scholarship would be immune to authorial situatedness, who hold fast to the view that their *work* (their *surveys*, their *figures*, their *diagrams*) would somehow not be *their work* (their *surveys*, their *figures*, their *diagrams*).⁵⁸²

University of California Press series where he himself had published his brilliant *Oedipus Lex* in 1995. Two glowing peer-reviews later, a contract was duly signed only for it to be rescinded by the Press in the fall of 2001 on the basis of force majeure. Because of its dire economic situation in the immediate aftermath of '9/11', the Press had resolved that it had to make various urgent commercial decisions including withdrawal from the law market. When he communicated the contract cancellation to me, the commissioning editor indicated that my book had been the very next one slated for production [all correspondence on file]. But the Press's concern to leave law was apparently so compelling that even the small number of extant contracts would not be honoured. This book project was jinxed.

⁵⁸² On 3 December 2021, *une fois n'étant pas coutume*, I agreed to join a group of distinguished constitutionalists, most of them comparatists, to discuss Steven Calabresi's comparative constitutionalism with specific reference to his *The History and Growth of Judicial Review*, a two-volume Oxford University Press publication then recently released. In the course of my ten-minute presentation (although online and speaking from various countries, the panelists were very much *in the United States*), I addressed Calabresi's thesis and contended that there was an autobiographical or self-fashioning dimension to his position, a stance that he himself promptly (and generously) confirmed in his immediate reply to my intervention. Strangely, I thought, given Calabresi's express endorsement of my claim, Ginsburg then proceeded, strenuously and stentoriously, according to my recollection and in my interpretation, to declare how he found my views 'offensive' and to insist that, since 'we are scholars' it could not be that 'positionality' mattered 'more' than 'ideas'. Leaving to one side the fact that I have never thought, said, or written that 'positionality' prevails over 'ideas' — my standpoint is that autobiography inevitably informs comparative scholarship in ways pertaining to indissociability rather than hierarchization — I was not-stunned to observe yet again the indigence of comparative law's epistemic ways (along the lines of the gift that keeps giving), to realize that well into the twenty-first century there are senior academics who still take strong exception to the affirmation that the comparatist is irremovable from any report on foreign law no matter how mathematically crafted. Cf [Beckett, S] (2011) [9 March 1949] [Letter to G Duthuit] in *The Letters of Samuel Beckett* Craig, G et al (eds) vol II Cambridge University Press at 136, where Beckett underscores how the

Towards the end of the previous century, then, I contributed a paper to the leading British general-interest law journal.⁵⁸³ This text consisted of a review essay purporting to deconstruct comparative law's orthodox epistemology. My target was a trade publisher's comparative-law primer that threatened, or so I thought, to make successful inroads into the student market in the United Kingdom (where I had recently taught for a few years) and in the Netherlands (where I had just begun to teach after moving from England to a research chair in comparative legal cultures). My critique having appeared in print, I met a chair of comparative law at the ancient English university on the easterly side of the British Isles who gently rebuked me for my text. Lo and behold, my senior colleague's complaint did not address the substance of my reproving appraisal, which he seemed to share. Rather, he thought it regrettable that I should have conferred unto an unmeritorious book such unearned visibility, that I should have rescued a comparatist-at-law from the oblivion where he deserved to remain mired. I can still recall my verecund self being startled upon hearing this reaction — a variation on the theme of *aquila non capit muscas* — as it had not occurred to me that there might be a sound argument to be made for conferring upon poor scholarship critical immunity from the mission to expose and depose. Rather, I had always found it evident that slipshod comparatism had to be denounced and potential readers suitably forewarned. However, my English colleague was impressing upon me that the intertextual dynamics at stake featured more complexity — and possibly more wisdom — than I had allowed. Whether with respect to my subsequent writing or by reference to my teaching over the many years and in the even more numerous countries, I have often thought about the conundrum that my fellow comparatist kindly raised with me, and I remain grateful to him for having drawn my early-career attention to such a vexing dilemma. Yet, more than a quarter century later, *je persiste et signe*: again, I am raising the academic profile of a woefully undeserving publication, this time in deliberate defiance of the wise counsel that I am receiving from various friends agreeing with the guidance I elicited back in the day.⁵⁸⁴

Why, then, can I not bring myself to listen to the well-meaning academics around me, whose judgement I otherwise trust? Why am I unable simply to look away and spare myself weeks of close reading and months of writing attunement as I ponder a text that I find utterly disappointing, that I actually resent trying to fathom? Why do I not rather turn to the rewarding books piling on tables and floors all around me, whether in Arles or Paris, patiently awaiting reading time — every deferred interaction the postponement of a fierce and unremitting longing constantly to deepen and expand my education in a desperate attempt to overcome my boorish Québec years, the place where I started from the wrong

artist is incapable of being 'in front of' ('devant') his art. As I adduce a quotation from Beckett's, and still thinking of Ginsburg, I am minded to refer once more to my most inspiring novelist and playwright in Beckett, S [1984] (1955) 'Henri Hayden, homme-peintre' in *Disjecta* Cohn, R (ed) Grove at 146: 'It is not at the end of its heyday, the crisis subject-object' ['Elle n'est pas au bout de ses beaux jours, la crise sujet-objet']. Writing in 1955, could Beckett have appreciated how eighty years later he would be in a position to repeat himself?

⁵⁸³ I refer to Legrand, P (1995) 'Comparative Legal Studies and Commitment to Theory' (58) *Modern Law Review* 262.

⁵⁸⁴ I am, in fact, a multiple recidivist. See Legrand, P (2020) 'Kischel's Comparative Law: *Fortschritt ohne Fortschritt*' supra note 400.

place ('Québec ma terre amère').⁵⁸⁵ Why do I not spend even more daily hours in the company of our two Camargues? After all, as any resolute Benthamite would remind me, a detailed review of an already-published book can only generate so much consequential utility in the sense at least that it cannot make the bungled publication disappear: a text is inherently contumacious. And then, there is the field of comparative law as I have lived through it over the decades, an experience on the basis of which I fully expect my critique to fall into the most soundless of voids (not least in terms of the VSI's predictable co-authorial imperviousness). Comparative law listens only to voices that tell comparatists what they want to hear — the corroborative views, the clement opinions.⁵⁸⁶ In

⁵⁸⁵ Miron, G (1999) [1970] *Compagnon des Amériques* in *L'Homme rapaillé* Beaudet, M-A (ed) Gallimard at 101. This verse is from a celebrated Québec poet, Gaston Miron (1928–96). As he refers to his wretched and distressing homeland, Miron observes that this territory also gave him his mother. The double entendre and alliteration are untranslatable into English. With respect to my Québec upbringing and education, as regards my *deprivation*, I readily adopt and adapt Beauvoir's exclamation, 'J'ai été floué' ('I was cheated'): Beauvoir, S de (2018) [1963] *La Force des choses* in *Mémoires* Jeannelle, J-L and Lecarme-Tabone (eds) vol II Gallimard at 380.

⁵⁸⁶ The unwillingness of comparatists to accommodate critique can prove almost comical. Consider Hirschl, R (2014) *Comparative Matters: The Renaissance of Comparative Constitutional Law* Oxford University Press. In this book, to my knowledge easily the most sophisticated discussion of comparative constitutional law's theoretical predicament, Ran Hirschl produces a shattering critique of comparative constitutionalism's scholarly ways. It is fair to say that this protestation is very much the leitmotiv of the entire text, and it is also proper to observe that Hirschl's critique is conducted in strong language. For Hirschl, law's comparative constitutionalism thus lacks 'theoretical elevation and coherence': id at 224. Accordingly, the author rebukes 'the field's ambivalence, if not outright reluctance, with respect to theory-building through causal inference': ibid. He adds that 'comparative constitutional law often overlooks (or is unaware of) the methodological principles of controlled comparison, research design, and case selection deployed in the human sciences': ibid. Hirschl also writes that 'comparative constitutional law, as a method and a project, remains under-theorized and blurry': id at 278. Indeed, 'the field of comparative constitutional law remains quite eclectic, and continues to lack coherent methodological and epistemological foundations': ibid. The fact is that 'the scholarship produced by legal academics often overlooks (or is unaware of) basic methodological principles of controlled comparison, research design, and case selection': id at 224. Alas, Hirschl's rejoinder fits within a theoretical system whose tropism towards scientificity troubles me, an issue that I have addressed elsewhere (see Legrand, P *Negative Comparative Law: A Strong Programme for Weak Thought* supra note 54 at 101–2). What I aim to emphasize at this juncture, however, is the robustness of Hirschl's critique — which puts me in the mind of a conversation I had with the late Karen Knop when we were both visiting at Georgetown University in 2011. As I was remarking on the effervescence surrounding comparative constitutionalism, she exclaimed 'It's such a throwback.' Now, against the background of the damnable comments of Hirschl's that I have quoted (my selection being far from exhaustive) one would have legitimately expected that when *Comparative Matters* proceeded to an examination of the work of two dozen comparatists or so, the individuals Hirschl regards as the leading voices in comparative constitutional law — therefore, inevitably, the very persons responsible for having ambushed comparative constitutionalism into the parlous state that he so insistently chastises — the general observations would have become more specific so that readers would have learned, for example, who was showing 'outright reluctance' towards theory, who was 'overlook[ing] [...] basic methodological principles', and so forth. In other words, one would have thought that Hirschl would have been connecting the dots, if only for his readers' benefit. But comparative law intensely dislikes an opprobrious critique that purports to name names, and Hirschl had evidently internalized the field's expectations. It follows that Hirschl's readership is treated to a profound contradiction as the author, having roundly dismissed comparative constitutional law on account of its major theoretical failings, then proceeds to term the various texts that he discusses '[g]reat', 'thoughtful', 'effective', 'detailed', 'seminal', 'careful[ly]', 'most valuable', 'meticulous', 'carefully crafted', and 'thorough'. One text in particular is said to offer a 'good substantive illustration'. Others are 'enrich[ing]', 'successful[ly]', 'nuanced', 'high-quality', 'useful', 'ample', 'impressive', 'exemplar[y]', 'majestic', 'impressive' (again), 'most sophisticated', 'effective', 'effective' (again), 'effective' (yet again), 'innovativ[e]', 'effective' (once more), 'thorough' (one more time), 'detailed' (*bis*), 'successful' (again), 'methodologically astute', 'most influential', 'influential', 'most prominent', 'powerful', 'notable', and 'pioneering'. One further text constitutes 'a major development', another is 'impressive' (once more) while yet another is 'open[ing] up entirely new possibilities'. Finally, two works are 'captivating' and, yes,

particular, electing to trudge in their miasma of deceit, self-pity, and wishful thinking, comparatists do not want to hearken to negative critique. And so it remains that '[c]omparative law languishes in a narrow dungeon of its own construction, deprived of light and air by a perversely constricted academic vision'.⁵⁸⁷ (Fully twenty-five years after such a sharp pronouncement, it ought to be most concerning how the VSI manages to keep this utterance's asperity thoroughly current and its measure of comparative law's fluttery heartbeat scrupulously topical.) To the extent that introspection can permit me to discern a cogent explanation justifying my drive — and to make sense of what can almost appear as an iraphiliac fixation with the pursuit of my adversarial claims in favour of an epistemic rupture within comparative law — I hold that any try at vindication must give pride of place to the late Bernard Rudden's deep influence on my life as a comparatist.

Rudden — *Professor* Rudden — generously agreed to supervise my dissertation during my postgraduate years at Oxford. Having landed in the midst of the nightmarish spires under a wildly implausible set of circumstances straight from an utterly philistine francophone outpost, I was Rudden's intrepid student for nearly four years in the 1980s. Barring impossibility on his part (my own were not considered to qualify), we met on Friday mornings at 9h30 so that he could annihilate the week's work and provide me with my marching orders for the next few days ('copy' would have to be ready by the next Thursday afternoon). A don of the old stripe, Rudden was a hard man: hard to please, hard to outwit, hard to reach, hard to know, and hard to like. (I long felt that if it had been pronounced to rhyme with 'rude', his surname would have proved suitably aptronymic.) Exhilarations were rarissime, to say the least, effulgent smiles non-existent. Yet, through the accumulation of brutal Friday sessions, Rudden provided the most solid of scholarly foundations for my education in comparative law and in the life of the mind more generally. I can still see him, tweeded and valiant, briskly crossing the law library at opening time on his way to the 'Typing Room', which he had somehow appropriated and converted into his personal office. And his crisp and caustic voice continues to resound within me. I can picture myself to this day being browbeaten into abiding adhesion to the non-negotiable imperatives of intellectual rigour that he had been painstakingly articulating and promulgating to successive cohorts of students and that he was now at least as determinedly foisting unto me.

It is not that Rudden did not suffer fools gladly; it is rather that he did not suffer them at all. And by no means did he take anything but an ecumenical view of the relevant category. To say that he was impatient with slowness and stupidity is to put the matter in very magnanimous terms. Expectedly, his publications were

'effective'. (All forty-two quotations within my enumeration are from Hirschl, R *Comparative Matters* supra at 232–77.) Who, then, are the mysterious comparatists attracting so much reproach and coming under such vehement attack throughout *Comparative Matters*? Who, then, are the comparatists whose work 'entails seemingly unsystematic — and at times scant and superficial — reference to foreign constitutional jurisprudence' (id at 237), whose '[c]ase selection is seldom systematic [...] and rarely pays due attention to [...] context and nuances' (ibid)? Within dainty comparative law, it would be at once impolitic and uncollegial to say. Hirschl, Bartleby-like, therefore prefers not to.

⁵⁸⁷ Merryman, JH (1998) 'Comparative Law Scholarship' (21) *Hastings International and Comparative Law Review* 771 at 784.

not for the faint of heart.⁵⁸⁸ Rudden's unswerving allegiance to the scholarly guise that he served with paramount intellectual and moral integrity as Professor of Comparative Law in the University of Oxford left an indelible mark on me that I remain proud to acknowledge with unbounded gratitude (which is one reason also why I have observed with as much incredulity as sadness the extraordinary institutional *abasement* to which the Oxford chair of comparative law has been relentlessly subjected over the past quarter century). A four-year exposure or so to Bernard Rudden's razor-sharp and scathing critical sensibility, to his probity, continues to rank as a most consequential and edifying episode within my academic *peregrinatio*.⁵⁸⁹ (I have intimations of Rudden's spirit circling like a silent falcon in the skies above the St Cross Building and Holywell Cemetery.)

What, then, did Rudden think? Before all else, I must emphasize that he was not in the least attracted to any ostentation of discipleship. Accordingly, he spared me intellectual thrallism — an attitude on his part that has to qualify as one of my most important strokes of luck. While he would accompany the writing of my dissertation, there would be no indoctrination: 'I'm not here to tell you what you think', he once bristled (I had naively sought some intellectual guidance). I would therefore bear responsibility for my thoughts, such as they were. And rather than inherit my conception of comparative law, I would have to fabricate it for myself — to engage in my own bricolage. Try as I may, I cannot recall Rudden purporting to enforce his ideas, whether pertaining to law or to the comparison of laws, with one striking exception: any translation had absolutely to be checked against the original (and these were pre-Internet days). Nor do I remember Rudden assigning specific readings. How, then, did he acquit himself of his supervisory duties? Significantly, I would say, Rudden taught me what Paul Ricœur had already styled the hermeneutics of 'suspicion'.⁵⁹⁰ I was not to take any assertion for granted, any statement at face value: no text was any proof against its readership. Although Rudden would not have deployed the term, not yet so fashionable in any event, I was to deconstruct — that is, dismantle, unbuild, disassemble — the claims that I read in order to assess their merit. And if they showed themselves to be unworthy, I had quite simply to 'scunner' at them and pursue prompt obliteration ('to scunner' is an ancient Scottish verb — Rudden was from Carlisle in the North-West of England — evoking revulsion or disgust).

'In the tradition of the greatest masters of all time', critique, I was plainly given to understand, was 'above all negative'.⁵⁹¹ The basic difference thus applied between deconstructive or negative critique, on one hand, and constructive critique or critique *tout court*, on the other. In effect, 'constructive criticism

⁵⁸⁸ Eg: Rudden, B (1985) *The New River: A Legal History* Oxford University Press; Rudden, B (1994) 'Things as Things and Things as Wealth' (14) *Oxford Journal of Legal Studies* 81; Rudden, B (2006) 'Matter Matters' in Endicott, T (ed) *Properties of Law* Oxford University Press at 367–79; Rudden, B (1999) 'The Gentleman's Agreement in Legal Theory and in Modern Practice' (7) *European Review of Private Law* 199; Rudden, B (1992) 'Torticles' (6/7) *Tulane European and Civil Law Forum* 105; Rudden, B (1984) 'For the First Gravedigger' (100) *Law Quarterly Review* 540; Rudden, B 'Equity as Alibi' *supra* note 370.

⁵⁸⁹ For further discussion, see Legrand, P *Negative Comparative Law: A Strong Programme for Weak Thought* *supra* note 54 at 327–40 and 369n135.

⁵⁹⁰ Ricœur drew a dichotomy between a hermeneutics of 'suspicion' ('suspçon') and a hermeneutics of 'faith' ('foi'). See Ricœur, P (1965) *De l'interprétation* Éditions du Seuil 29–44.

⁵⁹¹ Tucci, N (1949) 'The Fallacy of Constructive Criticism' (16/11) *Partisan Review* 1102 at 1105.

[...] [wa]s [...] "criticism within the system" — an order that such critique conservatively reaffirmed on the assumption that the governors of thought could correct their errors — 'as opposed to "criticism of the system"', which was potentially transformative of existing practices.⁵⁹² If you will, '[c]onstructiveness [wa]s [...] the political or philosophical equivalent of the happy ending in the movies or in magazine stories' even as '[a] negation st[ood] by itself in its own right.'⁵⁹³ For my educational benefit, the parallel was drawn with the way a gardener appreciates the necessity for weeding: the exercise has to mean the eradication of the weeds.

Consider comparative law's long authoritative epistemic norms (representation, objectivity, truth, and subjectivity): constructive critique holds that the practices informing the comparison of laws fall short of honouring the field's ideals and calls attention to these discrepancies meanwhile consolidating the ideals at stake (not that approach to objectivity but this one, not that method but this one...). For its part, negative critique challenges the governing standards themselves (no objectivity, no method...). Otherwise said, I was taught that there is critique and critique, that one can opt for ultimately sterile gentility or struggle to write with resplendent clarity and meticulous candour, to be resoundingly honest, without the brakes of nicety. Observe moreover, along with the OED, that 'nice' connects etymologically with 'foolish, simple, ignorant'; now, who would want one's critique to be 'foolish, simple, ignorant' — benighted? I can most confidently answer: certainly not Bernard Rudden.

Not a fleering settling of scores, negative critique within comparative law is a necessary discommodating art form channelling indignation and condemnation *on behalf of comparative law*. It follows that the individual feelings of those being reproached on account of their incompetent striving are properly irrelevant. '[L]oyalty in a critic is corruption' is thus George Bernard Shaw's richly thought-provoking apophthegm.⁵⁹⁴ It seems manifest that Shaw did not have in mind venality or outright misfeasance, but the abandonment of a higher good (such as comparative law) for a lower one (like personal emotions). This difference is information that Shaw appositely imparts to the comparatist. Such insight is what the comparatist's own sense of rectitude should readily be telling him. Even as I find that the role of Jeremiah cannot be a convivial part to play, and even as I would much rather be brushing Biscoia or cleaning Grégaou's hooves (the unassuming pocket-size and vinyl-handle 'Lincoln' hoof pick proving optimally serviceable, bright red my favourite colour), I am determined not to allow my jadedness with a stance of opposition get the better of me. The obvious danger liable to afflict the comparatist having to overcome quotidian wariness in the face of epistemic simplism is a relaxation of critical benchmarks, which disconcertingly under-theorised comparative law patently cannot afford: the field emphatically needs more theoretical sophistication. The sense of surrender I would feel if I had not written this review about the grey and destitute VSI is accordingly much stronger than the forceful vexation that accompanies me in the crafting of my commentary; it may be that no unexamined life is worth

⁵⁹² Id at 1110.

⁵⁹³ Id at 1106 and 1108.

⁵⁹⁴ Shaw, [GJB (1952) [1897] 'Ghosts at the Jubilee' in *Plays and Players: Essays on the Theater* Ward, AC (ed) Oxford University Press at 257.

living, but it is certainly the case that no unexamined comparative law is worth introducing — not even very shortly.

I accept that there are comparatists-at-law who will not be prepared to credit someone who contends to be exerting himself towards some vision of intellectual refinement and moral sincerity before anything else. For the vagrant spew of opinion, such words may sound strained and self-conscious. Reserving the student minds that I have helped contemplate the comparison of laws differently, my negative critique of the VSI will in all likelihood enhance my renown for acrimony and cynicism, a hostile scowler ranting against the party to which he has not been invited (unless I be ascribed the persona of the iconoclastic Puritan scolding sinners with a craggy finger). Apart from being most firmly persuaded that '[b]ad comparative law is worse than none',⁵⁹⁵ from exhibiting negative resilience, and from confirming that my faithfulness to comparative law other-wise (to a different comparative law that mobilizes enhanced wisdom towards otherness-in-the-law) is genuine, I continue to feel duty-bound explicitly and combatively to indict comparative law's delinquent lamestream from my marginal vantage point. (However, let it be recalled and saluted that I often commended clever comparative work over the ten years, from 2006 until 2015, during which I wrote a regular 'Noted Publications' section in the *Journal of Comparative Law*.⁵⁹⁶) Not only have I been aiming to open the door to worldly comparative law, but I have sought to close the door to the pedestrian mode of comparison that the VSI sees so fit to uphold.⁵⁹⁷ (Over the last three decades, my plaint arguing a displacement from stale actuality to fresh possibility has generated the full gamut of reactions not to mention the occasional insult. Most lamentably, I think, some comparatists have opted for wholesale cancellation — without, then, the least engagement — on the oh-so-convenient ground that they thought my tone too antagonistic or too strident or too whatever-justified-in-their-mind-their-excluding-motion. Quære: is this the VSI's reason also? Verve

⁵⁹⁵ Koschaker, P (1936) 'Was wermag die vergleichende Rechtswissenschaft zur Indogermanenfrage beizusteuern?' in Arntz, H (ed) *Germanen und Indogermanen: Festschrift für Herman Hirt* vol I Winter at 150 ['Schlechte Rechtsvergleichung ist schlimmer als keine']. While I do not purport to deny Paul Koschaker's scholarly eminence, which I would be incompetent to assess in any event, I admit that this Romanist and historian is not on my radar screen. My interest in the quotation I adduce therefore arises from the significance of the message rather than the authority of the messenger. For what I regard as an excellent assessment of Koschaker's accommodating and opportunistic behaviour during the Nazi era, see Giaro, T (2019) 'Les troubles de la mémoire: Koschaker, redécouvert et expurgé' (6/2) *Grief* 73. Tomasz Giaro's text is a review of the problematic Beggio, T (2018) *Paul Koschaker (1879–1951)* Winter. Writing in a different era and thus using different language, Goethe also took the view that comparative studies are emphatically not for everyone. I refer to Goethe, [JW von] (1907) [1829] *Maximen und Reflexionen* Hecker, M (ed) in *Schriften der Goethe-Gesellschaft* Schmidt, E and Suphan, B (eds) vol XXI Verlag der Goethe-Gesellschaft §492 at 106–7: 'The educated scholar should compare [...]; the admirer [...] improves himself best when he does not compare, but considers each contribution individually' ['Der ausgebildete Kenner soll vergleichen (...); der Liebhaber (...) fördert sich am besten, wenn er nicht vergleicht, sondern jedes Verdienst einzeln betrachtet']. Although collected in the posthumous *Maximen und Reflexionen* from 1833 (Goethe died in 1832) — a title that instantly evokes La Rochefoucauld's 1665 *Réflexions ou sentences et maximes morales* — this excerpt is taken from *Wilhelm Meisters Wanderjahre*.

