The Negative Turn in Comparative Law

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II

No method

Quite apart from the fact that '[e]very method is a fiction', at least in the etymological sense that it has been fashioned,[1] I want to observe at the outset, in the most general terms, that '[t]he search for objective guidance is in conflict with the idea of individual responsibility … . It shows fear, indecision, a yearning for authority and a disregard for … new opportunities'.[2] In order to counter this abdication with specific reference to comparative law, '[i]t is important to recognise that comparison is not a method or even an academic technique; rather, it is a discursive strategy'.[3]

*

Method's claim upon comparatists-at-law is fraudulent. It is not part of doing good research in foreign law, of doing good comparative law, to abide by a method, by any method.

Long an orthodox mainstay,[4] a practice imbued with vanity (of the type 'my method is the true method, and it must be applied absolutely, and there can be

1 S Mallarmé, [Notes sur le langage] in *Œuvres complètes*, vol 1 (B Marchal ed, Gallimard 1998 [1869–70]) 504.
2 P Feyerabend, *Against Method* (4th edn, Verso 2010 [1975]) 261.
3 B Anderson, 'Frameworks of Comparison' *London Review of Books* (21 January 2016) 18. cf M Seigel, 'Beyond Compare: Comparative Method After the Transnational Turn' (2005/91) Radical History R 62, 66: '[S]cholars interested in transnational approaches should consider cross-national comparison as subject rather than method.'
4 Eg: MA Glendon, PG Carozza, and CB Picker (eds), *Comparative Legal Traditions* (4th edn, West 2014) 17: 'Comparative law is … an indispensable heuristic method for legal and social theory'; UA Mattei, T Ruskola, and A Gidi (eds), *Schlesinger's Comparative Law* (7th edn, Foundation Press 2009) 1, where the co-authors refer to '[t]he method called [c]omparative [l]aw'; JC Reitz, 'How to Do Comparative Law' (1998) 46 Am J Comp L 617, 617: 'I believe that there is a "comparative method"'; K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, Mohr Siebeck 1996) 32: 'Comparative law … is … an excellently suitable method for putting legal science on a new, realistic basis'; L-J Constantinesco, *Traité de droit comparé*, vol 2 (LGDJ 1974) 23: 'Mainstream scholarship is of the opinion that comparative law conflates with the comparative method'; O Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 LQR 40, 41, where the author notes, in the frame of his inaugural lecture to the Chair of

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no other method but mine'),[5] infused with complacency (along the lines of 'do not expect me to be asking myself probing questions about my method'),[6]

Comparative Law at Oxford, that '[c]omparative law – this has almost become a common place – is not a topic, but a method. Or better: it is the common name for a variety of methods of looking at law, and especially of looking at one's own law' [accord: Glendon, Carozza, and Picker supra 14]; RB Schlesinger, 'Teaching Comparative Law: The Reaction of the Customer' (1954) 3 Am J Comp L 492, 498, where the author mentions 'the comparative method'; R David, *Traité élémentaire de droit civil comparé* (LGDJ 1950) 4: 'Comparative law … is the comparative method applied in the domain of legal science'; HC Gutteridge, *Comparative Law* (2nd edn, Cambridge University Press 2015 [1949]) 1: '[T]he phrase "Comparative Law" denotes a method of study and research'; E-H Kaden, 'Rechtsvergleichung' in *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes*, vol 6 (Vahlen 1938) 11: 'The concept of comparative law … identifies nothing other than a method of legal investigation'; P de Francisci, 'La scienza del diritto comparato' (1921) Rivista internazionale di filosofia del diritto 233, 246, where the author says of comparative law that 'it reduces itself to a method of exposition'; F Pollock, in Congrès international de droit comparé, *Procès-verbaux des séances*, vol 1 (LGDJ 1905) 60: 'Comparative law … is but the introduction of the comparative method into law.' Adde: O Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2007) 32 Brooklyn J Int'l L 405; HE Chodosh, 'Comparing Comparisons: In Search of Methodology' (1999) 84 Iowa LR 1025; F Schmidt, 'The Need for a Multi-Axial Method in Comparative Law' in H Bernstein, U Drobnig, and H Kötz (eds), *Festschrift für Konrad Zweigert* (Mohr Siebeck 1981) 525–36. See generally PG Monateri (ed), *Methods of Comparative Law* (Elgar 2012) [hereinafter *Methods*]; PG Monateri, *Advanced Introduction to Comparative Legal Methods* (Elgar 2021). Adde: R Scarciglia, *Methods and Legal Comparison* (Elgar 2023).

5 Eg: Zweigert and Kötz (n 4) 33, where the co-authors defend their preferred method, functionalism, as '[t]he basic methodological principle of all comparative law' and where they opine that comparative research can only be conducted in terms that are 'purely functional'. Responding to functionalism, Günter Frankenberg writes of '[t]he blatant reductionism of the comparative method': G Frankenberg, *Comparative Constitutional Studies* (Elgar 2018) 71. Already, in the 1980