⁵⁹⁶ For a further laudatory review, see Legrand, P (2022) 'On Comparative Law's Repressed Colonial Governance' (70) *American Journal of Comparative Law* 884.

⁵⁹⁷ For a compelling philosophical argument in favour of the primacy of possibility over actuality, of the prioritization of redemption, with specific reference to the thought of Adorno and Heidegger, two of my principal sources of inspiration, see Macdonald, I (2019) *What Would Be Different* Stanford University Press.

or torque having nothing whatsoever to do with material warrant, however, such shirking of intellectual responsibility, such *cowardice* in fact, could only eschew at a stroke, every time, the abiding academic requirement to come to terms with the gist of an argument on its substantive merits. *Ita sit* — and, frankly and most fortunately, ‘I am not concerned with securing acceptance and understanding for my work’.⁵⁹⁸)

Of course, I can appreciate how the mythoclastic character of my work would have produced the malaise and enervation that I have been sensing within comparative law as I faced the steadfast refusal of comparatists to recognize cognitive realities they perceive as traumatic, on one hand, and as I encountered in response to my unrequited insights the insistent peddling of so many perversions about the ways of intellectual activity, on the other (think representation, objectivity, truth, and subjectivity — or rots).⁵⁹⁹ After all, who wants the ordinary state of epistemic affairs disordered? Who wants to have their German-compatible mental hard-drive wiped clean? ‘I overstand you, you understand.’⁶⁰⁰

The deceptions that orthodox comparatists and their followers have been wanting to preserve include the grand epistemic illusions that one can understand foreign law and recount it as it is, exactly, in words of one’s own choosing, that if only one will be scientific enough — methodical — one can produce an accurate representation of foreignness, a mimetic statement of the foreign at once objective and true. Comparatists have been conserving further fairy-tales to the effect that foreign law, although a human construction, would inexplicably take the form of an a-cultural phenomenon, that it would *par extraordinaire* exist on some transcendental plane beyond culture. There is more, for orthodox comparatists and their proponents have also been protecting the unsubstantiated (and yet so widespread) claim that somehow laws would not differ inter se in any material manner, that such mimesis would allow laws to travel across borders seamlessly and embed themselves into another *corpus juris* without the need for any meaningful transformation along the jocund way — so much so that one could refer to the process as a ‘transplant’ (think of the geranium getting from the small blue pot into the larger brown pot *tel quel* or of Greta’s heart being inserted into Bianca’s body *an sich*). And comparatists have been sustaining the most implausible view that they themselves would intervene within foreign law as a-cultural entities, individuals (improbably) not having been raised and educated anywhere in particular, (unthinkably) not having attended law school anywhere specific, and (unimaginably) not having been trained in comparative law by any identifiable person, thus able to approach foreignness without the least epistemic inclination whatsoever.

I maintain that comparative law has neglected the primordial question of what it means to be a human being seeking to know foreignness (comparatists *are* human beings seeking to know foreignness). Not only is it the case that comparatists do not appear to know as a fact what they are (cognitive human

⁵⁹⁸ [Beckett, S] (2014) [1 April 1958] [Letter to M Horovitz] in *The Letters of Samuel Beckett* Craig, G et al (eds) vol III Cambridge University Press at 122.

⁵⁹⁹ For my critique of rots, see *infra* at 407–12. A more extensive argument is in Legrand, P (2023) ‘Negative Comparative Law: The Sanitization Enterprise’ *supra* note 19.

⁶⁰⁰ Joyce, J (2012) [1939] *Finnegans Wake* Henkes, R-J; Bindervoet, E and Fordham, F (eds) Oxford University Press at 444.

beings), but it is worse for they do not seem to know that they do not know this fact. Comparative law has therefore left unaddressed (and thus unanswered) the question concerning how the human mind's capacity for rational reflection and wilful action operates to try and secure its cognitive results and why this underwriting enterprise must founder, why it must fail to bridge the abyss between world and word. Indeed, the established, common, and remarkably durable view in force amongst comparatists is that the applicable epistemic dynamic is such as to permit comparative law to act as a representational practice, that is, to allow the comparatist to access foreign law-worlds and build neutral descriptions thereof provided he is prepared to resort to properly scientific tools and mobilize these instruments genuinely scientifically (that is, methodically) — such motions ultimately resting under the comparatist's spontaneous control and turning on his specific earnestness: 'It's enough to will it, I'll will it.'⁶⁰¹

This picture has been holding comparative law captive, and it holds the disciplined VSI captive, preventing both comparative law and the VSI from properly understanding the way the comparing mind actually works. Arguably comparative law's longest error, this misapprehension of the constitutive conditions of apprehension of foreignness inhabits and underlies the comparison of laws before any theory, as a background assumption that has come to seem so obvious, so unquestionable, that it thoroughly informs comparative practice even as it remains unprobed and unsustainable. The product of an obsolete and pernicious if immensely influential Cartesian mindset, a world-view with a strong air of chalk dust and mahogany about it that would have both individuals and the laws they study ablating themselves from cultural prejudice, this less-than-whelming configuration distorts understanding while its prevalence prevents comparatists from acknowledging the profound inadequacy of the governing epistemic framework to what it means to negotiate with foreign law, with the foreign, with the other-in-the-law, with the other — to the jagged unfolding of comparison.

Consider once more the powerful and enduring myth within comparative law that the comparatist would be or ought to be a non-cultured, fully autonomous, completely agential individual enjoying total capacity for self-governance independently from any external power structure, someone who could be thinking objectively and truthfully over or above foreign law-worlds, themselves consisting of non-cultured laws. At the very least, the cultural facet would not carry legal significance and could therefore be excluded from the reach of comparative legal studies. The neurophysiological facts of the matter, however, are that '[c]ulture is part of biology' and that '[c]ulture is crucial for understanding human behavior' — whether one is contemplating the making of the comparatist or envisaging the fabrication of foreign law.⁶⁰² Pace Descartes, then, '[t]he "subject" [...] does not exist if one means by that some sovereign solitude [...]. The subject [...] is a *system* of relations between layers: [...] mental, society, world. Within this scene, the punctual simplicity of the classical subject

⁶⁰¹ Beckett, S (2010) [1967] *Texts for Nothing* in *Texts for Nothing and Other Prose, 1950–1976* Nixon, M (ed) Faber & Faber at 11. In effect, the comparatist-at-law would be implementing the Cartesian 'central executive' assumption: Clark, A (1997) *Being There: Putting Brain, Body, and World Together Again* MIT Press at 140.

⁶⁰² Richerson, PJ and Boyd, R (2005) *Not by Genes Alone* University of Chicago Press at 4 and 3 [emphasis omitted].

is nowhere to be found.⁶⁰³ To be sure, Heidegger baldly renounced the word altogether.

The comparatist *is* unreservedly encultured: he *is* a cultural product; having been springed by culture, he exists *as* cultural output.⁶⁰⁴ To enunciate the matter economically, culture takes the form of a normative framework, of a structure of governance (there is accordingly the significance-establishing role of culture), which means that the comparatist always-already finds himself located in a meaningful world providing him with his adjudicative bearings. For instance, envisage 'legal language, legal reasoning, legal argument and legal justification'.⁶⁰⁵ (More complicatedly, consider protean perceptions, inchoate awareness, and unconscious assumptions.) The comparatist's legal mind was always-already fashioned, shaped, constructed — it was edified — culturally: it was framed.

Thus, the English jurist was thrown into an English legal education that taught him about the doctrine of precedent and the royal prerogative. Meanwhile, the US jurist was thrown into a US legal education that taught him about the doctrine of precedent and strict scrutiny, but not about the royal prerogative. For his part, the French jurist was thrown into a French legal education that did not teach him about the doctrine of precedent, the royal prerogative, or strict scrutiny. But then, it taught him about codification and the 'partie civile'. (Under French law, the victim of a crime can choose to join the criminal proceedings — thus make himself into a 'partie civile' — so as to claim civil damages. This strategy entitles the victim to various evidentiary and procedural benefits.) These learning experiences are constitutive: they make the jurist into who he is and, if he should ever rebrand himself as a comparatist (the comparative bifurcation is structurally an event subsequent to the learning of one's first law), they provide him with the equipment against which he will attempt to make sense of foreign law. The comparatist's mind is thus antecedently saddled and organized. ('Is there a single word of mine in all I say?', asks a Beckett character.⁶⁰⁶) And one does not wrest oneself free, ever. (Think of legal culture as verdict: it befalls one, even as one is hardly conscious of the process.⁶⁰⁷) For instance, the French jurist can never make it such that he will not have been thrown into a French legal education that did not teach him about the doctrine of precedent, the royal

⁶⁰³ Derrida, J (1967) *L'Écriture et la différence* Editions du Seuil at 335 ['(l)e "sujet" (...) n'existe pas si l'on entend par là quelque solitude souveraine (...). Le sujet (...) est un système de rapports entre les couches (...) du psychique, de la société, du monde. A l'intérieur de cette scène, la simplicité ponctuelle du sujet classique est introuvable']. Cf Wittgenstein, L *Tractatus Logico-Philosophicus* supra note 3 §5.631 at 151: 'The thinking, presenting subject; there is no such thing' ['Das denkende, vorstellende, Subjekt gibt es nicht']; Fish, S (2015) *Think Again* Princeton University Press at 100: 'The "I" or subject, rather than being the freestanding originator and master of its own thoughts and perceptions, is a space traversed and constituted — given a transitory, ever-shifting shape — by ideas, vocabularies, schemes, models, and distinctions that precede it, fill it, and give it (textual) being.' In Rodolphe Gasché's words, '[s]ubjective reading, thus, is not subjective': Gasché, R (1998) *The Wild Card of Reading* Harvard University Press at 228. Adde: Beckett, S *The Unnamable* supra note 20 at 123: 'I, who cannot be I.'

⁶⁰⁴ Cf Rosen, L *The Rights of Groups* supra note 96 at 116: 'We are creatures of culture.'

⁶⁰⁵ Wilson, G (1987) 'English Legal Scholarship' (50) *Modern Law Review* 818 at 845.

⁶⁰⁶ Beckett, S *The Unnamable* supra note 20 at 61.

⁶⁰⁷ I draw on Erixon, D (2020) [2013] *La Société comme verdict* at 140.

prerogative, or strict scrutiny. And the US jurist can never change the fact that he will not have been taught to appreciate the royal prerogative.

It follows that when the English, US, or French jurist eventually comes to foreign law, he can never approach it from a clean slate or a blank page. And the presence of this cultural baggage, of these cultural encumbrances — simultaneously enabling since culture also provides a template to facilitate an appreciation for circumstances and things — must mean that the jurist will inevitably see foreign law through his encultured juridical eyes. Typically, the French jurist will wonder how English law can manage without a civil code. And the US jurist will characteristically marvel at the quaintness of the royal prerogative. If you will, foreignness must find itself being assessed relatively. When the US jurist exclaims at the eccentricity of the royal prerogative, he is inevitably doing so by reference to the normative model into which he himself has been thrown upon arrival at his US law school — which, of course, does not feature any governing significance being ascribed to the royal prerogative. Ultimately, the US jurist's self-in-the-law cannot meaningfully exist apart from culture, out of culture, beyond culture — any fantasy evoking a comparatist who would be 'untethered',⁶⁰⁸ 'free-floating',⁶⁰⁹ being devoid of all tenability (the Cartesian belief in methodical or pseudo-scientific modalities of deculturation notwithstanding). Effectively, the self-in-the law belongs to culture more than culture belongs to it: the US jurist cannot fashion strict scrutiny his way; instead he must operate *their* way (he must address strict scrutiny the way *it* is done).⁶¹⁰ It is key to emphasize how the jurist/comparatist's ordinary epistemic situation does not as a matter of course allow for cognizance to form other than through inheritance: it builds on deep foundations of pre-judgement, on sets of deeply-ingrained preferences and aversions into which one has been thrown.⁶¹¹ *No gaze is aloof.*

Now, although it is also assumed, still in the best senescent Cartesian epistemic tradition, that foreign law would be or ought to be non-cultured, the doctrine of precedent, the royal prerogative, strict scrutiny, codification, and the 'partie civile' all exist as thoroughly encultured entities: like the comparatist, these legal tenets have not fallen from the skies, and they each feature a local history, they each address local politics, they each convey a local philosophical commitment, they each cater to a local society, they each strike a local economic compromise, they each instantiate a local epistemology — and, not least, they are each written in a local language. If you will, the doctrine of precedent, the royal prerogative, strict

⁶⁰⁸ Law, J (2015) 'What's Wrong With a One-World World?' (16) *Distinktion* 127 at 130.

⁶⁰⁹ Heidegger, M *Sein und Zeit* supra note 27 at 339 ['freischwebend'].

⁶¹⁰ Cf Gadamer, H-G *Wahrheit und Methode* supra note 15 at 281: 'History does not belong to us, but we belong to it' ['(D)ie Geschichte (gehört) nicht uns, sondern wir gehören ihr'].

⁶¹¹ Cf id at 295: 'Understanding is to be thought of less as a subjective act than as participating in an event of tradition' ['Das Verstehen ist selber nicht so sehr als eine Handlung der Subjektivität zu denken, sondern als Einrücken in ein Überlieferungsgeschehen'] (emphasis omitted). For refutations of the idea that human cognition would not be culturally constrained, see eg Richerson, PJ and Boyd, R *Not by Genes Alone* supra note 602; Kirmayer, LJ (2020) *Culture, Mind, and Brain* Cambridge University Press; Lende, DH and Downey, G (eds) (2012) *The Encultured Brain* MIT Press; Brekhus, WH (2015) *Culture and Cognition* Polity; Ross, N (2003) *Culture and Cognition* Sage; Wexler, BE (2006) *Brain and Culture* MIT Press; Tomasello, M (1999) *The Cultural Origins of Human Cognition* Harvard University Press; Wheeler, M (2005) *Reconstructing the Cognitive World* MIT Press. See also Marchand, THJ (ed) (2010) *Making Knowledge* Wiley-Blackwell.

scrutiny, codification, and the 'partie civile' all conceal traces of history, politics, philosophy, and so forth, which can be elicited through a tracing exercise at once depending upon the comparatist's sensitivity to foreignness and fostering his enhanced appreciation of it. (Think of the traces I mention as the text's lymphatic system: invisible on the graphical surface, yet so crucially present.) The local construction that has taken place whereby history, politics, philosophy, and so forth have morphed into law — the juridification, the jurimorphing⁶¹² — invites deconstruction so that the comparatist can reveal through tracing the fabric of the foreign law-text-as-textile, its 'making-of', webbed and woven, its haunting, with a view to an enhanced understanding purporting to do interpretive justice to foreignness whose elementary condition is to be in situation somewhere, over there. Crucially, 'the "text" does not reduc[e] itself [...] to the sensible or visible presence of the graphical or of the "literal"'.⁶¹³

The concept of 'culture' readily evokes that of 'world', and 'enculturation' conjures 'worldliness'.⁶¹⁴ It follows that comparative law involves the interaction — not to say the clash — of two worlds: the comparatist's and the foreign law's. More intricately, the tension arises between the comparatist as being-in-the-world and foreign law as a different being-in-the-world, elsewhere, in a different world, then. Note how the sequences of hyphens matter as they purport to convey the way in which worldliness is inherent to the comparatist or to foreign law. The being-in-the-world's 'in' does not allude to something like 'coffee in the cup', which connotes separability. Rather, it suggests a situation such as being in love or being in mourning, each an all-encompassing condition: 'In it and out of it and against it is accomplished all genuine understanding, interpreting, and communicating.'⁶¹⁵ A comparatist cannot not be intrinsically worldly: no comparatist ever emerged in the air, and no comparatist exists in the air either. For its part, foreign law cannot not be worldly: no foreign law ever emerged in the air, and no foreign law exists in the air either. Whether as regards the comparatist or foreign law, there is embeddedness in worldliness, a grounding. Both with respect to the comparatist and foreign law, worldhood is as structural as it is inextinguishable, as inherent as it is embracing. Whether one is addressing a comparatist-in-the-world or a foreign-law-in-the-world, one is contemplating 'a unitary phenomenon', a 'primary finding [that] must be seen as a whole', a situation where there prevails an '[i]ndissolubility' (despite the presence of structurally composite parts such as 'the comparatist'/'the world' and 'foreign law'/'the world').⁶¹⁶ To insist on the matter of conjunction as regards

⁶¹² The term 'jurimorph' is Kyle McGee's: McGee, K (2015) 'On Devices and Logics of Legal Sense: Toward Socio-Technical Legal Analysis' in McGee, K (ed) *Latour and the Passage of Law* Edinburgh University Press at 61–92.

⁶¹³ Derrida, J (1972) *Positions* Editions de Minuit at 87–88 ['le "texte" ne se rédui(t) pas (...) à la présence sensible ou visible du graphique ou du "littéral"']. For an extensive discussion of traces and tracing, see Legrand, P *The Negative Turn in Comparative Law* supra note 73 at 262–315.

⁶¹⁴ Heidegger expressly connects what he styles 'intra-worldliness' ('Innerweltlichkeit') with 'culture' ('Kultur'): Heidegger, M *Die Grundprobleme der Phänomenologie* supra note 564 at 241.

⁶¹⁵ Heidegger, M *Sein und Zeit* supra note 27 at 169 ['In ihr und aus ihr und gegen sie vollzieht sich alles echte Verstehen, Auslegen und Mitteilen'].

⁶¹⁶ Id at 53 ['ein einheitliches Phänomen'; 'primäre Befund muß im Ganzen gesehen werden'; 'Unauflösbarkeit'].

the comparatist-at-law, for instance, '[s]elf and world are not two beings, like subject and object.'⁶¹⁷

And it is emphatically not that the comparatist's world is epistemically superior to foreign law's. It is a serious mistake, for example, to presume, in Cartesian fashion or along orthodox comparative law's unthinking epistemic lines, that the comparatist is able to exercise cognitive control or mastery over foreign law.⁶¹⁸ Indeed — and this empirical fact is epistemically key — there is a gap between the two worlds: one world (the comparatist's) is here and the other world (the foreign law's) is there. The interval may be small — an imperceptible slit, perhaps 'the merest hand's-breadth of air'⁶¹⁹ — but it is present, and it *must* be present for there to be more than one world. (Helpfully, I think, the German language draws the opposition between *Grund*, of which there is none filling the emptiness between self and other, and *Abgrund*, the void.) The neural challenge that the comparatist must tackle is therefore to understand a law-world that is other than his, a law-world that is different from his, a law-world that is located elsewhere than his, at a distance from his, at a distance historical, political, philosophical, social, economic, epistemic, linguistic, and so forth — cultural! An acknowledgement of the incompressibility of distance (otherness and spatiality cannot be dissociated) is crucial to the appreciation of the self-and-other dynamics: the presence of the hiatus means that the self cannot be the other, which entails that the comparatist's apprehension of foreign law unavoidably takes place at one remove. (Ultimately, I can only imagine *me* being my friend and not my friend being my friend.⁶²⁰) Each occurrence of alleged understanding must therefore ultimately rank as 'a not-understanding'.⁶²¹ Yes. There is what the comparatist cannot know of foreign law — there is the secret that foreign law keeps from the comparatist, there is foreign law's resistance to the comparatist's disclosure. There is, in this paramount sense, 'the priority of the object'.⁶²² And this is how, Descartes notwithstanding, the comparatist cannot

⁶¹⁷ Heidegger, M *Die Grundprobleme der Phänomenologie* supra note 564 at 422 ['Selbst und Welt sind nicht zwei Seiende, wie Subjekt und Objekt'].

⁶¹⁸ I elicit various aspects of orthodox comparative law's Cartesianism in Legrand, P (2005) 'Paradoxically, Derrida: For a Comparative Legal Studies' (27) *Cardozo Law Review* 631 at 645–54.

⁶¹⁹ Beckett, S *Murphy* supra note 467 at 155.

⁶²⁰ Cf Nagel, T (1979) *Mortal Questions* Cambridge University Press at 169, where Thomas Nagel famously distinguishes between 'what it would be like for *me* to behave as a bat behaves' and 'what it is like for a *bat* to be a bat'. See also Sperber, D (1996) *Explaining Culture* Blackwell at 58: '[Y]our understanding of what I am saying is not a reproduction in your mind of my thoughts, but the construction of thoughts of your own which are more or less closely related to mine.' Cf Nietzsche, F [1883] *Also sprach Zarathustra* in *Digitale Kritische Gesamtausgabe* Colli, G; Montinari, M and D'Iorio, P (eds) <<http://www.nietzschesource.org/#eKGWB/Za-I-Ziel>> [§]4: 'Never a neighbour understood the other' ['Nie verstand ein Nachbar den andern']. Adde: Beckett, S (2010) [1976] 'Closed Place' in *Fizzles in Texts for Nothing and Other Short Prose, 1950–1976* Nixon, M (ed) Faber & Faber at 147: '[N]o two ever meet.' Throughout my argument, I am marshalling 'self' and 'other' in a phenomenological rather than an ontological sense (and I fully accept the likelihood of a misalignment between the two meanings).

⁶²¹ Cf Humboldt, W von (1907) [1836+] *Über die Verschiedenheit des menschlichen Sprachbaues und ihren Einfluß auf die geistige Entwicklung des Menschengeschlechts in Gesammelte Schriften* Leitzmann, A (ed) vol VII/1 Behr at 64: '[A]ll understanding is [...] always simultaneously a not-understanding' ['Alles Verstehen ist (...) immer zugleich ein Nicht-Verstehen']. This text is Humboldt's 'Kawi-Werk', a monumental study of the Kavi language on the island of Java, which remained incomplete at the time of the author's death in 1835.

⁶²² Adorno, TW (1975) [1966] *Negative Dialektik* Suhrkamp at 184–87 ['(der) Vorrang des

control or master foreign law, ever: foreign law is simply not at the disposal of an objectifying command on the part of the comparatist.

If I were pressed to condense my negative critique into just a few words, I could confidently say that I have been concerning myself with the interaction between the comparatist and foreign law; that I have been aiming to subvert and invert the conception of this process obtaining within orthodox comparative law; and that I have therefore been seeking to move the epistemic cursor away from the primacy of the 'subject', which comparatists-at-law have been erroneously assuming, to that of the 'object', which is *what is the case* (I am deliberately sticking to the classical binary in order to make the range of my epistemic motion as clear as possible). To express myself in Kuhnian terms (although I would not want to suggest for comparative law the slightest measure of scientificity), I could (immodestly) argue that I have been attempting to conduct a paradigm shift — not '[p]our faire remarquer moi',⁶²³ but to make comparative law better attuned to the epistemic predicament that is the case across selfness-in-the-law and otherness-in-the-law and thus to enhance the comparison of laws' intellectual credibility — a most worthy intellectual endeavour given the inherent value of a comparing mindset (at least in its culturalist valence). In terms of the neutralization of the binary opposition subject-object (and thus of the affirmation of the fragility of coexistence), I have indeed sought to take epistemic matters one important step further through a recasting of what would be the 'object's' 'objecthood'.

What I mean is that I have been insisting how the so-called 'object' — say, a foreign law-text — is not in the least of the inert or passive type (figure a table or a mountain), but that it is rather unceasingly under construction, so to speak, such edifying process having to do with the text's structure (it consists of words, which are inherently labile, ever in motion) and also taking the form of the comparatist's interpretive work, interpretation therefore being actively involved in the fashioning of foreignness, in the delineation of foreign law, interpretation being constantly on the move also. In this last regard, I am advocating for an ontological conversion away from (Cartesian) dualism to (Heideggerian) non-dualism: the comparatist-at-law is in the foreign, the comparatist-at-law's account is of the foreign. And the point must no longer be for the comparatist-at-law colonially or imperially to grasp foreignness but rather to allow the foreign

Objekts']. Through the secret, foreignness *lives on* as otherness — a pluralist configuration warranting comparative law's principled rejoicement. And this is why Edouard Glissant defends a 'right to opacity' with a view to the preservation of singularity against assimilation: Glissant, E (1990) *Poétique de la relation* Gallimard at 204 ['droit à l'opacité']. The other-in-the-law is *entitled* to be incompletely understood, thus misunderstood, so as to be saved from appropriation. Yes.

⁶²³ [Duthuit, G] (1948) 'Notes About Contributors' (2) *Transition Forty-Eight* 146 at 147 [emphasis omitted]. Although unattributed, the blurbs are presumably the work of Georges Duthuit, the literary journal's sole editor. Duthuit quotes the explanation that Beckett would have shared, seemingly orally, to explain his then recent decision to switch his writing from English to French. Famously, Beckett's phrase is an incorrect rendition of 'pour me faire remarquer'. Beckett's evidently ungrammatical formulation can only have been deliberate. Whatever the range of reasons why Beckett would have willingly chosen to address Duthuit in improper French, they must include a self-deprecating allusion to his inadequate command of the language. Cf Edwards, M (1992) 'Beckett's French' (1) *Translation and Literature* 68 at 69: '[Beckett] speaks pidgin French here as if to indicate, in a way very much his own, that French written by a foreigner, were it even impeccably correct, is not the same thing as French written by a Frenchman. Without moving in the least, the words change meaning. Beckett's French is not French. There is a gap, a confusion.' In other words, there is difference.

to grasp him, thus transforming foreignness from object of theoretical thinking to source of comparative reflection.⁶²⁴

Traumatic as they may prove for orthodox comparative law, two primordial conclusions must carry from the epistemic configuration obtaining within real-life comparison — from the precedence of the ‘object’, of foreignness, that I defend — one invalidating description, the other disproving knowledge. Because of the rift between self and other, in the absence of any possible traversal from the self to the other across that opening, the cleft being ‘incommensurable with all the attempts at passage, at bridge, at isthmus, at communication, at translation, at trope, and at transfer’,⁶²⁵ the comparatist has no choice but to bring the foreign into his language. However, the comparatist’s word cannot match the foreign law’s world: local word must fall short of foreign world (consider the symbolic fact that vis-à-vis world, word is missing a letter). Whether one is approaching the matter by way of intension or extension, to refer to standard linguistic terminology, no French word can identically convey the English ‘estoppel’, no English word can mimetically render the Mexican ‘amparo’, and no German word can duplicately express the Indonesian ‘adat’: because of the ‘disfaction, [...] désuni, [...] Ungebund, [...] disaggregating, [...] disintegrating, [...] breaking down’, ‘[l]anguage will always be a construction of some kind.’⁶²⁶ Although there is an analysis of language taking place in language, the instrument of investigation is self-language while the focus of investigation is other-language. And there is thus no possibility of an interchangeability across the comparatist’s word and the foreign law-world given the fact that the comparatist’s words and foreign texts are constitutively exterior to one another — which is why, since ‘nothing is namable’ across the space separating word from world,⁶²⁷ given the comparatist-at-law’s structurally doomed effort to overcome the interconnection’s interruption, ‘[w]hat guides me is always untranslatability.’⁶²⁸ For a philosophical statement of this problematique, consider Jean-Luc Nancy’s enunciation: ‘[T]he otherness of the other constitutes precisely that to which recognition itself prohibits access.’⁶²⁹ Theodor Adorno offers a converging

⁶²⁴ Cf Barthes, R (2002) [1977] *Fragments d’un discours amoureux* in *Œuvres complètes* (2nd ed) Marty, E (ed) vol V Editions du Seuil at 285: ‘[H]enceforth, of the other, not to want to seize anything’ [‘(D)orénavant, de l’autre, ne plus rien vouloir saisir’]. For a more extensive reflection on the need for comparatists to reconsider the idea of foreign law as an ‘object’ of study, see Legrand, P (2026) *The Ways of Negative Comparative Law* Routledge at 277–304.

⁶²⁵ Derrida, J *La Bête et le souverain* supra note 553 at 31 [‘incommensurable à toutes les tentatives de passage, de pont, d’isthme, de communication, de traduction, de trope et de transfert’].

⁶²⁶ Jameson, F *The Years of Theory* supra note 22 at 48. For its part, the enumeration that I track is in Beckett, S *Dream of Fair to Middling Women* supra note 33 at 138–39. Meanwhile, ‘intension’ roughly means ‘definition’ while ‘extension’ evokes ‘contents’. Thus, the intension of ‘ship’ could be ‘vehicle for conveyance on water’ whereas its extension could mean ‘cargo ships, passenger ships, battleships, and sailing ships’. My point is that, for example, no French word can identically carry the English ‘estoppel’, whether one is focussing on what ‘estoppel’ means (its definition) or on what it subsumes (its contents).

⁶²⁷ Beckett, S *Texts for Nothing* supra note 601 at 45.

⁶²⁸ Derrida, J (April 2004) ‘Du mot à la vie: un dialogue entre Jacques Derrida et Hélène Cixous’ (Interview with A Armel) *Magazine littéraire* 22 at 26 [‘(c) qui me guide, c’est toujours l’intraductibilité’]. The words are Derrida’s. Cf Cochrane, H (11 April 2025) ‘Mission Impossible’ *The Times Literary Supplement* 1 at 1: ‘Translating Dante is impossible.’ Substitute any other name, any other writer — or any foreign law.

⁶²⁹ Nancy, J-L (1996) *Etre singulier pluriel* Galilée at 101 [‘(L)’altérité de l’autre constitue

insight: 'The interpretation of the found reality and its abolition are connected to each other.'⁶³⁰ And one finds in Beckett an analogous intimation: '[M]y notes have a curious tendency [...] to annihilate all they purport to record.'⁶³¹

Arguably, then, it is not only that the comparatist-at-law cannot describe, but that there is no foreign law to be described anyway since, instead of awaiting collection or harvesting, foreignness is ever emergent, fragile, mutable, and incomplete — contingent. Now, if there can be no description of foreign law, there can therefore be no knowledge of it. Indeed, there can be no foreign law in any meaningful sense. But, as the saying goes, this is quite another matter. It is a matter, however, that I propose to address at once, if briefly.

The indisputable cognitive constraints that I have just indicated — hurdles physiologically unsurmountable no matter how severely the comparatist exerts his rationalist agency in order to overcome them (*ça ne passe pas*)⁶³² — are the pre-eminent empirical limitation around which I must articulate my negative (and stupefying) critique of comparative law: no, understanding cannot be achieved; no, description cannot be had; and no, knowledge cannot be secured. In other words, my negative critique depends upon an unassailable neurophysiological actuality thoroughly informing my argument: that is, the weakness of the comparing mind on account of its cognitive finitude, a deflationary condition affecting its word-wrought representational ability. Yes. While orthodox comparative law refuses to admit the cognitive fact of the weak mind — a treacherous blind spot, an occlusion induced by a collective neurosis — I do not find it possible for my part to overlook this primordial bodily hindrance. And it is not only that comparative law is in the throes of salient cognitive/linguistic limitations regarding understanding, description, and knowledge, but that it is *structured* by these very boundaries as comparatists strain to understand, to describe, and to know, all the while trying to do perspicuous justice to foreignness across the existing fission that must cancel any possibility of fusion (irrespective of how much 'violence' the interpretation of foreignness being propounded would visit on the foreign law-text).⁶³³ In my view, a strong epistemic programme is therefore required so as finally to reckon with the comparatist's weak mind.

No comparatist — not even orthodox Italian comparatists — can experience anything like the simple, direct contact with foreign law that has classically

précisément ce dont la reconnaissance même interdit l'accès'].

⁶³⁰ Adorno, TW (1973) [1931] 'Die Aktualität der Philosophie' in *Philosophische Frühschriften* Tiedemann, R (ed) Suhrkamp at 338 ['Die Deutung der vorgefundenen Wirklichkeit und ihre Aufhebung sind auf einander bezogen'].

⁶³¹ Beckett, S *Malone Dies* supra note 38 at 88.

⁶³² Cf Ponge, F (1999) [1961] 'La pratique de la littérature' in *Méthodes in Œuvres complètes* Beugnot, B (ed) vol I Gallimard at 678: 'I think these two worlds [the world of words and the external world] are watertight, that is to say, without passage from one to the other. One cannot pass' ['(J)e pense que ces deux mondes (le monde des mots et le monde extérieur) sont étanches, c'est-à-dire sans passage de l'un à l'autre. On ne peut pas passer'].

⁶³³ Heidegger, M (2010) [1929] *Kant und das Problem der Metaphysik* Herrmann, F-W von (ed) Klostermann at 202 ['Gewalt']. Famously, Heidegger entered this observation with respect to his controversial interpretation of Kant in the context of his 1929 debate with Ernst Cassirer in Davos (Switzerland), a watershed disputation in the history of Continental philosophy. Bearing in mind that no edition expresses the final word, ever, the definitive text on this *Auseinandersetzung*, on this *Arbeitsgemeinschaft*, has to be Gordon, PE (2010) *Continental Divide* Harvard University Press.

been taken for granted within comparative law. But comparatists have been so schooled in epistemic simplism, for so long and in so many ways, that they can hardly imagine accepting this basic constataion without feeling overwhelmed by the distress of comparative misery. It remains, though, that the foreign law the comparatist's brain actively registers as foreign law is but the incessant projection, the continuous extrapolation, and the unceasing translation out of the law into which the comparatist himself has been encultured. To assert the matter as emphatically as I can: steeped in Cartesianism's grim grooves, orthodox comparatists know not what they are doing. Even as they think they are engaged in an enterprise that they can scientificize through sheer brain-power (and method!), an undertaking they assume can produce scientifically exact reports on foreign law, an initiative they think can generate a writing reliably duplicating foreign law's foreignness, they are not, in fact, able to do anything of the kind. Rather than supply the indisputability or inescapability that would attach to identity, mimesis, or duplication of foreignness, comparatists mired in interpretation — in *their* interpretation, in their *encultured* interpretation, to boot — can only offer a situated re-statement, *theirs*.

No matter how rigorous their research, how strict their writing, how detailed their information, how acute their insights, how extensive their references, comparatists telling about their exploration of foreign law, sharing their conclusions by way of a conference or publication, are involved in narrativization and persuasion, in argumentation and vindication — all such rhetorical strategies being *their* (encultured) rhetorical strategies expressing themselves in *their* (encultured) language and according to *their* (encultured) writerly ways. I accept, of course, that the degree of narrativity is much less overt in comparative law than it is in *Hard Times*. But the comparatist is nonetheless implicated in story-telling, in fiction — and he is telling *his* story, foreign law as *he* sees it, in *his* words, in *his* language, thus *his* foreign law. Beckett's character exclaims: 'All I know is what the words know.'⁶³⁴ He means, of course the words that *his* language makes available to him: all he 'knows' is through those words since he can only 'know' through those words. Such is what the comparatist-at-law can do, then: to read, interpret, and enunciate through the being-in-the-world that he is, to produce *his* encultured foreign law, which is therefore not so foreign and not so foreign to him. What the comparatist's intelligence purports to give him as foreign law is, in effect, *not* foreign.

Instead of a sharp boundary whereby one could discern how the comparing mind stops here and foreign law begins there, what manifests itself is an ever so close intertwinement between body and (foreign) world. For example, when a comparatist writing on the law of privacy opines that '[o]ne can see a remarkable degree of continuity in the civil law',⁶³⁵ he is revealing, if discreetly, the tight interweaving I am addressing. The words 'a remarkable degree of continuity', while stated assertorily, consist in a personal interpretation of the materials that the comparatist has elected to consider — a necessarily tentative and provisional reading, a defeasible account. It is not that '[o]ne can see', but that 'I, James Gordley, claim to see' — a dramatically different perceptual scenario. For all its structural precariousness, the comparatist's interpretive input finds itself being closely integrated into/as the foreign law that it is allegedly describing

⁶³⁴ Beckett, *S Molloy* supra note 42 at 29.

⁶³⁵ Gordley, *J Foundations of Private Law* supra note 460 at 230.

most faithfully. Hence Derrida: 'Every constative utterance itself rel[ies] on a performative structure at least implicit.'⁶³⁶ Observe, again, that there is never any stable, pre-given foreign law awaiting discovery and harvesting by a merely collecting comparing mind: nothing is simply found as brute data. Rather, the mind impacts on foreign law as it comes into contact with foreignness (ipso facto no longer foreign...): it transforms the foreign instantaneously — it *tames* foreignness. The comparing mind thus assumes a constitutive, performing role: it is doing something, it is fashioning the foreign, it is putting the foreign into shape — it is doing something *to* the foreign so as to be able to do something *with* the foreign. When a (distinguished) comparatist like Gordley writes that 'civil law systems are more inclined [than the common law] to allow one to recover for any infringement of dignity and reputation',⁶³⁷ he is *enacting* foreign law. In sum, the comparing mind and foreign law are not independent from one another even as the text of foreign law exists, there, in an extracranial sense. (Note that when James Gordley argues about 'civil-law systems', he stands as a comparatist-who-brands-civil-law-systems-as-particularly-concerned-with-dignity-and-reputation. In other words, he is an interpreter who, even as he necessarily projects himself into the encultured text out of his 'own' enculturation that he arrays, at once 'expose[s] himself to the text and receive[s] from it a more ample self'; importantly, 'the self is constituted by the "matter" of the text', so that one does not remain who one once was after one has entered into an encounter with foreign law.⁶³⁸ There thus applies a chiasmus: while the comparing mind frames foreign law, foreign law moulds the comparing mind, too.)

Despite orthodox comparative law's overt analogies with 'physics', 'molecular biology', and 'geology',⁶³⁹ the study of foreign law, the comparison of laws, is emphatically not a science: it is not modeled after science in the least, and it is not in possession of its own scientific standing at all. While '[i]t is inconceivable that France would follow Ptolemy and Italy would adopt Copernicus', in contrast to planetary orbits 'law is culture-specific.'⁶⁴⁰ In particular, the comparison of laws, unlike biochemistry, combines engagement with the foreignness being studied and self-introspective interventions by the student of foreignness: comparatists do not just use themselves as research tools for generating their information, but they also harness the inevitable transformation of themselves and of the so-

⁶³⁶ Derrida, J (1994) *Force de loi* Galilée at 59 ['Tout énoncé constatif repos(e) lui-même sur une structure performative au moins implicite'].

⁶³⁷ Gordley, J *Foundations of Private Law* supra note 460 at 239.

⁶³⁸ Ricoeur, P (2013) [1972] *Cinq études herméneutiques* Labor & Fides at 73 ['s'expos(e) au texte et re(çoit) de lui un soi plus vaste'; 'le soi est constitué par la "chose" du texte'] (emphasis omitted). For an argument along these lines with specific reference to comparative law, see Legrand, P 'Foreign Law as Self-Fashioning' supra note 37.

⁶³⁹ Zweigert, K and Kötz, H *Einführung in die Rechtsvergleichung* supra note 87 at 13 ['Physik'; 'Molekularbiologie'; 'Geologie']. Whatever its influence within comparative law will have been, I am minded to qualify such an enumeration as epistemically cataclysmic on its own terms — anything, at any rate, but a toytous contention.

⁶⁴⁰ Fletcher, GP (1997) 'What Law Is Like' (50) *Southern Methodist University Law Review* 1599 at 1610. Because a foreign law-text is very much unlike a chain molecule, one must forgo an 'improper extension of [scientism] to [a] domai[n] of cultural activity to which it does not and cannot apply': Rodowick, DN *Philosophy's Artful Conversation* supra note 82 at 55. Peter Hacker properly refers to such projection as 'illicit': Hacker, PMS (2001) 'Wittgenstein and the Autonomy of Humanistic Understanding' in Allen, R and Turvey, M (eds) *Wittgenstein, Theory and the Arts* Routledge at 42 [emphasis omitted].

called ‘foreignness’ that the encounter necessarily involves as a primary source of information and insight in its own right.

The comparison of laws is thus language, and it is rhetoric, reconstructive rhetoric, too. It is not representation, then. It is re-presentation, that is, vergency and difference: the comparatist-at-law is, at best, ever on the verge of foreign law and thus always remains distinct from it. It is not fixity of meaning, then. It is play, the *play* of the foreign law’s text and of the comparatist’s text (in the sense of the semantic movement rendered uncircumventable because of the structural plasticity of language generating inherent equivocity of meaning, given the instability or flux, contingency or indeterminacy, that structure the comparatist’s interpretive words even as he is trying his utmost to limit the semantic leeway). The journey *to* cannot be accomplished, the journey *from* cannot be escaped. The comparatist must realize that ultimately ‘the only source [he] ha[s], the only source of reference, [is] [his] own bloody self.’⁶⁴¹

Foreign law is therefore not pregiven at all; instead, it arises from/as the comparatist’s interpretation: what is named ‘foreign law’ ultimately stands as a retrospective and synthetic effect of the comparatist’s discourse. To be sure, the comparatist’s formulation/simulation of foreignness is constrained by externalities, by something outside the comparing mind (say, the foreign statute’s words, there). Yet, it is inevitably the case that the comparing mind must mediate the comparatist’s contact with foreignness, a fact that plainly excludes the possibility of an elucidation and an exposition that would be straightforwardly identical, mimetic, or duplicative. Note that this epistemic situation is not imposed on comparatists by some malevolent creature: impossibility of representation is intrinsic to comparison across law-worlds. And it is necessary to follow this epistemic constraint to its logical end: the comparative account *becomes* the foreign law, whether in the eyes of the comparatist or for the comparatist’s readership (although it is evidently not *the* foreign law, as a matter of empirical fact). Consider Beckett and apply to the comparatist what he says regarding Joyce: ‘His writing is not *about* something; *it is that something itself*.’⁶⁴² Thus, for James Gordley and for Gordley’s US reader, Gordley’s report on the civil law of privacy becomes the civil law of privacy — although it is evidently not so as a matter of empirical fact. And for Judge Richard Posner in *Bodum v La Cafetière* and for Posner’s readers, Alberto Luis Zuppi’s report on the French law of oral proof against a written contract became the French law of oral proof against a written contract (although it was evidently not so as a matter of empirical fact).⁶⁴³

⁶⁴¹ Cf [Beckett, S] (2009) [14 November 1930] [Letter to T McGreevey] in *The Letters of Samuel Beckett* Fehsenfeld, MD and Overbeck, LM (eds) vol I Cambridge University Press at 55. See also Beckett, S *The Unnamable* supra note 20 at 88: ‘I on whom all dangles, better still, about whom, much better, all turns, dizzily, yes yes, don’t protest.’

⁶⁴² Beckett, S ‘Dante... Bruno. Vico.. Joyce’ supra note 490 at 27. Porter Abbott observes that this statement marks a motion from a representational to a non-representational enactment, an acknowledgement thus showing what must be the negative way forward for comparative law. See Abbott, HP (2013) *Real Mysteries* Ohio State University Press at 82 and 92.

⁶⁴³ I refer to *Bodum USA v La Cafetière* (2010) 621 F3d 624 (7th Cir). For a fully-fledged refutation of the court’s ‘comparative’ effort, see Legrand, P (2013) ‘Proof of Foreign Law in US Courts: A Critique of Epistemic Hubris’ (8/2) *Journal of Comparative Law* 343. For a further (and converging) critique from a US civil-procedure standpoint, see Clopton, ZD (2025) ‘Foreign Law on the Ground’ (50) *Yale Journal of International Law* 50 at 84.

Whatever that expression might be taken to mean, then, there can be no civil law *as it is* or no French law *as it is* across boundaries. What there is, rather, is civil law or French law as a US comparatist says it is (or, in Judge Posner's case, a pseudo-comparatist). In all strictness, the moment foreign law enters within the comparative sphere it ceases to exist other than as the comparatist's foreign law — which means, not insignificantly, that what the comparatist configures as 'foreign law' is not actually 'other' to the comparatist: *it is of him*. (Needless to add, it did not occur to the fedifragous VSI to apprise its elicitors, if only over the length of one or two sentences, that the expression 'foreign law' is semantically problematic, deeply so.)

And this comparatist's foreign law will vie for credibility with that comparatist's foreign law, questions of (presumed) differential authority — what is the comparatist's institutional affiliation? Where is he publishing his work? Where is he being invited to teach or lecture? — inevitably playing a role in establishing what *impression* the re-presentations at hand will be making on their interpreters. Ultimately, whether James Gordley's readership finds Gordley's construction of French law's 'erreur' persuasive and deems his narrative more compelling than other available comparative narratives on 'erreur' — whether Gordley's readership is prepared to show *faith* in Gordley⁶⁴⁴ — will also have to do with the readers' own enculturation and be affected by whatever readerly goal is being pursued by whatever reader through the act of reading.⁶⁴⁵ A historian's illustration aptly emphasizes the reader's decisive role in the matter of allegiance: 'Strictly speaking, it was not Schiller's essay which influenced Schlegel, but *Schlegel's own reading* of it; nor was it the ideas in Schiller's essay which influenced Schlegel, but *Schlegel's understanding* of those ideas.'⁶⁴⁶ Observe that adhesion remains provisional: it is defeasible. Some day, some other interpretation of French law's 'erreur' will appear on the marketplace of ideas that will find greater favour than Gordley's with some readers at least, not to mention the fact that, the comparatist acting as an ambulant being, Gordley himself may well offer in time his own revised interpretation of 'erreur' thinking after all that his earlier reading had been in error — an attunement process that is properly infinite.

Since there are seemingly more and more laws to compare and given that the comparison of laws matters more and more with a view to countering the shrill recrudescence in manifestations of nationalist ethno-retrenchment, I am resolutely dedicated to the proposition — to the negative critique — that it is academically indefensible to allow comparative law to be satisfied with its indigent and obscurantist orthodox epistemology, to be cleaving to its 'fake integrities',⁶⁴⁷ to remain blocked in the ossified subject-dominates-object correlation. The epistemic fact of the matter is rather that of *dislocation*: the comparatist cannot represent foreign law (as any serious reflection on

⁶⁴⁴ Cf Redfield, M (2013) 'Wordsworth's Dream of Extinction' (21/2) *Qui parle* 61 at 68: '[R]epresentations perform their "adequations" or acts of "binding" only as acts of faith.' Unlike Marc Redfield, I would have written 're-presentations'.

⁶⁴⁵ Cf Auyoung, E 'What We Mean by Reading' *supra* note 44 at 103: '[A]ny reading goal directs [...] attention to some aspects of a text and not others.'

⁶⁴⁶ Mink, LO (1987) [1968] 'Change and Causality in the History of Ideas' in Fay, B; Golob, EO and Vann, RT (eds) *Historical Understanding* Cornell University Press at 221 [emphasis modified]. Louis Mink was one of the twentieth century's leading philosophers of history.

⁶⁴⁷ Beckett, S *Dream of Fair to Middling Women* *supra* note 33 at 28.

representation must confirm). Because of what he is and because of what it is, the investigation of foreignness finds itself having to contend with an irrelation (or disrelation). Meanwhile, the VSI unaccountably reveals that what remains to be done towards the elicitation of comparative law's great elusion from hard neurophysiological and epistemic facts remains undone.

For my comparative purposes, perhaps Beckett's most elemental enunciation is his declaration that 'anyone nowadays who pays the slightest attention to his own experience finds it the experience of a non-knower.'⁶⁴⁸ Applying Beckett's contention to the specific case of foreign law, his insight entails that 'any attempt to utter or eff it is doomed to fail, doomed, doomed to fail.'⁶⁴⁹ It is indeed the theoretical fulcrum of negative comparative law's salient claims that the concept of comparison harbours within itself a generative *irrelating* (or disrelating) that must ultimately entail a structural *unknowing*. In other words, what there is, and all there can be, is a construction or a deeming of knowledge — if you will, there is knowledge *as* foreign law rather than knowledge *of* foreign law. Given the fact that the self cannot be the other, the fact of *irrelation* (or disrelation) is inexorable: *the irrelation is an irreduction*. The connection between self and other being structurally broken, comparative law must operate in a specific space of normativity where there obtains non-knowledge of foreign law rather than knowledge thereof.

To be sure, orthodox comparatists spontaneously assert (or assume) that a perfect correspondence or identity between their words and the foreign law that they purport to represent has been achieved or is achievable. For example, there is prominent mention being made of 'scientific exactitude' as the relevant expository remit.⁶⁵⁰ However, the possibility of such isomorphy is but a simplistic postulate without the benefit of any genuine thinking having been invested in the matter. Otherwise said, it is not only that the orthodox comparatist-at-law thinks he can know what he cannot know, but it is also that he is not even *thinking* about the matter of knowledge at all and not appreciating that there must always occur an epistemic dissonance, that there must necessarily arise an epistemic fracture, across the comparatist and foreign law.

For a description to materialize or for knowledge to emerge, comparatists-at-law would have to marshal fully independent, 'intact' concepts like representation, objectivity, truth, and subjectivity — which is impossible as none of these ideas is operating independently from any mind. Disadjustment of the comparing mind vis-à-vis foreign law being unavoidable, I argue that '[w]e cannot compare [...] without being aware of the distorting impact of the very

⁶⁴⁸ Shenker, I (1979) [1956] 'Interview With Beckett' in Graver, L and Federman, R (eds) *Samuel Beckett: The Critical Heritage* Routledge & Kegan Paul at 148. The words are Beckett's. For further information on this controversial conversation — which initially appeared as 'Moody Man of Letters' (6 May 1956) *The New York Times* 2–1 — see Bair, D (1978) *Samuel Beckett* Harcourt Brace Jovanovich at 651n22. Cf Unger, RM (2024) *The World and Us* Verso at 138–39: 'What we recognize as knowledge is knowledge such as an embodied and finite being like us, with limited perceptual and cognitive equipment, may achieve. It is as embodied and finite beings that we engage the world.' See also id at 2: 'We find ourselves trapped in our bodies and their limited perceptual apparatus.' Adde: Devereux, G (1967) *From Anxiety to Method* Mouton at 137: 'Ethnocentric, culture-specific distortion is inevitable.'

⁶⁴⁹ Beckett, S (2009) [1953] *Watt* Ackerley, CJ (ed) Faber & Faber at 53.

⁶⁵⁰ Zweigert, K and Kötz, H *Einführung in die Rechtsvergleichung* supra note 87 at 44 ['wissenschaftliche Exaktheit'].

process of comparison.⁶⁵¹ It is Mallarmé, I suggest, who optimally formulates the epistemic predicament that the field of comparative law — and the VSI — has yet to countenance: 'Every comparison is, beforehand, defective.'⁶⁵² And 'there is no getting straight so crooked an affair.'⁶⁵³

To adduce my claim in different language, I firmly contest the premiss that one can inscribe foreign law without inscribing oneself along the merry way. Rather, I contend that every comparison is inherently autobiographical. Even as the intervention within foreignness attests to the epistemic precedence of foreign law over the comparatist, there occurs an indelible manifestation of the comparatist's imprint on the comparison. No capture of reality being direct, every 'representation' is someone's 'representation' (more perspicuously, then, a re-presentation, that is, an iteration — a repetition with a difference — an interpretation): 'To speak, to name, to write are only secondarily an equipment for representation [...]. To name is first to trigger reality, [...] it is to create.'⁶⁵⁴ No vision, no matter how acute, can therefore guarantee the comparatist's detachment from foreignness or, if you will, no foreign law can be warranted meaningfully to exist in a state of epistemic isolation from the observing comparatist: '[The] observer infects the observed with his own mobility.'⁶⁵⁵ Likewise, every 'objectivity' or 'truth' is someone's 'objectivity' or 'truth' (more perspicuously, then, an interpretation). And there is no 'subjectivity' that is not encultured, which means that there is no unfettered will, no agency that is not always-already in situation and accordingly acting as an interpretive filter to try and make sense through interpretation of the (foreign) information reaching it. The comparatist's thought cannot attach itself to a vantage that would behave transcendently, out-of-mind, and therefore without carrying its mind's mark: the comparatist's mind cannot think out of mind. In the end, even the most enthusiastic attempt at transcendentalism (say, under the name of objectivity or truth) remains mired in human finitude. It must accordingly consist, at

⁶⁵¹ Hutchinson, B 'Comparativism or What We Talk About When We Talk About Comparing' supra note 18 at 24.

⁶⁵² Mallarmé, [S] (2003) [1892] 'Tennyson vu d'ici' in 'Quelques médaillons et portraits en pied' in *Divagations in Œuvres complètes* Marchal, B (ed) vol II Gallimard at 138 ['Toute comparaison est, préalablement, défectueuse']. Stéphane Mallarmé's text adopts the form of an Alfred Tennyson obituary. I cannot be surprised that Derrida showed keen interest in Mallarmé. See eg Derrida, J (1972) *La Dissémination* Editions du Seuil at 199–318. Quite apart from this chapter, whose title 'La double séance' has long become renowned, Derrida had earlier contributed a much less familiar entry on Mallarmé in a literary encyclopaedia. See Derrida, J (1974) 'Mallarmé' in *Tableau de la littérature française* vol III Gallimard at 368–79.

⁶⁵³ [Beckett, S] (2011) [17 January 1956] [Letter to A Reid] in *The Letters of Samuel Beckett* Craig, G et al (eds) vol II Cambridge University Press at 596.

⁶⁵⁴ Gaspar, L (1978) *Approche de la parole* Gallimard at 125 ['Parler, nommer, écrire ne sont que secondairement un outillage de représentation (...). Nommer, c'est d'abord susciter le réel, (...) c'est créer'].

⁶⁵⁵ Beckett, S *Proust* supra note 555 at 515.

best, of *fake* transcendentalism.⁶⁵⁶ The allegedly transcendental can only be but 'transcendental contra-band'.⁶⁵⁷

While it may appear superficially alluring to surmise that the comparatist can somehow bracingly exclude himself from the epistemic equation, perhaps through the adoption of what would be a scientific method, this position is, empirically, profoundly erroneous.⁶⁵⁸ The comparatist-at-law necessarily incorporates, inescapably embodies, the (legal) epistemology into which he was encultured: this epistemology cannot be unfastened from his lived experience, from his rejoinder to the circumstances that visit him, which means that ultimately the bricolage that stands as one's comparison depends on one's flair; in the end, *all is interpretation* (including method, which is always-already, of course, someone's interpretation of method): *there is no epistemic warrant*.⁶⁵⁹ Concretely, no French jurist, for instance, can unlearn the distinction between private law ('droit privé') and public law ('droit public') that he will have been compelled to master on account of the dressage to which he will have been subjected from the very inception of his French legal studies and that will therefore partake of his epistemic reaction to the English legal model. At best, ethnocentrism — in particular, juricentrism — may be kept in check to some (indeterminate and indeterminable) extent. But it is unerasable: no French jurist can uneducate himself as regards the binary division that I mention (hence, the idea of legal culture as verdict).⁶⁶⁰ The conviction that a jurist should come to the appreciation of the legal as it is unfolding on the international scene (including the arbitral stage) without recourse to pre-conceived ideas, that is, without drawing on his own cultural background, on his prejudicial fore-structure, thus strikes me as being on a par with a belief in the possibility of a pentagon with three sides. In Roland Barthes's felicitous terms, 'my body is historical.'⁶⁶¹ So is every comparatist-at-law's.

Comparatists-at-law are stuck in a Cartesian rut, thus saddled with Cartesian rots, their Cartesianism buried away in the deep epistemic

⁶⁵⁶ Beckett is ever resourceful. Consider Beckett, S (2010) [1961] *Happy Days* Knowlson, J (ed) Faber & Faber at 30: 'There is so little one can say, one says it all. All one can. And no truth in it anywhere.' And envisage Beckett, S *Waiting for Godot* supra note 575 at 31: 'I don't remember exactly what it was, but you may be sure there wasn't a word of truth in it.' (The exclamation is from Beckett character Pozzo, in my view the one worthy Pozzo.) Contemplate also Beckett, S *Worstward Ho* supra note 43 at 88: 'The words [...] [...] How almost true they sometimes almost ring!'

⁶⁵⁷ Derrida, J (1974) *Glas* Galilée at 272a ['contre-bande transcendante'].

⁶⁵⁸ For explorations of the inevitably autobiographical character of comparative law, see Legrand, P 'Foreign Law as Self-Fashioning' supra note 37; Legrand, P *Negative Comparative Law: A Strong Programme for Weak Thought* supra note 54 at 315–69. Again, for my remonstrance against method within comparative law, see Legrand, P *The Negative Turn in Comparative Law* supra note 73 at 8–50.

⁶⁵⁹ Cf Derrida, J (1983) 'La langue et le discours de la méthode' (3) *Recherches sur la philosophie et le langage* 35 at 36: '[A]ny method [...] implies a kind of historicity' ['(T)oute méthode (...) implique une espèce d'historicité']. The idea that method would have anything to do with objectivity or truth thus properly pertains to mythology — hence Legendre, P *L'Amour du censeur: essai sur l'ordre dogmatique* supra note 10 at 92: '[M]ethod entails myth' ['(L)a méthode charrie le mythe'].

⁶⁶⁰ See supra at 396.

⁶⁶¹ Barthes, R (2002) [1978] *Leçon in Œuvres complètes* (2nd ed) Marty, E (ed) vol V Editions du Seuil at 446 ['mon corps est historique'].

suppositions underwriting the field where they labour and invisible to most.⁶⁶² Thus, orthodox comparatists-at-law readily want to think that they can avail themselves of total freedom ('Look at me! I can do representation, objectivity, and truth if only I methodically set my autonomous and masterly mind to it.') However, comparatists-at-law have the matter precisely the wrong way around, for there are few things that bind comparative law so closely to its cognitive limitations as the contention that it can stand free of its cognitive limitations. Quite simply, the illusion of freedom leads comparative reason to overstep itself and fall into error. And to be in error is not to be free: it is to be trapped. The emperor is naked, and comparative law's dominant epistemology is vacuous. Long committed to the victorious enunciation of an *adæquatio rei et intellectus* that they believe to be attainable for the better (and for the good of comparative law), orthodox comparatists must jettison the rots (representativity/objectivity/truth/subjectivity) — the pseudo-transcendental dross, the epistemic detritus — that has long been cluttering comparative law's theory and practice to the point where this accumulating jetsam, a bizarre floating procession, has stunted the understanding of what it means to understand foreign law, thereby intransigently stultifying worthy comparison.

Along the lines of a purging of the drains, I defend a cleansing of comparative law to eliminate its cloggy epistemic decay, its viscous epistemic waste, its sticky epistemic *Schleim*. (It must be clear, *mais cela va peut-être mieux en le disant*, that my undertaking has nothing whatsoever to do with the Kelsenian quest for the purity of legal doctrine. His scrubbing and mine are washing strategies that harbour diametrically opposite ambitions. Indeed, the Kelsenian meracity concerns precisely the implementation of theoretical undertakings that I wholeheartedly reject such as analytical depersonalization and legal autarky. Unlike Hans Kelsen, I am emphatically not mysophobic.) I therefore uncompromisingly refute rots as a regulative epistemic ideal because it discloses unwarranted (and unwarrantable) confidence in the comparatist-at-law's power of thought. Quite simply, the appreciation of foreignness informing comparative law *cannot* be based on rots, which is structurally unable to supply the epistemic foundations being craved: think dead ends; cul-de-sacs; blind alleys; and the odd cliff drop. (Incidentally, the dispensation with rots entails no loss since there *never* was representation, objectivity, truth, or subjectivity — all orthodox comparatists-at-law's assertions to the contrary notwithstanding.)

When I maintain that the comparison of laws is structurally autobiographical, that it inescapably implies 'this cursed first person'⁶⁶³ — a claim that, in passing, disables any and all argument that any and all comparison could have universal reach — I am not thinking of 'autobiography' in the sense that the comparatist would be deliberately narrating his life as he expatiates on foreign law. What I mean instead is that the comparatist's life is being written — is writing itself — into the comparison *nolens volens*, often clandestinely. When a US comparatist is writing on French law against the background of a year's postgraduate studies at the Sorbonne, for example, that Sorbonne year is inevitably informing the US comparatist's writing: it suffuses the writing, it is present

⁶⁶² For comparative law's Cartesianism, see Legrand, P 'Paradoxically, Derrida: For a Comparative Legal Studies' *supra* note 618 at 645–54. A more extensive argument is in Legrand, P (2023) 'Negative Comparative Law: The Sanitization Enterprise' *supra* note 19.

⁶⁶³ Beckett, S *The Unnamable* *supra* note 20 at 56.

as the writing, so intimately in fact that there is, to quote from Heidegger's once more, an 'indissolubility' manifesting itself between the inscriber and the inscription.⁶⁶⁴ Note how the autobiographical valence is certainly not to be reduced to an attempted recovery of the past. Rather, it is primarily a mode of action concretizing itself in the moment of writing, at the very instant of entextualization: it is a form of being-in-the-text as the text is being written.

I can easily see how comparatists, characteristically trained as positivists and as so-called legal 'scientists' — the civil-law version of this subornation proving especially exacerbated — cannot admit that their comparisons should be shrinking into the epiphenomenal vestiges of a life's contingencies and vagaries. (Do I mean to say that a US comparatist's account of French law would differ if he had not studied at the Sorbonne, that a different French law would then be produced? *Oui*.) Irrespective of the comparatist's discomfort with the view that an autobiographical enquiry — an *autobiographical* enquiry! — could be channelling information on foreign laws, it is epistemically the case that the articulation of a 10,000-word investigation into the French law of adoption will meaningfully depend on whether the relevant comparatist trained as a jurist and comparatist in Berkeley or Berlin, whether he came to his study with a sound knowledge of the civil-law tradition or not and of French civil law or not and of the French language or not, whether he had the opportunity to do fieldwork in France or not, whether (and to what extent) he brought to bear to his work a pre-existing familiarity with French law's social, political, or historical setting — a pre-existing store of information into which he could insightfully tap — perhaps through prior local exposure on account of a one-year research stay in Aix-en-Provence or whatever. The comparatist cannot not be in the comparison (where else would he be?). *Scribere est agere*.

There is more (and there is accordingly further aggravation for Tom Ginsburg to confront, his convenient blazoning of epistemic immunity notwithstanding): 'The creations of the mind — and the principles that preside over them — follow the fate of our moods, of our times, of our passions and of our disappointments.'⁶⁶⁵ A comparatist's account of the French law of adoption emphatically *is* a 'creatio[n] of the mind'. The report at hand will therefore also qualify as an *emotional* statement, inescapably so. How reasonable could it be, for instance, to assume that the experience of a comparatist having been personally involved in an adoption (either as the adopted or the adopter) would have no import whatsoever — zero impact! — on his unfolding appreciation of the French law of adoption? (I am evidently not saying that comparatists who have not been party to an adoption are disqualified from studying the French law of adoption, which would be a very silly claim to make.) And how reasonable could it be, for instance, to expect that a comparatist's personal experience of having been refused as a potential adopter would have no import whatsoever — zero impact! — on his unfolding appreciation of the French law of adoption? Consider a further illustration: how reasonable could it be, for instance, to expect that a comparatist's personal experience of having been raised and of having attended law school in a multicultural society would have no import whatsoever — zero

⁶⁶⁴ Supra at 398.

⁶⁶⁵ Cioran, [E] (2011) [1949] *Précis de décomposition* in *Œuvres* Cavailès, N (ed) Gallimard at 135 ['Les créations de l'esprit — et les principes qui y président — suivent le destin de nos humeurs, de notre âge, de nos fièvres et de nos déceptions']. My allusion to Ginsburg refers to supra at 387.

impact! — on his unfolding appreciation of the French statute prohibiting all forms of conspicuous religious attire in primary and secondary public schools?⁶⁶⁶ As between the emotions and the law-text, there is once again 'indissolubility'.⁶⁶⁷ Yes. (Observe that like ethnocentrism or juricentrism, emotions may be kept in check to some indeterminate and indeterminable extent. But, like ethnocentrism or juricentrism, they are unerasable, the challenge remaining to ensure that the affective does not unduly mar the effective.)

Every experience is primed to influence the comparison, every comparison therefore proving singular vis-à-vis all other comparisons. Every interpretation is thus always at once disclosive of foreign law as seen through a comparatist's eyes — never of foreign law *tout court* (whatever such expression might mean) — and revealing of those comparing eyes themselves (which moreover change over time, say, as one's familiarity with the foreign language or acquaintance with the foreign culture or foreign law deepens). It follows that every comparison *depends*. And foreignness — foreign law — therefore depends, too.⁶⁶⁸ For instance, the German law of privacy can be said to be informed by Fascism, or so argues James Whitman.⁶⁶⁹ Alternatively, Fascism can have nothing pertinent to do with the German law of privacy, or so appears to opine James Gordley.⁶⁷⁰ It depends, then, each comparatist-at-law bringing to bear his (encultured) understanding of law, his (encultured) appreciation of comparative law, and so forth.⁶⁷¹ Since there can be, strictly speaking, no description and no knowledge of foreign law because only interpretation is possible, it is the case that no comparatist is able to guarantee his reading, to assure his construal — it is *his* (encultured) reading, it is *his* construal (it is, say, Whitman's reading, Gordley's construal). And no reading or construal can be unselfed, which must mean that no account of foreign law can be unselfed either: every report on foreign law discloses someone's (encultured) foreign law. There is thus Whitman's German law of privacy as there is Gordley's German law of privacy, two different German laws of privacy. If you will, according to Whitman Fascism is the detail of the German law of privacy in the sense that it epitomizes the comparatist's acuity, sensitivity, exhaustivity, realism, and expertise. Meanwhile, Gordley regards Whitman's Fascism as a detail with respect to the German law of privacy in the sense that

⁶⁶⁶ 'Statute no 2004-228 of 15 March 2004 Enframing, in Application of the Principle of Laicity, the Wearing of Signs or Attire Demonstrating Religious Belongingness in Public Primary and Secondary Schools' ('Loi no 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics'), now *Code de l'éducation* (Code of Education) art L141-5-1 <www.legifrance.gouv.fr/loda/id/JORFTEXT000000417977/>: 'In public primary and secondary schools, the wearing of signs or attire whereby students ostensibly demonstrate religious belongingness is prohibited' ['Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit'].

⁶⁶⁷ *Supra* at 398.

⁶⁶⁸ It is not only comparison, foreignness, and foreign law that depend. See eg Till, J (2013) *Architecture Depends* MIT Press.

⁶⁶⁹ See Whitman, JQ (2004) 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (113) *Yale Law Journal* 1151 at 1166 and 1188.

⁶⁷⁰ See Gordley, J (2007) 'When Is the Use of Foreign Law Possible? A Hard Case: The Protection of Privacy in Europe and the United States' (67) *Louisiana Law Review* 1073.

⁶⁷¹ I address the Whitman/Gordley controversy at length in Legrand, P (2017) 'Jameses at Play: A Tractation on the Comparison of Laws' (65) *American Journal of Comparative Law* [Special Issue] 1.

the term would attest, from the standpoint of law, to negligibility, superfluity, desultoriness, errancy, and irrelevance.

Structurally, the comparatist-at-law can only engage in speculation (etymologically, a ‘speculum’ is a mirror, an image reprising the pre-eminent and autobiographical idea that *the comparatist is in the comparison*).⁶⁷² It then remains for readers to arbitrate the dispute — thus Talal Asad calls Whitman’s claim ‘startling’.⁶⁷³ Is Whitman’s claim ‘startling’, then? Is it objectively ‘startling’, is it ‘startling’ as a matter of truth? Certainly not, since Whitman’s argument is an interpretation (which is all it can ever be, no matter how sophisticated). There is no certainty; there cannot be (or, if you will, the only certainty is uncertainty). Between Whitman’s and Gordley’s competing interpretations, ‘[o]ne is not more true than the other.’⁶⁷⁴ Asad’s response is an interpretation, too (what else could it be?). In effect, ‘[t]he certainty of an assured reading would be the first idiocy.’⁶⁷⁵ There is indeterminacy, until one (the comparatist or his reader) determines one’s favoured interpretation. There is undecidability, until one (the comparatist or his reader) decides on one’s preferred interpretation. And anyone’s favoured or preferred interpretation competes with other favoured or preferred interpretations — all of them different — such that indeterminacy and undecidability simply cannot be brought to a standstill. *It is all interpretation.*⁶⁷⁶ *It all depends.*

There is not *the* meaning of a foreign law-text, then. There is no meaning of a foreign law-text that is fixedly valid for all comparative/interpretive experience. In other words, there is no foreign law whose meaning is not relative to the finitude of the purportedly knowing creature coming to foreignness: every possible meaning remains within the sphere of creatureliness, and no interpretive breakthrough is possible from or beyond human finitude. Indeed, one cannot leave the self behind, evading the shackles of the ego and its marks,

⁶⁷² Cf Beckett, S *The Unnamable* supra note 20 at 85: ‘What can one do but speculate, speculate, until one hits on the happy speculation?’

⁶⁷³ Asad, T (2018) *Secular Translations* Columbia University Press at 33.

⁶⁷⁴ Driver, T (1979) [1961] ‘Interview With Beckett’ in Graver, L and Federman, R (eds) *Samuel Beckett: The Critical Heritage* Routledge & Kegan Paul at 219. The words are Beckett’s. This conversation initially appeared as ‘Beckett by the Madeleine’ in the summer 1961 edition of the *Columbia University Forum*.

⁶⁷⁵ Derrida, J (2003) *Béliers* Gallimard at 45 [(l)a certitude d’une lecture assurée serait la première niaiserie]. Cf Driver, T ‘Interview With Beckett’ supra note 674 at 220: ‘The key word in my plays is “perhaps”.’ The words are Beckett’s.

⁶⁷⁶ Cf Varela, FJ (1984) ‘The Creative Circle: Sketches on the Natural History of Circularity’ in Watzlawick, P (ed) *The Invented Reality* Norton at 322: ‘[W]e live in an apparently endless metamorphosis of interpretations following interpretations.’ Francesco Varela (1946–2001), a Chilean biologist and neuroscientist, famously introduced the concept of ‘autopoiesis’ into biology. Adde: Montaigne, *Les Essais* supra note 464 bk III, ch XIII at 1115: ‘[W]e only intergloss ourselves’ [(N)ous ne faisons que nous entregloser] Cf Nietzsche, F [1886] ‘*Nachgelassene Fragmente*’ in *Digitale Kritische Gesamtausgabe* Colli, G; Montinari, M and D’Iorio, P (eds) <[http://www.nietzschesource.org/#eKGWB/NF-1886,7\[60\]](http://www.nietzschesource.org/#eKGWB/NF-1886,7[60])> §7(60): ‘[O]nly interpretations’ [(N)ur Interpretationen]. This excerpt has long been included as part of the assemblage hastily concocted at the behest of Elisabeth Förster-Nietzsche, Nietzsche’s self-interested sister, and published in 1901, a year after the philosopher’s death, in all likelihood out of self-interest, as *Der Wille zur Macht* (*The Will to Power*). The text consists in a collection of reflections liberally extracted from unpublished notebooks. See eg Nietzsche F (1968) [1886] *The Will to Power* Kaufmann, W (ed) Kaufmann, W and Hollingdale, RJ (trs) Vintage at 267. See generally Diethe, C (2007) *Nietzsche’s Sister and the Will to Power* University of Illinois Press.

and in the smithy of one's mind one can only conceive of the *inconceivability* of fully-fledged interpretive freedom. Not only is no comparison ego-emptying, but quite to the contrary every comparison is ego-affirming.

Enter Imogene (As She Would)

While it is not my remit to instruct the VSI's co-authors as regards the topics I think their primer ought to have covered but did not, it strikes me that a good idea would have been for the text to design a brief hypothetical scenario so as to illustrate how comparative-law research actually unfolds. In my view, the process's lineaments stand as follows.

Consider the US Economic Espionage Act of 1996 (EEA), a statute to be located at 18 USC §§1831–1839 that was enacted to address the theft of trade secrets from US companies by foreign governments, companies, or individuals and by other US companies or individuals (the wide-ranging EEA applies to conduct outside the United States by US organizations or individuals, and it covers US and foreign entities operating in the United States). Now, imagine Imogene as a young comparatist teaching at the Sorbonne and wishing to research the EEA for the purpose of writing a law-review article in French to be published in a French comparative-law journal, her research (the work of a French jurist addressing US law) doubtlessly qualifying as genuine comparative work. To be sure, the pre-existence of the EEA vis-à-vis Imogene's expression of interest is undeniable. Clearly, the EEA pertains to an arrangement cranially external to Imogene, and its material existence has nothing whatsoever to do with Imogene undertaking to make the statute the focus of her comparative endeavour. However, it is Imogene who will now proceed to make sense of the statute for the benefit of her French readership. (Note: 'to make sense', that is, to fabricate meaning.) Needless to say, Imogene cannot do or write whatever she wants, if only because there is the wording of the statute as it stands and the conventional meaning that the statute's words carry. For example, Imogene could hardly claim with the least credibility that the EEA is about inheritance tax or carriage of goods by sea: foreign law-texts dictate their own terms of engagement (the foreign speaks). Yet, the law-review article that Imogene is devoting to the EEA will necessarily rest on her understanding of the statute and will take the form of her presentation of it, effectively her presentation anew, her re-presentation (the EEA has already been presented as US law by US jurists in the United States, a US point of view that does not exist as brute data and therefore solicits Imogene's constructive and articulative input — her framing).

The thirty printed pages in French that Imogene is minded to dedicate to the EEA will feature whatever judicial or doctrinal references she will have opted to isolate and retain so as to address the statutory patterns and connections she discerns, possibly also the law-text's disparities and irregularities if she ascertains any. And her discernments and ascertainties will benefit from the fact that Imogene is fluent in English and that she is thoroughly familiar not only with US law in general but with the US law of international business transactions in particular (that she studied at a leading US law school in the course of a postgraduate year she spent in Chicago). Specifically, Imogene's analysis will profit from her familiarity with US institutional structures (why a federal statute instead of reliance on state trade-secret law?). Meanwhile, at the entextualization stage, Imogene's article will omit whatever judicial or doctrinal references she

will have elected to select for exclusion — or that she will not have encountered during her research for whatever reason (including, possibly, unduly hasty investigation). In a further revelation of Imogene's presence within the text, as the text, her argument will incorporate her emphases (this quotation rather than that, for instance) therefore accounting for her interpretive slant (which itself will owe something to her socialization into law and her institutionalization into comparative law — to her enculturation). In all likelihood, the perceived strength of her exploration will be contingent on its thoroughness, which will in turn involve the matter of its currency, which may hang on fieldwork, which may hinge on financial resources and available time. Assume Imogene has three months at her disposal to work on the EEA and suppose further that she is able to have her air fare to Chicago and local accommodation paid for her through a grant and that she manages to secure access to a top law library and a stellar (and generously obliging) law librarian such as Sarah Reis. It must be obvious that Imogene will then generate a different article — *and a different foreign law* — than her French colleague's who had only one month available and had to research the matter from Paris with most limited access to relevant databases and without any library assistance whatsoever (and who happens to be less familiar than Imogene with US law and not nearly as conversant as her in English). The representation of the EEA being produced depends on such biographical factors, not to mention a myriad others. Yes.

Observe that I have not even addressed the issue of translation, with respect to which Imogene will also play a crucial role in identifying what she regards as the optimal French words to re-state the EEA's English terms now that she is extending her mind into foreignness.⁶⁷⁷ Of course, being the thoughtful comparatist that she is, Imogene appreciates how French — the tool that she is harnessing to conjure the EEA — cannot be ad idem with English. For example, at §1831(a)(2) the EEA refers to someone who 'without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret'. In French, perplexingly, 'to download' and 'to upload' are both 'télécharger'. Given the French language's affordances, its constraints on creativity, how will Imogene transact the translation? No doubt she will bring to bear her personal view of the matter, perhaps choosing to resort to an explanatory note. And she will also inject a personal input into the translation process, necessarily so, when she finds herself having to translate, still out of the EEA, formulations like 'interlocutory appeal' and 'injunctive relief' appearing at §§1835 and 1836(a), respectively. In other words, Imogene's translations cannot aspire to representation, objectivity, or truth — and there is nothing she can subjectively do to overcome this predicamental epistemic state of affairs. I refer once more to the rots that comparative law must vanquish: '[E]xtraneous perception break[s] down in inescapability of self-perception.'⁶⁷⁸ What Imogene can do — and what she must do — is to aim for a translation that will be just,

⁶⁷⁷ I know of no worthier account of what takes place as the comparatist's mind embraces foreignness than Peter Sloterdijk's excellent (anti-Cartesian) explanation. For a detailed exposition of Sloterdijk's (with extensive quotations), see Legrand, P *The Negative Turn in Comparative Law* supra note 73 at 240–42.

⁶⁷⁸ Beckett, S (2009) [1967] *Film in All That Fall* Frost, E (ed) Faber & Faber at 97. For my critique of rots, see also supra at 407–14. A more extensive development is in Legrand, P (2023) 'Negative Comparative Law: The Sanitization Enterprise' supra note 19.

that will do justice to foreignness.⁶⁷⁹ Forget exactness or accuracy. But she cannot overlook that underlying the apparent serenity of any hermeneutic gesture on her part, there is taking place an assertion of power, a display of epistemic violence over the EEA as it exists, there.

Imogene's article will not — and cannot — meaningfully (as a matter of meaning) feature the EEA as such (leaving to one side the more abstract issue of whether there can even exist 'the EEA as such' and what that determination would entail). All Imogene can do is to convey her very best understanding of the EEA, ultimately her EEA, then — that is, to engage in a creative exercise in *invention*: 'to invent' is at once to find (there is the EEA, there, on the US statute book) and to fashion (the EEA's meaning must be elicited through deconstruction and reconstruction, through understanding, by way of selected references, chosen quotations, and preferred French words). Inevitably, what Imogene's French readership will be invited to consider is therefore not a pristine or unfiltered EEA — the EEA certainly does not exist as a ready-made — but an Imogenized EEA, such Imogenization of the EEA being, once more, interpretively unavoidable. Now, not only does Imogene instaurate the EEA (she institutes the EEA, she establishes it), but *Imogene's EEA becomes the EEA* both for her and (arguably even more so) for her readership (although it is evidently not the EEA as a matter of empirical fact), an effective coalescence that can be expected to attract little attention and even less concern on the part of orthodox comparatists who might fancy taking an interest in the edification of Imogene's comparison.

Allow me to insist, as the epistemic point could hardly be more crucial: there was never any stable, fixed, pre-given EEA awaiting discovery by a merely harvesting comparing mind such as Imogene's along the lines of the Cartesian subject/object dualism. Consider how the mind operates. Orthodox comparative law heavily distorts the shape and character of biological cognition by insisting on a neat demarcation between mind and world. Rather, the '[m]ind is a leaky organ, forever escaping its "natural" confines and mingling shamelessly with [...] world'.⁶⁸⁰ Foreign law and the comparing mind are therefore not independent from one another even as the text of the EEA exists statutorily, in an extracranial sense, independently from the comparing mind. As it comes into contact with foreign law — *with what it understands as foreign law* — the comparing mind instantaneously impacts on foreign law: no interpretation-out is possible without interpretation-in materializing ipso facto. Because the comparing mind is necessarily enactive, since it intervenes as an input device (it inputs meaning), it follows that there cannot be description (in the sense of duplication or mimesis). The comparing mind is *of* the foreign world that it is examining: again, it is enactive, which means that it inputs meaning into the text that it is reading. Yet, the mind is also *of* the local world that it hails from: it is an output device, it is encultured, it channels the culture that it incorporates or embodies. And by dint of interpretation, no matter how purportedly minimal, the comparing mind constitutes foreign law (it fashions it), and it does so from its encultured standpoint (it angles it). In effect, *the comparatist's extending mind produces the foreign law-text that is there, before one, its 'own' text, a supplemental*

⁶⁷⁹ For an argument that a translation can only aim for justness and must resolutely do so, see Glanert, S and Legrand, P 'Foreign Law in Translation: If Truth Be Told...' supra note 36 passim.

⁶⁸⁰ Clark, A *Being There: Putting Brain, Body, and World Together Again* supra note 601 at 53.

or new text.⁶⁸¹ For example, when James Gordley writes that ‘civil law systems are more inclined to allow one to recover for any infringement of dignity and reputation’,⁶⁸² he is inputting a meaning into the foreign law-texts that he has been reading and such interpretation stands as an output of his enculturation. The civil-law’s stated ‘inclination’ is not the civil law’s, but Gordley’s — it is Gordley’s interpretation of the civil law. It follows that Gordley — contrary to the claim he himself would presumably maintain — is not stating what the law is, but what he interprets it to be (against the background of his enculturation as a US jurist, comparatist, and expert in the civil-law tradition).⁶⁸³ Epistemologically, the difference between the two cognitive configurations I mention could hardly be starker.

There are additional implications to Imogene’s research into the EEA that deserve to be addressed. During her ten years as a French law student at the Sorbonne, Imogene was thoroughly socialized into law and extensively institutionalized into comparative law (in particular during the five years she took to write her doctoral dissertation under the challenging supervision of Grégoire de Capellane, a comparatist educated over many years of study, research, and teaching in both the civil-law and common-law traditions). Now, it is the case that all French law students studying law in France are taught systematically to articulate their writings into two parts of roughly equal length inter se, each part featuring in its turn two sub-parts of roughly equal length inter se. I insist that all French students have to follow this structured and structuring pattern: all French law students — *all of them* — must methodically compose their texts — *all of them* — into two parts of roughly equal length inter se, each part featuring two sub-parts of roughly equal length inter se, a model that all French law students know simply as ‘the plan’, or ‘le plan’, the definite article being optimally appropriate as there is no alternative. The model holds, whether one is at work on the briefest of case notes or a full-length doctoral dissertation, whether one is from Marseille or Brest, and whether one is addressing family law or constitutional law. (Incidentally, the OED holds that the English word ‘plan’ connotes ‘[a] design according to which elements of something are arranged; a scheme of organization; a configuration, arrangement, or type of structure’. ‘Outline’, as the term evokes the ideas of brevity or roughness and suggests a

⁶⁸¹ Cf Wasser, A ‘Empiricism, Criticism, and the Object of Criticism’ supra note 300 at 481: ‘Unless we perform a kind of “Pierre Menard” operation in which our critical reading of a text repeats the original word for word, our critical observations, even in their most self-effacing [...] mod[e], do not offer a mirror image of their object. Rather, they are elaborated in a new discourse.’ Audrey Wasser specifies that ‘[critical] discourse produces a new [tex]t, the [tex]t of its reading’: id at 481. Her allusion is to a Borges short story. See Borges, JL (2005) [1944] ‘Pierre Menard, autor del Quijote’ in *Ficciones* Alianza Editorial at 41–55. Borges’s Menard is a fictional French twentieth-century writer whose literary critique of Cervantes’s masterwork is line-for-line identical to the early-seventeenth-century original.

⁶⁸² Supra at 404.

⁶⁸³ I refer to Gordley, J (2007) ‘When Is the Use of Foreign Law Possible? A Hard Case: The Protection of Privacy in Europe and the United States’ supra note 670 at 1081: ‘I am concerned with what the law [i]s.’ While I have sought to deconstruct this formulation in my earlier work (see Legrand, P ‘Jameses at Play: A Tractation on the Comparison of Laws’ supra note 671 at 67–69), it is only recently that I thought I could detect the echo of Chief Justice John Marshall’s famous words in *Marbury v Madison* to the effect that the task of the judge is ‘to say what the law is’: (1803) 5 US (1 Cranch) 137 at 177. If I am hearing properly and if Gordley’s indagatory model is indeed a Supreme Court Justice, I find that his referential prioritization of a judicial figure fits neatly with the elevated status of the judge within the common-law tradition.

summary or abstract, would therefore not do to translate the French 'plan': the key organizational or structural dimensions would be missing.)

Think phyletic memory: French law students are being uniformly instructed to proceed in this uniform way by their teachers just as these teachers have themselves been uniformly instructed to operate in this uniform way by their own teachers just as those teachers had themselves been... (Since the matter is regarded in France as pertaining to elementariness, primary training responsibility in fact lies with first-year teaching assistants.) This practice could be traced to epistemic influences having made themselves felt over the very many years that would include Ramism (a sixteenth-century, pre-Cartesian school of thought inviting further interpretation). Be the tracing exercise into the *longue durée* as it may, every French law student is always-already thrown into an analytical configuration that pre-exists him, an experience that 'befalls' him,⁶⁸⁴ a framework that he must now apply in his own stead: there is no question whatsoever that he must do as *they* did (before him) and as *they* do (around him).⁶⁸⁵ Culture, understood as comprising 'the inventory of procedures for the formation of the self',⁶⁸⁶ is here on full deployment thus leading, according to Beckett's caustic carceral-space metaphor, to the making of 'a caged beast born of caged beasts born of caged beasts'.⁶⁸⁷ *One cannot escape.* Indeed, it has been aptly observed that '[t]he plan in two parts is to law what Marianne is to the French Republic [...]: a cultural and national symbol'.⁶⁸⁸

As an encultured French jurist and comparatist pursuing her academic career in France and wanting to publish on the EEA in a French law journal, Imogene is not in control of this organizational situation: she must comply. There is simply no escape from the French plan for her: think of the plan as an electric wire barrier, floodlit, and dog-patrolled. And observe the normative role that power plays in the inculcation of the template I am addressing: each teaching generation is robustly mastering (and therefore maintaining) the relevant socialization and institutionalization processes — including the formative epistemic influences (the epistemologization) — to which it exposes and subordinates the new generation

⁶⁸⁴ Heidegger, M (1959) *Unterwegs zur Sprache* Neske at 159: 'To have an experience with something, be it a thing, a human being, a god, means that it befalls us, that it strikes us, comes over us, upsets and transforms us' ['Mit etwas, sei es ein Ding, ein Mensch, ein Gott, eine Erfahrung machen heißt, daß es uns widerfährt, daß es uns trifft, über uns kommt, uns umwirft und verwandelt'].

⁶⁸⁵ Cf Barraud, B (2015) 'L'usage du plan en deux parties dans les facultés de droit françaises' *Revue trimestrielle de droit civil* 807 at 811 and 819, where Boris Barraud refers to 'a demand whose obligatoriness hardly raises any doubt' ['une exigence dont l'obligatorité ne fait guère de doute'] and who remarks that 'the student will always have scrupulously to conform himself to it' ['l'étudiant devra toujours scrupuleusement s'y conformer'].

⁶⁸⁶ Sloterdijk, P (2001) *Nicht gerettet* Suhrkamp at 201 ['das Inventar von Selbstformungsprozessen'].

⁶⁸⁷ Beckett, S *The Unnamable* supra note 20 at 104.

⁶⁸⁸ Touzeil-Divina, M (14 March 2011) 'Le plan est en deux parties... parce que c'est comme ça', *L'Actualité juridique droit administratif (AJDA)* 473 at 473 ['(l)e plan en deux parties est au Droit ce que Marianne est à la République française (...): un symbole culturel et national']. A Belgian academic, having declared himself 'an unconditional admirer of the plan in two parts, two sub-parts, with titles "well balanced" that answer to one another', has opined that such plan is 'an expression of the French genius': Kaczmarek, L (2012) 'Faut-il repenser les exercices juridiques?' in Flores-Lonjou, M; Laronde-Clérac, C and Luget, A de (eds) *Quelle pédagogie pour l'étudiant juriste?* Bruylant at 106 ['un admirateur inconditionnel du plan en deux parties, deux sous-parties, avec des intitulés "bien équilibrés" qui se répondent'; 'une expression du génie français'].

of students. Think of a reproductive unravelling of enculturation, the fact that French law students feel the uncircumventable obligation to abide by the bipartite and quadripartite framework being empirically verifiable and the further fact that, for all intents and purposes, all of them actually follow this model being no less empirically verifiable (every student's commitment being confirmed by every other student's commitment). Meanwhile, consider the additional empirically verifiable fact that Australian, Brazilian, Chinese, Danish, English, Finnish, German, Hungarian, Italian, or... US law students do not abide by the French framework — whose cultural fabric thus brooks no reasonable contestation.⁶⁸⁹

In France, the existence of institutional authorities, of introductory books on legal writing, and of set practice sessions with teaching assistants during the first-year programme of legal studies, not to mention the presence around one of other law students who are assumed to share an equivalent or common (that is, an 'equivalent enough' or 'common enough') understanding of how a plan is to be devised, all of these forces (and no doubt a few more) generate a convergence between the various writers of law-plans making it plausible to each student that the plan is a thing-like entity, a real object, that somehow exists outside of him and to which he has to pay allegiance. Strictly speaking, of course, the atmospherics of transmission do not involve a fully-integrated collective effort but rather take the form of a very tightly and most effectively co-ordinated set of individual initiatives (open to inspection) that orient personal deportment *as if* there was a real entity that somehow lived beyond one and demanded unconditional obedience.

However, even such a dogmatic system as French plan-writing in French law faculties cannot perform mechanically and will therefore feature expressions of

⁶⁸⁹ Cf Barraud, B 'L'usage du plan en deux parties dans les facultés de droit françaises' supra note 685 at 812, where the author claims 'a usage that is not to be found anywhere abroad' ['un usage qui ne se retrouve nulle part à l'étranger']. I am minded to qualify this statement by excepting the locations where France has exported the plan as one of its technologies of imperial management. While on the topic of foreign jurisdictions, it is worth mentioning that there is not the slightest shred of evidence whatsoever that French student exposure to foreign textual architectonics through institutional ambulation — one-semester and one-academic-year exchanges, fully-fledged joint-degree programmes, or co-supervised doctorates involving a foreign academic and implying research *à l'étranger* — has generated the faintest challenge to the governing French scheme. This immutability is readily understandable if one recalls the acute manifestations of unwarranted narcissism and arrogance for which the French are (in)famous. Indeed, French law professors readily introduce the French plan as a sign of the superiority of French legal thought. Eg: Vivant, M (2001) 'Le plan en deux parties, ou de l'arpentage considéré comme un art' in *Le Droit privé français à la fin du XXe siècle* Litec at 982, where Michel Vivant maintains as follows: 'The plan in two parts [...] gives [...] to speech a rigour that is also, let us not hesitate to say it, a French quality that one perceives well when, for example, during an international congress, the identical theme is treated by a French jurist who leaves nothing in the shade and a jurist come from other horizons whose discourse often loses itself into meanderings and digressions' ['Le plan en deux parties (...) donne (...) au propos une rigueur qui est aussi, n'hésitons pas à le dire, une qualité française qu'on perçoit bien quand, par exemple, lors d'un congrès international, le même thème est traité par un juriste français qui ne laisse rien dans l'ombre et un juriste venu d'autres horizons dont le discours se perd souvent en méandres et digressions']. In the words of a Sorbonne colleague of mine writing about the French doctrinal rejection of a third category that would be added to those of 'parliamentary regime' and 'presidential regime' so as better to fit the French constitutional model, '[t]he love of binarism is stronger than anything': Mériau, E (2025) *Constitution* Anamosa at 53 ['(l')amour du binarisme est plus fort que tout']. For his part, Pierre Legendre refers to 'nationalist incabining': Legendre, P *L'Amour du censeur: essai sur l'ordre dogmatique* supra note 10 at 251 ['l'encabanement nationaliste']. My neologism ('incabining') wants to account for Legendre's ('encabanement'), the derogatory slant meaning to underscore the idea of 'confine[ment] within narrow and hampering bounds' (OED).

dissentience, whether voluntary or not. For instance, there will be students who misunderstand the model (say, the novice jurists), and there may be others who will dare to tinker with the paradigm at the margin, perhaps in the futile hope that their plan will strike the law teacher as being more rhetorically agile than other plans in the class. Still, the legal culture of the plan in French law faculties is sufficiently well implanted so that if a student submitted a seven-part plan with the fifth part featuring three sub-parts (even fathoming such a scenario to be possible), all that the law teacher would have to do upon returning the homework (quite plausibly unmarked) is look the student in the eye and say 'Monsieur, votre plan...' ('Sir, your plan...').⁶⁹⁰ The law teacher would not require to be more specific since he would be speaking on the basis of a tacit assumption that the pattern of plan-writing is so well known that one can easily draw on this consubstance in order to implement its normativity in the most immediate terms. The teacher's admonition would also reveal his own embrace of the cultural model of plan-writing and his firm determination to be upholding it. Indeed, '*to defend the plan into two parts is to defend the faculties of law*',⁶⁹¹ and 'its disappearance would be the sign of obscure times for the law to live through'.⁶⁹² In effect, it is hardly an exaggeration to observe that such idiosyncratic seven-part plan as I contemplate would ultimately be regarded as a threat to the social order. (*Anecdotaly...* As we were eating the scrambled-eggs-and-caviar breakfast that he had very kindly cooked for me in his Trinity College rooms, Tony Weir explained that he had once challenged his friend Pierre Catala, a leading French jurist, that surely not everything could be divided into two parts. Catala had encouraged Weir to offer an example of what he had in mind. Wittily, I thought, Weir had replied: 'The Holy Trinity.' Weir heartily recounted to me how Catala was unfazed and immediately proceeded to parry: 'Part One: The Holy Trinity is Three; Part Two: The Holy Trinity is One.' *Touché*.)

To summarize, then: because she is writing in French with a view to publication in France, Imogene's access and re-presentation of US law must happen through French legal culture: *it cannot not do so*. Imogene's access to US law and her re-presentation of US law cannot be Frenchless. However, her re-presentation of US law in the French-systematic way that I am explaining must invest the US statute with a coherence that is foreign to it — thus performing an incongruent rationalization of the US law-text — and in this sense must operate a distortion of the EEA, '[a] conceptual scheme [being] the first violence of all commentary'.⁶⁹³ In an important sense, Imogene will therefore be conducting, inevitably, a Frenchification of the EEA in the name of a strong French dedication

⁶⁹⁰ Cf Barraud, B 'L'usage du plan en deux parties dans les facultés de droit françaises' supra note 685 at 820: '[A]n identical discourse held within an outline into three parts will get an inferior mark to the one that would be granted if the outline was bipartite' ['(U)n même discours tenu dans un plan en trois parties obtiendra une note inférieure à celle qui serait accordée si le plan était bipartite'].

⁶⁹¹ Id at 819–20 ['*défendre le plan en deux parties, c'est défendre les facultés de droit*']. Cf Lemieux, M (1987) 'La récente popularité du plan en deux parties' (12) *Revue de la recherche juridique* 823 at 835, where Marc Lemieux reproves 'a corporatist ideology' ['une idéologie corporatiste']. Accord: Vivant, M 'Le plan en deux parties, ou de l'arpenage considéré comme un art' supra note 689 at 975.

⁶⁹² Barraud, B 'L'usage du plan en deux parties dans les facultés de droit françaises' supra note 685 at 819 ['sa disparition serait le signe de temps obscurs à vivre pour le droit'].

⁶⁹³ Derrida, J *L'Ecriture et la différence* supra note 603 at 124n1 ['(un) schéma conceptuel (étant) la première violence de tout commentaire'].

to a strict writerly formalism that is squarely the product of her enculturation. While the VSI is evidently 'Made in Italy', Imogene's text on the EEA will very much stand to be 'Made in France.'

To disparage the matter of the plan as a simple question of form would be profoundly to misunderstand the political impact of enforced binary articulation in strict accordance with one formal model only. And I am unwilling to believe that anyone (except, perhaps, my French colleagues) would be seriously prepared to profess that the coerced rationalization of French students' legal writing is bereft of programmatic values — that it would be *wertfrei*, to say it like Weber. Quite simply, the formal cannot not relate to the political (with apologies for the double negative): if only because it indicates an arrangement of elements, a patterning, since it imposes control and containment, given that it shapes what it is possible to think, say, and do, the yield of form is also political. Yes. Most strikingly, I suggest, the French compulsory systematization operates as an exercise in the strong affirmation of institutional power inasmuch as it purports to restrain any meaningful expression of agency and simultaneously to foster zealous obeisance to state authority (the law professors themselves being state adjuvants in their capacity as civil servants). Such is the dominant ideology, such is the deliberate intention: to keep law students in their proper place, where the legal mind (indeed the mind *tout court*) finds itself subdued. As one is addressing a spectacular case of dressage, it is understandable that the methodical accoutrements being forcibly and censoriously nurtured through the obligatory plan should evoke the epistemology of objectivation and veridiction. Crucially, the detachment of form from individuality, from particularity, acts as a de-personalization strategy that translates into the conferment of a seemingly independent existence to the plan. After all, the plan pre-exists everyone currently working as a jurist in France, irrespective of what any French jurist wishes to say or do. And the plan is, of course, the uniquely correct or exact way, the only right or proper manner to frame one's thought — the fact that everyone else is doing likewise, the comfort of repetition, the absence of difference, contributing to every jurist's feeling of propriety and consolidating every jurist's sense of virtue. There is thus nothing epiphenomenal about form. Rather, one is witnessing a cultural commitment that regards the French plan as essential to the affirmation of sound legal thinking: French legal education will therefore tolerate no other form. Given their massive investment in the unity of form, a fascinating occurrence of the most obstinate conservative activism and exclusionism, of a totalizing formalist impulse, one could say that French jurists have allowed themselves to forget about contingency and to fall into the trap of essentialization — the formal whole absorbed into the hole of formalism. And the plan is French, which means that it reinforces the very strong sense of legal patriotism, of legal imperialism, obtaining locally. If you will, there takes place a blending of formalism and nationalism. By contrast, vitality, freshness, difference — otherness — are to be adamantly silenced through form. The abiding institutional significance of the plan in French law faculties can be captured through an *anecdote* that refers to my time as a postgraduate student at the Sorbonne in the 1980s. I then had French classmates who explained to me that they had personally experienced five-hour written final examinations where the law teacher demanded that only a plan be submitted by way of answer.⁶⁹⁴

⁶⁹⁴ See generally Levine, C (2015) *Forms* Princeton University Press at 1–23.

As it happens, there is more to *elegantia juris* French style. Leaving to one side the fact that the author must steadfastly resort to the so-called 'literary I', which means the inscription of the first-person plural (the assumption being that the desubjectivization of the argument translates into heightened scientification), I find it pertinent rapidly to mention some further structural features unswervingly characterizing the French plan. For example, the first part of the binary arrangement must be preceded by a short introduction to both parts heralding how the two parts are synchronised. This introduction is known in French as 'l'annonce du plan' or 'the announce of the plan', and it must begin with 'une phrase d'accroche', that is, a sentence to hook the reader, a catchphrase. Also, a further brief introduction (the 'chapeau' — literally, 'the hat') must herald each pair of sub-parts, the goal once more being to inform the reader how each sub-binary has been constructed. And then, the headings of the parts have to resonate with one another as must the headings within each pair of sub-parts. The idea of resonance refers to symmetry (both as to length and contents) and to assonance or alliteration, the antimetabole being a favorite figure of speech. By way of illustration, consider the following sequence pertaining to a hypothetical French essay in comparative law:

I. What Comparison Can Do For You

A. To Promote Foreignism

B. To Demote Nationalism

II. What You Can Do For Comparison

A. To Inject Culturalism

B. To Eject Positivism.

Observe the principal inversion and the overall synchronicity that it carries ('What Comparison Can Do...'/'What You Can Do...'). And note the further contrareities and assonances ('Promote'/'Demote'; 'Foreignism'/'Nationalism'; 'Inject'/'Eject'; 'Culturalism'/'Positivism'). Envisage also how the headings and sub-headings are cadenced in order to optimize what one might style 'legal aesthetics'.

Imogene will thus have to Frenchify — and simultaneously to de-Americanize — the EEA along these aesthetic lines, bearing in mind that elegance, far from being a mere ornament that would be superimposed upon legal reasoning, is that reasoning itself. More accurately, it is that visible side of the logical rigour that French jurists understand to be implementing legal rationality. In the process, the EEA will find itself being arrayed to a measure of appropriation or assimilation, in effect falling prey to a brand of formalist colonialism or imperialism (which, as Imogene herself appreciates, is eminently problematic in terms of the ethics of comparative law — a case of aesthetics v ethics, then). It follows that the EEA, as it will be re-presented under Imogene's signature in the French law journal, will be other than the EEA as it exists on the US legal scene. If you will, there will be the EEA, and the EEA'. In other words, there will be difference, there will be the differend.

Now, it must stand to reason that if Imogene is seeking a deep understanding of the EEA — and how conceivable is it that, as an earnest comparatist, she would be content with a superficial one? — she will require to go beyond statutory analysis, judicial exegesis, and doctrinal commentary because '[the] value [of rule-comparison] as a source of explanation [...] is small.'⁶⁹⁵ To put the matter differently, Imogene will have to engage in a cultural analysis of the EEA, that is, inscribe the EEA's worldly attachments (some of them at least) that positivism would readily discard or outlaw, deeming them out-of-law. In particular, Imogene-as-culturalist will have to trace the statute and its significant criminal penalties and civil sanctions to the United States as a land of cutting-edge technological innovation, as a country embroiled in a perpetual struggle for planetary ideological, political, military, and economic supremacy and at war on these various fronts with competitors such as China, Russia, and their proxies — thus inordinately preoccupied (or obsessed) with its national security. The religious, messianic drive fuelling the doctrine of exceptionalism might well deserve some attention, too.⁶⁹⁶ And then, as I have mentioned, Imogene will have to address the internal dynamics of federalism to explain why state trade-secret laws were considered to be insufficient and therefore deemed to warrant the EEA. Only if the statute's enculturation (or worldliness) is brought to the fore can the existence and the contents of the law-text carry any significant meaning, can the foreign law-text be narrated *not quite* (there is foreignness's secret...).

It is key to emphasize how culture is not around the EEA; rather, the statute is thoroughly cultural: culture innerves the law-text, which therefore exists as cultural statement. 'If we are to make headway in understanding legal studies as cultural studies and legal practice as cultural practice, then [...] [t]he goal [...] is to understand law not in relationship to culture, as if they were two discrete realms of action and discourse, but to make sense of *law as culture*',⁶⁹⁷ very much

⁶⁹⁵ Merryman, JH (1974) 'Comparative Law and Scientific Explanation' in Hazard, JN and Wagner, WJ (eds) *Law in the United States of America in Social and Technological Revolution* Bruylant at 89n20.

⁶⁹⁶ See eg Kessler, AD (2017) *Inventing American Exceptionalism* Yale University Press; Engen, AC Van (2020) *City on a Hill: A History of American Exceptionalism* Yale University Press; Tyrrell, I (2021) *American Exceptionalism* University of Chicago Press; Lipset, SM (1997) *American Exceptionalism* Norton; Hodgson, G (2009) *The Myth of American Exceptionalism* Yale University Press.

⁶⁹⁷ Mezey, N (2001) 'Law as Culture' (13) *Yale Journal of Law and the Humanities* 35 at 36 [my emphasis]. See also Rosen, L (2006) *Law as Culture: An Invitation* Princeton University Press; Kahn, PW (1999) *The Cultural Study of Law* University of Chicago Press 1999. Not only does positivism deny culture, but positivism is positivism only in so far as it disavows culture. Predictably, orthodox comparative law has therefore been activating its immune defences in order to shield itself from culture — a primordially threatening idea that positivist comparatists are determined to cancel. For an example of the summary expulsion of the law's enculturation (as if one could simply wave one's positivist wand...), see Milhaupt, CJ and Pistor, K (2008) *Law and Capitalism* University of Chicago Press at 208, where the co-authors dismiss culture on the ground that it is '[an] open-ended concept' and that its use would 'ope[n] a Pandora's box of interpretive nightmares'. For another positivist, any account (of foreign law) 'must remain within the law without taking recourse to general societal culture, because culture and its relation to the legal rules and institutions are unclear': Michaels, R (2006) 'Two Paradigms of Jurisdiction' (27) *Michigan Journal of International Law* 1003 at 1017. Please note: because the matter is unclear, it will be ignored (not clarified). Along analogous positivist lines, contemplate the equally intellectually demeaning position that 'linking law to [...] cultural phenomena of a specific country would be impossible': Smits, JM (2002) 'The Harmonisation of Private Law in Europe: Some Insights from Evolutionary Theory' (31) *Georgia Journal of International and Comparative Law* 79 at 81. Quaere: how, then, can Jack Balkin write that '[t]o understand the attractions of originalism in the United States, one must stop thinking of it primarily as a theory of interpretation and start thinking about it as a cultural narrative' (Balkin, JM *Memory and Authority: The Uses of History in*

unlike the VSI, then, that persists in acknowledging, Kelsen-like, what would be 'purely legal criteria' (96) — effectively non-existent parameters, a delusion of the positivist mind.

Positivism's (and orthodox comparative law's) cultural evasion notwithstanding, the EEA is US culture speaking legally (rather than, say, literarily or cinematographically or architecturally or whatever). While culture can still be distinguished from law, not unlike the way in which the canvas can be differentiated from the painting, it is not outside law any more than the canvas is outside the painting. *Culture is not an exterior (or contextual) entity to law*, no matter how indigestible this fact may appear to positivists determined to keeping law 'pure'. For Imogene, the epistemic summons is accordingly to make herself indisciplined, that is, to accept that she must range beyond the discipline of law — and away from positivists wielding their discipline (etymologically, a discipline is a whip). In order to achieve a deep understanding of foreign law, Imogene must develop an allergy to academic silos, foster an antagonism to university ramparts.⁶⁹⁸

Significantly, the indisciplined calibration, if I can call it that, will very much depend on Imogene's own predilections — an observation that returns one to the autobiographical dimension within comparative law and to the contingency of the re-presentation of foreign law that a comparatist finds oneself defending. It is Imogene who, harnessing her flair to inform her bricolage, will decide on the worldliness at stake: the 'amount' of world that she wants to include in her analysis, the 'sort' of world that she regards as meaningful, and the 'depth' of world that she deems pertinent. Thus, she may decide that the EEA should primarily be traced to geopolitics and therefore grant more weight (and more words and more references) to this matter than, say, to ideology. Imogene fully appreciates that another comparatist, however, might beg to differ and hold religiosity worthy of greater significance than she herself is willing to concede. To repeat, no comparatist can say everything that could potentially be said about a given foreign law, and a report on foreign law necessarily heralds an unfinishable situation: foreignness is, properly speaking, unsaturable since, any turbulent discharge of words notwithstanding, all the evidence can never be

Constitutional Interpretation supra note 387 at 59); how, then, can Steven Calabresi argue that 'in [US] constitutional culture there is actually a well-established Burkean practice and tradition of venerating the text and first principles of the Constitution': Calabresi, SG (2006) 'The Tradition of the Written Constitution: Text, Precedent, and Burke' (57) *Alabama Law Review* 635 at 637; how, then, can David Strauss refer to 'the Constitution's cultural salience': Strauss, DA (2003) 'Common Law, Common Ground, and Jefferson's Principle' (112) *Yale Law Journal* 1717 at 1734; and how, then, does William Baude feel able expressly to connect '[o]riginalism's [c]ontingency' with 'legal cultur[e]': Baude, W (2015) 'Is Originalism Our Law?' (115) *Columbia Law Review* 2349 at 2399 [emphasis omitted]? Meanwhile, there is Uwe Kischel's view that the lack of definition of culture would constitute a major operational liability: there is no 'clear picture or definition of legal culture', and there are 'problems in finding an exact definition' (the words 'an exact definition' translate 'ein[e] genau[e] Definition'): Kischel, U *Rechtsvergleichung* supra note 201 at 230 and 231. Quite apart from heralding their devotion to 'black-letter' law, it strikes me how the various disclaimers that I list (Milhaupt and Pistor's, Michaels's, Smits's, and Kischel's) betray a (seemingly unabashed) laziness that hardly becomes comparative research, an endeavour not at all suitable for the timorous. For a striking (and untheorized) attempt at keeping law positivistically pure, culture being safely relegated to the ever-so-conveniently-expendable 'contexts' [sic], a basic confusion between intrinsicality and surrounding, see Husa, J (2015) *A New Introduction to Comparative Law* Hart at 3. For a renewed commitment to law's purity (and to 'contexts' ...), see Husa, J (2023) *Introduction to Comparative Law* (2nd ed) Hart at 4.

⁶⁹⁸ Again, I make the case for an indisciplined comparative law in Legrand, P *Negative Comparative Law: A Strong Programme for Weak Thought* supra note 54 at 182–216.

collated ('there might be a hundred [traces] and still we'd lack the hundred and first').⁶⁹⁹ As befits interpretation, singularity and dissensus will (and must) carry, a diversity of interpretations therefore tracking the variety of comparative studies probing the EEA and illuminating the statute from different angles (unlike the scenario obtaining with respect to particle physics where experimental replication and therefore consensus is key). So as to persuade her readers to credibilize her understanding of the EEA over other statutory interpretations by other comparatists-at-law, Imogene's remit must be to develop a reading of hers — an encultured reading of hers — that is clever, audacious, and convincing. In this respect, she recalls Bruno Latour's admonitions: '[A] good account [i]s one that traces a network'; moreover, '[a] good [account] should trigger in a good reader this reaction: "Please, more details, I want more detail[s]"'.⁷⁰⁰ Yes: comparative epistemology as an epistemology of details.

(As she indulges a brief introspective interlude, the kind of pause that comparatists ought to favour so much more than they do, Imogene smiles to herself that she is implementing the logic of the loom. Traces chafe against positivism's default notion of textuality and attendant conceptual constructs — all evocations of stability and control suggesting that meaning would feature the impermanence of stones rather than the transience of cloth. Yes. Traces are too entwined with worldliness, too interconnected amongst themselves (every thread tugging a bit at every other thread), too resonant with culture, too redolent also of the interdependence that one associates with the idea of network and therefore with that of indiscipline, for monocular positivists to approach them seriously, to accept that texts are complicated sites held together by nodes or tangles, to allow that texts act as votive containers, social signifiers, historical carriers of memory, and political vectors of belief (a mnemonic marking law's continuous embeddedness in locality), to take the taut fabric's weight, sag, resistance, and pliability legally. And, of course, '[t]here are no methodologically predicted limits of relevance.'⁷⁰¹ Yet, not only are traces the archive of the text, says Imogene to herself, but they stand for the text at its textmost, for the text as hypertext: they are the architext of the text.)

Note that for Imogene to claim her account of the EEA, no matter how competent, to be representational, to assert that her report heralds objectivity or veridiction, for Imogene to defend her subjective ability to reach such epistemic ends through method and hard work — or via whatever tactic — would be to arrogate to herself a privileged and wholly imaginary vantage outside of her

⁶⁹⁹ Beckett, S *The Unnamable* supra note 20 at 52. I substitute 'traces' for Beckett's 'wretches'. See also Beckett, S (1995) [1972] 'The Lost Ones' in *The Complete Short Prose* Gontarski, SE (ed) Grove 1995 at 219: 'All has not been told and never shall be.' See also Steiner, G *On Difficulty* supra note 134 at 157: 'The interaction of text and interpreter is never closed.'

⁷⁰⁰ Latour, B *Reassembling the Social* supra note 485 at 128 and 137.

⁷⁰¹ Steiner, G *On Difficulty* supra note 134 at 157. Elsewhere, George Steiner makes his point through a compelling illustration. I refer to Steiner, G (1997) *Errata* Weidenfeld & Nicolson at 19: 'The informing [situation] 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. The [situation], without which there can be neither meaning nor understanding, is the world.' I substitute 'situation' for Steiner's 'context'.

own cultural reality. Indeed, '[t]he choice [...] of a withdrawn standpoint is only ever as fictitious as the construction of abstract utopias.'⁷⁰² Anyone who would suggest otherwise and maintain that somehow the comparing mind would be able to disembodify itself, to de-enculture itself, to abstract itself away from corporeality, might as well be defending the existence of flying broomsticks or angry blankets. How could the comparison of laws not be the outcome of cognitive processing and thus subordinated to human cognition's quandary? But once comparative law puts cognition back in the brain, the brain back in the body, and the body back in the world, once the physical embodiment of the comparing mind — and, indeed, the world-embeddedness of foreign law — are taken seriously, the theoretical model on offer from orthodox comparatists decidedly looks distinctly fatuous, in effect irredeemably compromised.

Imogene cannot represent the EEA because it is what it is (an encultured entity whose foreignness is so detailed that it is properly infinite), and she cannot represent the EEA because she is who she is (an encultured entity needing to name the foreign through her encultured mind including her encultured language); there is, then, the it-impediment and the I-impediment, a double bind that Beckett captures thus: 'First the body. No. First the place. No. First both.'⁷⁰³ Such is comparison — a coming not-together of the not-knowable other and the not-knowing self — which is why Mallarmé proved most insightful as he underscored the constitutive precarity of the epistemic enterprise, the intractability of representation, of objectivity, of truth, of a subject who could achieve those,⁷⁰⁴ 'false exits' affording but the illusion of transcendence and mastery, lulling the comparatist into an epistemic sleep, the apparent open door in fact a solid brick wall.⁷⁰⁵ What Mallarmé presciently devised is the 'rupture of the lines of communication',⁷⁰⁶ a fact that the comparatist's neural hardware simply cannot overcome: 'The one will say, I cannot see the object to represent it because the object is what it is. The other, I cannot see the object to represent it because I am what I am.'⁷⁰⁷ There is — and there can be — no *adæquatio foranus et intellectus*. It follows that the comparatist is never in a position to think of foreign law with integrity unless, at some point or other, he acknowledges his presence in the re-presentation of the foreign. Meanwhile, any attempt rigorously to eliminate the comparatist's perspective from his picture of foreign law must lead to senselessness since the comparatist himself is indispensable to any configuration of his purported understanding of foreign law. The foreign law that he claims to know is in part mind-, culture- (including language-), and theory-dependent, and the comparatist is thus part of the re-presentation of

⁷⁰² Adorno, TW (2003) [1951] 'Kulturkritik und Gesellschaft' in *Kulturkritik und Gesellschaft I* Tiedemann, R (ed) Suhrkamp at 26 ['(d)ie Wahl eines (...) entzogenen Standpunkts ist so fiktiv wie nur je die Konstruktion abstrakter Utopien'].

⁷⁰³ Beckett, S *Worstward Ho* supra note 43 at 81. As regards the it-impediment and the I-impediment, I draw on Beckett, S 'Peintres de l'empêchement' supra note 24 at 136.

⁷⁰⁴ Supra at 407–14.

⁷⁰⁵ Derrida, J (1972) *Marges Galilée* at 162 ['fausses sorties'].

⁷⁰⁶ Beckett, S [1984] (1934) 'Recent Irish Poetry' in *Disjecta* Cohn, R (ed) Grove at 70.

⁷⁰⁷ Beckett, S 'Peintres de l'empêchement' supra note 24 at 136 ['L'un dira: Je ne peux voir l'objet, pour le représenter, parce qu'il est ce qu'il est. L'autre: Je ne peux voir l'objet, pour le représenter, parce que je suis ce que je suis']. The English version is Beckett's own: Beckett, S (2011) [1948] 'The New Object' (18) *Modernism/modernity* 878 at 879.

the foreign through a continuous chain of reference including the reading, the musing, the discerning, and the writing (which does not mean, of course, that the statutory or judicial extracranial reality of foreign law is somehow mind-dependent).

To be sure, '[t]he problem [comparatists] face, as students of [them]selves, is that of catching [them]selves in the act of making [them]selves.'⁷⁰⁸ And this difficulty has been compounded by a very positivist refusal on the part of orthodox comparatists to engage in even minimal introspection with a view to achieving greater clarity regarding the epistemic limits within which their work must be implemented and thus to lower their epistemic sights accordingly. Unsurprisingly, perhaps, I have therefore repeatedly encountered comparative law's reaction of distaste to my Mallarmean claim regarding the structural — *the unsurmountably structural* — epistemic configuration characterizing any research into foreign law and all comparison of laws, the fact that the body of the (comparing) worker is present in the body of the (comparative) work. And reactions to my argument from indiscipline, to my intimation for the need to engage in an archaeological tracing of foreignness to its constitutive discursive components, have ranged from the implausible view that the digging I am expecting of the comparatist falls beyond the boundaries within which law must somehow find itself analytically circumscribed and that my contention must accordingly be ignored (Germany) to the disgraceful position that my stance is unduly complicated and simply requires too much effort (France, Finland, Italy). (Such resistance both to the fact of the comparatist's worldliness and to the further fact of foreign law's worldliness — to a topological thinking of law — is, I suggest on the basis of decades of first-hand exposure to civilians all over the planet, practically definitory of the civil-law tradition.⁷⁰⁹ In particular, civilians have long been 'intent on creating a comparative discipline on purely juridical [...] terms',⁷¹⁰ on what they deem thus. And civilians are properly uneducable inasmuch at least as they cannot be made to repent of their lust for the certainty that they associate with rules and with rules-oriented analysis.⁷¹¹ I reserve the small matter of *vilpitön mieli*...)

A further cluster of remarks is pertinent. To acknowledge the basic empirical fact of the situatedness of law — to recognize that every law, whether Bolivian, Spanish, or Turkish, arrays its own history, its own politics, its own society, and so forth — and to respect the correlative empirical fact that every law developed differentially from all other laws through a dynamic of multifaceted singularization (historical, political, social, and so forth) must lead

⁷⁰⁸ Noë, A *The Entanglement* supra note 17 at 24. Cf Brower, RA (1951) *The Fields of Light* Oxford University Press at xii: '[T]he responsible critic is obliged to give an account of how he works. He will not succeed, of course, since no one [...] ever describes exactly what he does. However conscious the operator may be, there is always some point at which he becomes inarticulate; some indispensable act of perception [...] always lies beyond expression.'

⁷⁰⁹ Supra at 249–50.

⁷¹⁰ Koskenniemi, M and Kari, V (2018) 'A More Elevated Patriotism' in Pihlajamäki, H; Dubber, MD and Godfrey, M (eds) *The Oxford Handbook of European Legal History* Oxford University Press at 996.

⁷¹¹ See Legrand, P 'Are Civilians Educable?' supra note 347. Relatedly, Robert Gordon notes 'the old Formalist belief that only specialized-law-stuff-separate-from-politics is law': Gordon, RW 'Critical Legal Histories' supra note 307 at 122–23 [emphasis original]. It ought to be superfluous to add that the doctrine of formalism is itself a political practice.

one to challenge pseudo-normative pacificatory paradigms — corny thematic peace-processy enunciations — that purport to tell life across laws in terms of harmony, complementarity, or unity, these strategies signalling but the realm of violent self-serving fantasy. Instead, the comparatist must actively substitute the tropes of discrepancy, strife, and competition — that is, the figure of incommensurability. There can be no synthesis of conflicting models, there is no possibility of reconciliation across inherently agonistic and mutually exclusive law-worlds: 'judge' will never mean 'juge', and 'contract' will never mean 'contrat'. Indeed, the meanings of 'judge' and 'juge' or of 'contract' and 'contrat' will never converge (which is precisely why such concepts are comparable pace the VSI [69]). The empirical fact of the matter is that 'language is monologue': it speaks 'lonesomely'.⁷¹² Within comparative law, this situation indicates how what there is across legal cultures (and therefore across legal languages) pertains to disjointedness or discontinuance — hence, across the diremption and disruption, the fiction of an interlocution, the pretence of an understanding. I do say *fiction* of an interlocution and *pretence* of an understanding. Yes. In effect, '[w]e [...] are at most always only "thereby"'.⁷¹³

At best, then, the comparison '*holds together*, without hurting the dis-jointure, the dispersion, or the difference, without effacing the heterogeneity of the other'.⁷¹⁴ Otherwise said, 'the division, the dis-junction, is the relation'⁷¹⁵ — that is, the irrelation (or disrelation) is what there is, not a problem to which there would have to be a solution, then: the comparison moves outside of the dynamic of relation that is assumed to be requisite for comparative law (and by comparative law), arguably one of the most significant theoretical insights to have escaped the orthodoxy. As rationality finds itself being relativized — the estimation of plurality must be a key factor in the comparatist's allegiance to foreignness — comparison structurally invites conflict, no appeal to contrived and evanescent overarching commonalities being in a position to overcome the constitutive comparative dissensus. (Once more, recall how there is also antagonism amongst comparatists saying the foreign law — even amongst

⁷¹² Heidegger, M *Unterwegs zur Sprache* supra note 684 at 265 ['die Sprache ist Monolog'; 'einsam']. Otherwise said, 'everything in me knows that I always speak the one language': Gaspar, L *Approche de la parole* note 657 at 12 ['tout en moi sait que je parle toujours la même langue']. More complicatedly, the language that I always monologue is the monolingualism of the other — the native language into which I was thrown and that I call 'mine' is, on reflection, someone else's language that was transmitted to me. Cf Derrida, J (1996) *Le Monolinguisme de l'autre* Galilée at 47: 'My language, the only one that I hear myself speak and know how to speak, is the language of the other' ['Ma langue, la seule que je m'entende parler et m'entende à parler, c'est la langue de l'autre']. The witty French double entendre is lost in translation.

⁷¹³ Heidegger, M *Sein und Zeit* supra note 27 at 239 ['Wir (...) sind höchstens immer nur "dabei"']. Cf Derrida, J [2003] *La Bête et le souverain* supra note 553 at 368: '[I]t does not suffice that we all have, you and me and so many others, here and now or anywhere or whenever, the vague reassuring feeling to understand one another, to speak between us the same language, to share an intelligible language, within a consensual communicative action, [...] that does not suffice for that to be true' ['(I)l ne suffit pas que nous ayons tous et toutes, vous et moi et tant d'autres, ici maintenant ou n'importe où et n'importe quand, le vague sentiment réconfortant de nous entendre, de parler entre nous la même langue, de partager un langage intelligible, dans une action communicative consensuelle, (...) cela ne suffit pas pour que cela soit vrai'].

⁷¹⁴ Derrida, J *Spectres de Marx* supra note 114 at 58 ['maintient ensemble, sans blesser la dis-jointure, la dispersion ou la différence, sans effacer l'hétérogénéité de l'autre'].

⁷¹⁵ Derrida, J (1988) *Mémoires* Galilée at 110 ['le partage, la dis-jonction est le rapport'].

comparatists operating within one language only⁷¹⁶ — as each vies to install the legitimacy of his interpretive position: ‘One way or another, comparatism is always a space of contestation.’⁷¹⁷)

Lest I be misunderstood, let me insist how I hold that, despite ‘the indigence of words in their exhaustion and their degradation’, notwithstanding ‘[t]he misery of expression’,⁷¹⁸ the comparatist is not short of relish and resource. To be sure, there is the comparatist’s language and its subordination to foreignness, foreign law’s refusal to yield to meaning in another language, the ‘radical disjunction between reality and word’.⁷¹⁹ But there is also the comparatist’s language that can be moulded according to expressive needs, as maker and unmaker of foreign law — language’s obstinate telling of foreignness in its own words. If you will, the comparing mind is wielded by foreign law’s foreign language even as it also wields its language over foreign law. Accordingly, there takes place an epistemic transaction of sorts, and while any interpretation of foreignness carries an infinitely deferred indeterminacy — while it can never *arrest* foreign law — it is not devoid of all normativity. As I have indicated, the comparatist’s afflicted experience/narrative of the foreign readily substitutes for foreign law, which means that it assumes foreign law’s normativity in foreign law’s stead. Because of the epistemic condition structuring the unsyncretizable character of the comparison across legal cultures, the goal can only be for the comparatist consistently to fail better in his quest for understanding and expressivity.⁷²⁰ Still, two mistaken assumptions must be resolutely avoided: that Imogene can de-enculture herself in order to meet the EEA on its own terms (she cannot install a distance from herself); and that Imogene can access the EEA in order to meet it on its own terms (she cannot efface her distance from the foreign). (A third premiss to be eschewed would be, of course, that the EEA does not exist as a cultural statement and that ascription of meaning to it could therefore circumvent cultural analysis.)

What orthodox comparatists regard as the uncompromising harshness of the deconstruction I conduct as I unremittingly seek to disrupt the prevalent starry-eyed comparatism in order to generate a cognitive awakening — I maintain that every comparatist is kept at a distance from foreign law, every law kept

⁷¹⁶ Cf Deleuze, G and Guattari, F (1991) *Qu’est-ce que la philosophie?* Editions de Minuit at 105: ‘[W]e speak the one language, and yet I do not understand you...’ [‘(N)ous parlons la même langue, et pourtant je ne vous comprends pas...’].

⁷¹⁷ Gagné, R ‘Regimes of Comparatism’ *supra* note 32 at 2. Cf Sandel, MJ (1998) *Liberalism and the Limits of Justice* (2nd ed) Cambridge University Press at 52: ‘[N]otwithstanding even the closest similarity of situation, no two persons could ever be said to be identically situated, nor could it be that any two persons had identical aims and interests in every respect, for if they did, it would no longer be clear how we could identify them as two distinguishable persons.’

⁷¹⁸ Cioran, [E] (2011) [1949] *Précis de décomposition* in *Œuvres* Cavaillès, N (ed) Gallimard at 20 [‘l’indigence des mots, dans leur épuisement et leur dégradation’; ‘(l)a misère de l’expression’] (emphasis omitted).

⁷¹⁹ Cioran, [E] (2011) [1956] *La Tentation d’exister* in *Œuvres* Cavaillès, N (ed) Gallimard at 351 [‘disjonction radicale entre la réalité et le verbe’].

⁷²⁰ Cf Beckett, S *Worstward Ho* *supra* note 43 at 81: ‘Ever tried. Ever failed. No matter. Try again. Fail again. Fail better.’ Failure is the only interpretive guarantee that the comparatist-at-law is in a position to supply, always. Converging with Beckett, Borges depicts the situation that the interpreter is bound to face as he seeks understanding across cultures by harnessing the word ‘derrota’, a defeat: Borges, JL (1995) [1947] ‘La busca de Averoës’ in *El Aleph* Alianza Editorial at 116.

at a distance from every other law, every comparatist kept at a distance from every other comparatist, every entity therefore an island⁷²¹ — is quite simply more realism than comparative law has been prepared to bear.⁷²² Comparative law recoils in the face of cognitive reality. Yes.⁷²³ After Theodor Adorno, what I am ultimately defending within comparative law is 'the emphatic concept of thinking'⁷²⁴ — what Susan Sontag named 'the absolute integrity of thought'.⁷²⁵ And the empirical fact of the matter is that '[w]e think with our bodies' (sight and hearing are physical activities),⁷²⁶ and 'we cannot *step outside* the domain specified by our body and nervous system. There is no world except that experienced through those processes given to us and which make us what we are.'⁷²⁷ It follows that meaning can only be embedded, embodied, experienced, emerging, and enacted — meaning can only be '5E-meaning'. (Incidentally, comparatists continue to think with their bodies and remain unable to step outside of their bodies even as they produce, instead of words, figures, charts, and diagrams. Once more, such figures, charts, and diagrams are someone's figures, charts, and diagrams. They, too, generate meaning that can only be embedded, embodied, experienced, emerging, and enacted — they, too, produce '5E-meaning'.⁷²⁸) Again, I can well see how the bodily character of thought, with the rescue and relegitimation of individual experience that it commands, sits very uneasily with orthodox comparatism's heedless and contradictory longing for both scientification and transcendentalism, hence a firm closing of the orthodox comparing eyes and ears — which is no doubt (no doubt!) why the most recent reference to my work in the VSI is from 2003, that is, fully twenty

⁷²¹ Cf Derrida, J *La Bête et le souverain* supra note 553 at 31: '[T]here are only islands' ['(I)l n'y a que des îles'].

⁷²² An excellent illustration — literally — of what I personally deem the woefully immature (and emetic) view of comparative law to which orthodox comparatists continue to cling, despite all cognitive and empirical evidence to the contrary, appears on the paperback cover of Siems, M and Yap, PJ (eds) (2024) *The Cambridge Handbook of Comparative Law* Cambridge University Press. The (patriarchal) image of a chain of people harmoniously holding hands is so hackneyed that it 'start[s] the vomit moving upwards': Beckett, S (2011) [15 January 1937] *German Diaries* Nixon, M (ed) Continuum at 87. I regard the 'pacifist' streak within comparative law as epistemically deluded at best. *Anecdotaly*, I borrow 'pacifist' from one of my Cairo students, who used it on 18 December 2024 to refer to a law teacher she had then recently met within a US comparative-law summer programme abroad.

⁷²³ There are exceptions. See eg Ruskola, T 'Beyond Anti-Anti-Orientalism, or How Not to Study Chinese Law' supra note 333.

⁷²⁴ Adorno, TW (2003) [1969] 'Resignation' in *Kulturkritik und Gesellschaft II* Tiedemann, R (ed) Suhrkamp at 798 ['emphatischer Begriff von Denken']. Importantly, Adorno deploys 'emphatic' as a means of distinguishing between the conventional meaning of 'thinking' and his own reference to a higher standard or norm. See Gordon, PE (2024) *A Precarious Happiness: Adorno and the Sources of Normativity* University of Chicago Press at 81–84.

⁷²⁵ Sontag, S (1969) [1966] *Styles of Radical Will* Farrar, Straus and Giroux at 80.

⁷²⁶ Guillory, J (2022) *Professing Criticism* University of Chicago Press at 7.

⁷²⁷ Varela, FJ 'The Creative Circle: Sketches on the Natural History of Circularity' supra note 676 at 320. The leading text on the embodiment of thought remains Merleau-Ponty, M (1976) [1945] *Phénoménologie de la perception* Gallimard. For an insightful study on this topic with specific reference to the work of Beckett, see Maude, U Beckett, *Technology and the Body* supra note 569. According to Ulrika Maude, Beckett's is 'one of the most serious efforts in literature to bring the body to the forefront': id at 11. See also Dennis, AM (2023) *Beckett and Embodiment* Edinburgh University Press.

⁷²⁸ Supra at 387.

years before the book's 2023 publication, a tactic investing 'gate-keeping' with well-nigh farcical meaning.⁷²⁹

While I have long been accustomed to the hostility that my 'irritating' views have generated within comparative law (solitude the concomitant of lucidity),⁷³⁰ even as I have allegedly become 'a byword for sustained, complex, thought-provoking and radical criticism of traditional comparative law',⁷³¹ the VSI's decision to expurgate wholesale my theoretical involvement in comparative legal studies over the past quarter century or so strikes me — and, I suggest, must strike anyone who brings to the issue the 'meremost minimum' of fair-mindedness⁷³² — as falling way, way, way below the most basic canons of the elementary intellectual integrity that must inform scholarly work.⁷³³ It is not so much that I mind for my own sake at being struck from this particularly tinny record. (For one thing, at this professional juncture I hardly have a career plan.) Indeed, those who know me well appreciate that I am most fortunately immune

⁷²⁹ For a somewhat spectacular contrast, consider the position of the *American Journal of Comparative Law* (AJCL). Established in 1952, the AJCL has long been the leading journal in comparative law. Sixty-five years after its launch, in 2017, for the first time in its history, the AJCL allocated a complete issue to a discussion of the work of a single comparatist. This special release is entitled 'What We Write About When We Write About Comparative Law: Pierre Legrand's Critique in Discussion.' In addition to publishing an original, 132-page contribution of mine, the AJCL convened five comparatists to address some of the ideas that I defend. Whatever one may think of the AJCL initiative, the special issue is there and, empirically speaking, it is very much a *special* issue. Yet, with the noteworthy exception of a reference to Sherally Munshi's excellent rejoinder (see Munshi, S 'Comparative Law and Decolonizing Critique' *supra* note 565), for the VSI the AJCL special issue does not exist. Needless to add, for the VSI my own text does not exist either, even as it has attracted at least one fully-fledged article by way of response: see Siliquini-Cinelli, L (2020) 'Experience vs Knowledge in Comparative Law: Critical Notes on Pierre Legrand's "Sensitive Epistemology"' (16) *International Journal of Law and Context* 443. It seems fair to remark that an article exclusively devoted to another article is not so frequent after all, the former's existence perhaps reasonably to be taken as a (no doubt rebuttable) presumption pointing to the significance of the latter. For my article within the AJCL special issue that the VSI chose to obliterate, see Legrand, P 'Jameses at Play: A Tractation on the Comparison of Laws' *supra* note 671.

⁷³⁰ Cf Teubner, G 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' *supra* note 294 at 14: 'Pierre Legrand irritates the [...] consensus of comparativists.' Note that Gunther Teubner offered this observation more than twenty-five years ago at this writing. I can safely say that considerably more irritation has occurred since then.

⁷³¹ Lemmens, K (2012) 'Comparative Law as an Act of Modesty: A Pragmatic and Realistic Approach to Comparative Legal Scholarship' in Adams, M and Bomhoff, J (eds) *Practice and Theory in Comparative Law* Cambridge University Press at 305.

⁷³² Beckett, S *Worstward Ho* *supra* note 43 at 82.

⁷³³ I refer to such texts as Legrand, P (2021) 'Negative Comparative Law and Its Theses' (16/2) *Journal of Comparative Law* 641; Legrand, P 'What Is That, To Read Foreign Law?' *supra* note 558; Legrand, P (2015) 'Negative Comparative Law' (10/2) *Journal of Comparative Law* 405; Legrand, P (2011) 'Foreign Law: Understanding Understanding' (6/2) *Journal of Comparative Law* 67; Legrand, P (2006) 'On the Singularity of Law' (47) *Harvard International Law Journal* 517; Legrand, P (2006) 'Antivonbar' (1) *Journal of Comparative Law* 13. As a matter of empirical fact, some of these articles have become widely known. I purposefully confine my list to six journal entries (which means that I omit scores of further references in English). Not a single one of the publications I indicate makes an appearance anywhere in the VSI. (I was more than once told that I was a comparatist of a Stakhanovite disposition. If so, one could not get the least inkling from reading the VSI.) Of course, even as I enumerate my work of disenchantment, I require to accept Pierre Legendre's observation that '[a]nyone who opens a road for thought must expect difficult days not that the red carpet be unfurled before him. He is bound to encounter an established doxa [...] and if he insists, he accepts [...] to [...] measure himself with the censors': Legendre, P *L'Amour du censeur: essai sur l'ordre dogmatique* *supra* note 10 at v ['Quiconque ouvre un chemin de pensée doit s'attendre à des jours difficiles, non pas qu'on lui déroule le tapis rouge. Il rencontre forcément une doxa établie (...) et s'il insiste, il accepte (...) d(e) (...) se mesurer aux censeurs'].

to the corrosive emotions of envy and resentment: *I cannot bring myself to be concerned*.⁷³⁴ Or, to put the matter colloquially in my wife's native language: 'Das ist mir völlig schnuppe!' However, my canon — my comparative superego — is Professor Rudden. And because I remain very firmly committed to his standards of scholarly rigour and intellectual honesty, the Rudden benchmark is whence I commence evaluation.⁷³⁵ 'What would Rudden be thinking?', I ask myself. In answer to this question, I interpretively locate the VSI's exceedingly tawdry intolerance having prompted the suppression of my work somewhere in the vicinity of intellectual sloth or superficial spitefulness (I must deny guilelessness, and I am prepared to exclude arrant fanaticism), at some level of consciousness or other — and there seems little reason to belabour the point. Nor am I alone in having been vetoed (which means that, on second thought, an aetiology of erasure from disciplinary memory — an aetiology of *purported* erasure from an *artificially constructed* disciplinary memory — might well prove instructive).

Any principled survey of comparative law covering the past thirty years or so would have to recognize that, say, Ron Allen, Tobias Berger, Kimberley Brayson, Sujit Choudhry, Mathilde Cohen, Balázs Fekete, John Gillespie, Simone Glanert, Mark Goodale, Richard Hyland, Paul Kahn, Emily Kadens, Martin Loughlin, Alexandra Mercescu, Naomi Mezey, Anthea Roberts, César Rodríguez Garavito, Lawrence Rosen, Theunis Roux, Amr Shalakany, Samuli Seppänen, Ruti Teitel, and Gary Watt have all been intellectually significant participants in the field (to limit myself to twenty-three evident names only). And, by any reasonable intellectual standard, 'A Fresh Start for Comparative Legal Studies?' (*Journal of Comparative Law*); *Comparative Law as Critique* (Elgar); 'Comparative Law in the Age of Globalization' (*Duquesne Law Review*); *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Brill); *Law as Culture: An Invitation* (Princeton University Press); 'The Importance of Elsewhere' (*Public Law Review*); *Local Meanings of Proportionality* (Cambridge University Press); *The Migration of Constitutional Ideas* (Cambridge University Press); *Partly Laws Common to All Mankind* (Yale University Press); *Paradigms in Modern European Comparative Law* (Hart); *Practice and Theory in Comparative Law* (Cambridge University Press); *Themes in Comparative Law* (Oxford University Press); and *Rethinking Comparative Law* (Elgar) are all significant titles in the field (to limit myself to thirteen evident captions only). Why, then, does the VSI not mention *any* of these names or *any* of these titles? Why thirty-six such stunning omissions — the very short introduction now taking the form of a very rort extrodution — even as the VSI somehow manages to find space for Italian comparatists like Matteo Nicolini, Lucio Pegoraro, Angelo Rinella, and Lucia Scaffardi (the co-authors' friends?) and for Italian texts like *Parlamenti in dialogo* and *Sistemi costituzionali (prova a immaginare: Italian texts in Italian in an English-language survey...)*. In all frankness, who, outside of Italy, has heard of these Italian individuals or of these publications in Italian? I certainly have not, and I do keep up to date. (I deliberately skip the *grotesque* bibliography, which heralds many more Italian names whose nebulosity and turbidity within comparative law do not *begin* to qualify them for inclusion in a panoramic excursus such as the VSI's — other

⁷³⁴ Cf [Beckett, S] (2014) [14 February 1957] [Letter to M Hutchinson] in *The Letters of Samuel Beckett* Craig, G et al (eds) vol III Cambridge University Press at 25: 'One is what one is and one's work what it is and the concern with approval small.'

⁷³⁵ Cf Derrida, J (1996) *Résistances* Galilée at 98: 'Whatever one makes of it, one must begin by hearing the canon' ['Quoi qu'on en fasse, il faut commencer par entendre le canon'].

than, of course, as tribal scarring. Lest there should be any confusion, let me state that I am not at all thinking of Pier Giuseppe Monateri, a worthy *thinker*.⁷³⁶)

Faced with an interpretive choice between deliberate omissions or gross negligence à répétition, I reckon that an appraisal along the lines of sheer, utter incompetence would prove uncharitable — and I am not. I must therefore contend that out of the thirty-six flagrant refusals I castigate (not to return to my own work and the elimination of twenty years' worth of my publications), some at least of these exclusions were actively wanted — that there materialized a degree of calculated suppression and repression, once more at some level of consciousness or other (no psychoanalyst I). Most interestingly, I find, the twenty-three names and thirteen works that I have identified as missing in action would all fall, if I were pressed to engage in a crude binary classification, on the anti-positivist or culturalist side of the major theoretical divide that I discern within comparative law. Now, I suggest that the eventuality of thirty-six coincidences stretches the meaning of 'coincidence' beyond any sensible semantic extension. Be the matter of censorship as it may, the VSI shows itself to be falling abysmally short of its mission, which remains to provide a dependable account of the lay of the comparative-law land.

Perhaps I can take advantage of my discussion of names to make a further general point regarding the comparatists whom the VSI chooses to include in its body text. My complaint in this regard concerns what I deem another elementary defect in the VSI's account. And once more, this primordial flaw is profoundly undermining the VSI's reliability — or so I hold. I have in mind the VSI's refusal to acknowledge the obvious point that different comparatists speak with different authority. Again, the question arises: is the VSI's readership being treated to a premeditated exercise in levelling or to an ignorant standardization? If the former, one would be confronted with an egalitarian epistemo-political move of most significant import, a commitment that would no doubt attract challenge (and that I, for my part, would forcefully contest). However, uncharitable as my interpretation may prove on this exceptional occasion, I simply cannot believe that the VSI was consciously driven by the principle of equality. In my view, what readers are facing is rather a hodgepodge bereft of any subversive engagement whatsoever. Recall how the VSI provides its readers with formulations galore along the lines of 'as Laura Nader has explained'(11), 'as Günter Frankenberg remarked'(13), 'as Ran Hirschl names them'(16), 'as [Konrad] Zweigert and [Hein] Kötz put it' (27), and so forth. One accepts, of course, that '[t]o write is to intervene in what has already been written' and that '[a]ll writing is essentially amplification of discourse'.⁷³⁷ Still, intertextuality cannot justify the VSI's flattening of comparative authority. At the risk of causing offence (one must sometimes live perilously...), I am keen to insist how it simply cannot make sense that, out of the VSI's reservoir of selected references, all comparatists-at-law would be operating on an authoritative par such that their insights would deserve to receive identical attention from the VSI's readers.⁷³⁸ I *strenuously* beg to differ. I would most definitely not lump Frankenberg or Hirschl with

⁷³⁶ And if, *concessio* firmly *non dato*, an Italian text in Italian had to appear in the *odd* bibliography, why not Resta, G; Somma, A and Zeno-Zencovich, V (eds) (2020) *Comparare Mimesis*? Or is it that these co-editors fall on the wrong side of the VSI's ideological tracks?

⁷³⁷ Bruns, GL (1982) *Inventions* Yale University Press at 52 and 53.

⁷³⁸ For my enumeration of many of the embrogged individuals, see *supra* at 246–47.

Husa; Damaška or Langbein with Goldsmith; Fletcher or Merryman with Chen; Whitman or Kahn-Freund with Curran or Barak-Erez.

Consider Konrad Zweigert and Hein Kötz. There is no need to prove that from the moment it appeared in English in 1977, Zweigert and Kötz's textbook 'contrast[ed] markedly with René David's *Les Grands systèmes [de droit contemporains]* [...], which it [...] rapidly replac[ed] as the leading textbook on the subject' of comparative law.⁷³⁹ The 'replac[ement]' has been so drastic in fact that the last edition of David's work to have appeared in English is from 1985, nearly a half century ago.⁷⁴⁰ And already, when Günter Frankenberg released his famous *Harvard International Law Journal* critique in 1985, his principal target was not David, but Zweigert and Kötz.⁷⁴¹ As I joined Lancaster University in 1992 — where, let me mention it once more, I spent three most rewarding years that permanently changed my intellectual outlook — the field of comparative law was in thrall to Zweigert and Kötz's text. The second English edition had been issued a few years earlier in 1987 — the book then newly in the hands of Oxford University Press — while the third English edition was in preparation and would appear some years later in 1998.⁷⁴² It is fair to say that Zweigert and Kötz were then exercising unchallenged epistemic supremacy within comparative law, at least in most European countries. (I would leave to one side the United States, where there obtains a 'cases and materials' ethos and where textbooks therefore carry limited sway, certainly in the law-school environment. I would also except France, where comparatists either did not know or did not want to know of Zweigert and Kötz's existence — to this day, Zweigert and Kötz's German book, although it has appeared in various languages, has never been translated into French, an excellent example of academic homelandism of the worst kind because the idea, *bien sûr*, was to confer a sort of intellectual immunity to René David's *Grands systèmes* model, arguably the best known instance of deeply deplorable 'legal tourism'. And, as I have indicated, the French Davidian fortress had shown itself to be duly impregnable until most recently.⁷⁴³)

Some time ago, Frankenberg could properly maintain that Zweigert and Kötz's book, although it has long been 'in need of dire revision', 'still sets the standard'.⁷⁴⁴ Now, it makes no sense for the VSI not to acknowledge Zweigert and Kötz's pre-eminence within the field of comparative law — David Kennedy refers to their 'agressive' governance⁷⁴⁵ — and not to recognize the considerable influence that these two German jurists have been exerting over comparatists-at-

⁷³⁹ Markesinis, BS (1994) 'A Matter of Style' (110) *Law Quarterly Review* 607 at 607.

⁷⁴⁰ See David, R and Brierley, JECB *Major Legal Systems of the World Today* supra note 206.

⁷⁴¹ See Frankenberg, G 'Critical Comparisons: Re-thinking Comparative Law' supra note 7. A most elementary electronic search reveals that David earned himself nine occurrences as against twenty-four for Zweigert and Kötz.

⁷⁴² See Zweigert, K and Kötz, H *Introduction to Comparative Law* (2nd ed) supra note 46; Zweigert, K and Kötz, H *Introduction to Comparative Law* (3rd ed) supra note 46.

⁷⁴³ Supra at 383–84.

⁷⁴⁴ Frankenberg, G (2016) "'Rechtsvergleichung' — A New Gold Standard?" (76) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1001 at 1002.

⁷⁴⁵ Kennedy, D 'New Approaches to Comparative Law: Comparativism and International Governance' supra note 157 at 627n19.

law for decades.⁷⁴⁶ Even if the German edition is now out of print and requires to be purchased at an *Antiquariat*,⁷⁴⁷ although Zweigert and Kötz may no longer claim a physical presence *auf dem Spielplatz der deutschen Rechtsvergleichung* (a concession that, in advance of personal empirical verification, I am readily prepared to make), they nonetheless herald a ghostly presence. If you will, Zweigert and Kötz haunt German comparative law and the field of comparative law as a whole: they *live on*, a ghostly presence very much remaining a significant form of presence.⁷⁴⁸ As one of Zweigert and Kötz's staunchest critics over the years, I contend that it is a dereliction of scholarly responsibility for the VSI not to apprise its readers of the salient fact of Zweigert and Kötz's long-standing referential status within comparative law. Incidentally, the VSI also fails to inform its readership that the most recent English edition of Zweigert and Kötz's is not 1977 (135), but 1998 — a twenty-one-year lag.

Not only is the VSI deeply mistaken in introducing the names it does as if they all mattered equally, but it is wrong even to hold that they all matter in the first place. To return to my illustrative enumeration ('as Laura Nader has explained' [11], 'as Günter Frankenberg remarked' [13], 'as Ran Hirschl names them' [16], 'as [Konrad] Zweigert and [Hein] Kötz put it' [27], and so forth),⁷⁴⁹ not all the names that I list — far from it — deserve to belong to a VSI-style survey given their absence of academic standing or lack of scholarly impact (or both) within the field of comparative law. As it uncomprehendingly elevates a number of comparatists to the ranks of scholars whose work must feature in a compact overview of comparative law, the VSI is working in ways as very mysterious as they are very frustrating. In fact, given the extraordinary extent of the misconception of the field of comparative law that they project, or so I argue, the VSI's co-authors seem to have landed from another, most remote planet.

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For all intents and purposes, I reckon the VSI to be 'unlessable unworseable'.⁷⁵⁰ Yes. I had to write this review in order to argue and demonstrate my claim, and I did. Yes. 'Comparative Law's Shallows and Hollows...' may look unsparing, yet I omitted much — critique being as impossible to evade as to satisfy in this

⁷⁴⁶ Influence is evidently consequential, and whatever influence is ascertainably manifesting itself must be credited at least in part to the influencer and to his ability to generate faith in him. For example, who remembers Pierre Arminjon (1869–1960)? A French academic who would have enjoyed a high profile in the 1950s, when he co-authored a three-volume treatise on comparative law (*Traité de droit comparé*) numbering 1,789 pages in all, Arminjon has fallen into utter oblivion even in France where neither his name nor his work are ever mentioned. In the event, Arminjon did not manage any of the influence he would have exercised in his lifetime to survive him. What conditions influence is a fascinating topic in its own right. In the case of Zweigert and Kötz, the sociological stars — which included a leading translator and would, in time, feature a leading academic publisher — began to align from the moment their work appeared in English in 1977.

⁷⁴⁷ I owe this information to Jonathan Friedrichs — then a Research Associate (*Wissenschaftlicher Assistent*) at the MPI-Hamburg — who communicated it to me in the course of an enriching conversation at Harvard Law School on 31 October 2023, the day after I spoke at the Harvard Comparative Law Workshop by invitation.

⁷⁴⁸ Cf Goodrich, P (2023) *Judicial Uses of Images* Oxford University Press at 173: '[G]hosts matter.' I suggest it is precisely this hauntological situation that has allowed Frankenberg to write as recently as 2016 how in the field of comparative law Zweigert and Kötz 'still se[t] the standard': *supra* at 434.

⁷⁴⁹ *Supra* at 433.

⁷⁵⁰ Beckett, S *Worstward Ho* *supra* note 43 at 101.

particular instance. Consider my text a small (well, a long...) act of forthright resistance to wholesale editorial 'dumbing down' — which is not to say that it was enjoyable to write. Often, I have felt that I was buzzing a hedge trimmer over a small pot containing two wilting tulips. But needs must.

Sonorous Silences

Within the practice that is comparative research into law, theory comes first, second, and third. Within the theory of comparative research into law, epistemology comes first, second, and third. These resolutions pertain to negative comparative law's key theoretical or epistemic tenets. Yet, the VSI remains stubbornly silent with respect to five clusters of theoretical or epistemic issues that ought to have been addressed in an introduction to comparative law, even a very short one, that any aspiring comparatist ought to know, understand, and take on comparing board. These aggregates of matters are well worth foregrounding, if briefly.

1. Comparative law structurally involves a culture clash featuring two thoroughly cultural entities: the encultured comparatist-at-law, over here, and the encultured foreign law, over there. Both the comparatist-at-law and foreign law exist as cultural entities (it is not at all that culture is merely contextual and thus disposable). On account of enculturation, no comparatist comes to the comparison with an open mind (in the sense of a fully autonomous and agential mind). There is no subject. On account of enculturation, no foreign law comes to the comparison with a stable or closed meaning (in the sense of a fixed and definitive meaning). There is no object.
2. The comparatist-at-law stands as the self-in-the-law and foreign law as the other-in-the-law. Between the self and the other, there is an unbridgeable hiatus, an irreducible irrelation (or disrelation), preventing accessibility and therefore understanding. The comparatist-at-law cannot (and does not) understand foreign law. What the comparatist-at-law understands instead is foreign-law-as-he-sees-it, an appropriation. A comparatist-at-law can only operate on the basis of 'his' (encultured) view of foreign law that he formulates in 'his' language, in 'his' words — which means that the allegedly foreign that the comparatist inscribes is not so foreign and not so foreign to him after all.
3. No comparatist-at-law, no matter how hard he tries and how sophisticated he is, can produce a description (or a representation) of foreign law that would be exact or accurate, approach foreign law objectively, or tell the truth about foreign law. All that the comparatist-at-law can achieve, ever, is to formulate his interpretation of foreign law. Because the comparatist's interpretation is, well, *the comparatist's* interpretation (it bears the comparatist's name), it will necessarily differ from foreign law and not be objective or truthful. No method can help, none. All that the comparatist-at-law can do, ever, no matter how hard he tries and how sophisticated he proves to be, is to formulate his interpretation of foreign law. Because the comparatist's interpretation is, well, *the comparatist's* interpretation (it bears the comparatist's name) — in effect the comparatist's *encultured* interpretation — the quality of the comparative work, of the bricolage, depends on the comparatist's flair.

4. No foreign law can ever be exhaustively elicited by way of the comparatist's interpretation, no matter how rich. Foreign law is unsaturable — there is always something more to say about it — so that it will resist full assimilation. The comparatist cannot absorb foreign law. Foreignness is not available to the comparatist.
5. Foreign law is a misnomer: it cannot (and does not) exist from the standpoint of the comparatist. What is foreign to the comparatist-at-law cannot be identified by him as law, and what the comparatist can identify as law cannot be foreign to him. In effect, the comparatist is behaving as if foreign law existed for him. Comparative law is thus based on an originary fiction, a massive subterfuge.

Comparative Law's Shallows and Hollows....: A Very Short Parergon

This essay, a form of inveterate action on my part (its precise texture was not planned but happened, was made to happen), is emphatically not meant to intervene as a slayer of all complication or designed to respond to easy reading. Nothing has been calmed in the text. Although I feel able to reckon with many interpretive victories bestrewn my demonstration, it remains that the release of my reaction is perforce all risk. All things considered, I remain confident that comparative law will overcome the inauspicious VSI and the captivation it may exercise on captive student audiences unaware that its tapestry is more holes than material. I maintain that comparative law will eventually take the VSI in its post-rots epistemological stride, even if at the speed of continental drift. Yes. Indeed, even the kudzu-like proliferating orthodoxy that does not yet see retains the power of sight potentially allowing it to outsoar the darkness of not-seeing. Meanwhile, for the sake of adamant clarity, I suggest a ten-point summary of this review.

1. I regard Oxford University Press's *Comparative Law: A Very Short Introduction* as a deplorable text, comprehensively so — a particularly poor exercise in *rimpiccolimento*. The only sensible recommendation, in my view, is for any comparatist who takes the study of foreign law seriously — who is *for* foreign law — studiously to avoid this book altogether. In particular, I hold that law teachers require to ensure that their students do not read this text: law teachers must actively and earnestly prohibit their students from doing so. It is not enough to engage in content-warning. The reading of this book must be prevented.
2. Although it should be introducing the field of comparative law, this text largely takes the form of a partisan and local declamation. Specifically, the two Italian co-authors regularly pedestal minor Italian comparatists while, in my view, significant foreign comparatists are recurrently (at times contemptibly) censored. Meanwhile, the topics under consideration are largely those that Italian comparatists classically value ('One of the major analytical aims of comparative law has been, and is, to group legal data into different categories, providing a systematic ordering of legal knowledge through classifications' [17] — thus more than one third of the entire book on 'classifications'). Moreover, the claims being advanced with respect to the various themes under discussion characteristically pertain to an Italian comparing mindset ('The plethora of cases and experiences [...] does not represent an impediment to finding commonalities' [41] —

think 'common-core' research and all that). Yet, the book does not herald the least sensitivity to its localism. Under the guise of a primer that would make sense to the entire planet, the Italian co-authors are offering a very Italian very short introduction to comparative law — while appreciating neither this limiting fact nor its anti-comparative implications.

3. Although one would legitimately expect a critical and personal statement to accompany an introduction to the field of comparative law as it stands, this book's contents display incessant intellectual servitude, what I consider an inane mix of epistemic path dependence and discipular obedience. In particular, the text routinely pays allegiance to myths long discarded and theories long discredited outside of Italy. In my opinion, the book is hopelessly mired in a stale comparative epistemology such that, if some German (and Hegelian) word-play be allowed, all *Sichaufheben* is *sich aufheben*.
4. This book features an impressive range of vacuous enunciations regarding the theory and practice of comparative law: 'Not all comparative assessment needs to include the entire world' (16); '[f]oreign law must be addressed in its entirety' (13); '[c]omparativists [...] ente[r] into the logic of the other studied systems without prejudices or preconceptions' (9); 'making comparative law a discipline requires an accredited methodology' (67); for 'comparison [to be] feasible' one must 'seek an invariant, universal language that could provide an unbiased and objective framework' (70); it is 'the belief in the universality of problems [that] make[s] comparison possible' (71); 'We cannot compare the English term *contract* with the French term *contrat*' (69); 'comparison is a way to see [...] universal traits' (98). The text numbers many more absurd propositions of this ilk.
5. This book features many statements about English law and French law — indeed about the common-law and civil-law traditions generally — that are interpretively unsustainable, that are demonstrably erroneous. No, the *ius commune* was not 'a new substantive law' that 'ruled continental Europe between the 11th and the 19th century' (57). No, Jeanne Chauvin was not 'the first French female lawyer' in 1900 (4). No, the French *Cour de cassation* is not 'prohibited from referring to foreign sources' (123). No, '[m]edical malpractice is [not] treated as a breach of contract under French law' (75). No, trust is not contract (14). No, *obiter dicta* do not concern 'factual elements' (56). No, English common law has not been '[a]lmost immune from Roman influence' (22). No, 'equity jurisprudence [...] was [not] unified with Common Law' (55) — and so forth. According to the expert I consulted, the section on Islamic law is also untrustworthy. It must follow that the sections on, say, Chinese or Hebraic law — not to mention dozens upon dozens of phrases or passages seemingly addressing all sublunar laws (including those of the Pygmies and the Zulus) — prompt the utmost suspicion not least because there is no evidence whatsoever that the co-authors are at all conversant in Chinese, Hebrew, or other languages even as they feel entitled to report on Chinese, Hebrew, or other laws.
6. On the rare occasions when this book appears willing to step out of the law-box and embrace a measure of indiscipline, it contents itself with propositions that I can only consider disconcertingly trite thus falling far

short of what behoves sophisticated comparative law: '[Translations] are not always [...] reliable' (14); '[t]ime plays a role in the construction of traditions' (38); '[h]istory has affected all traditions' (60); '[i]nterpretation plays a major role in several traditions' (64); '[s]ocietal needs and problems [...] are deemed universal' (71).

7. This book is written in poor English, many phrases or sentences being literally incomprehensible: 'Comparable similarities equate Common Law systems that allot significant law-making power to judges' (10); '[t]here was just a first instance' (55); '[t]he Islamic legal tradition also shares the threat of other traditions' (66); '[dogmas and concepts] are rooted in the same possibility for making comparison' (69); 'an ecclesiastical court [...] placed a mischief of rats on trial' (79). Besides, the text is poorly edited and accordingly features many glaring inconsistencies and howlers. No, 'Latin America' is not a country (3). No, there is no 'Korea' (53, 62).
8. Not a single one of this book's hundreds of allegations is sourced, not even those that appear in quotation marks, which means that the text lacks all referential value (even as other releases in the *Very Short Introduction* series feature endnotes). The mention of two gaffes must suffice. No, 'the many scholars who gathered at the Paris Congress in 1900 [did not] unanimously conclud[e] that comparative legal studies should be primarily aimed at discovering uniformities among various national laws' (99). No, Québec's 'private/civil [sic] law is [not] regulated under the standards of the Civilian tradition and the rest of the legal system [...] based on Canadian Common Law' (63).
9. The *lame* bibliography features dozens of striking omissions and a substantial number of puzzling inscriptions. It also boasts references that are more than twenty years out of date. No, the current edition of Merryman's *The Civil Law Tradition* is not from 1969. No, the current edition of Zweigert and Kötz's *Introduction to Comparative Law* is not from 1977.
10. Generally, this book is emphatically turned towards the past: it marks a seemingly desperate attempt to maintain the epistemic survival of long obsolete and indefensible comparative predispositions.
11. Generally, this book most regrettably reinforces the acute sense of intellectual benightedness, of apoliticism too, that has been relentlessly plaguing comparative law largely under the influence of dogmatic, repressive, and positivist/formalist German and Austrian theoretical models — and, in Italy, of an unsophisticated and shamanistic Italian framework.
12. I maintain that this vagulous book is far worse than nothing. The sooner it is ignored, the better comparative law will fare, howsoever it fares (a matter very much depending on the extent to which comparatists express a willingness and an ability to contain the epistemic rots that has been metastasizing across the field).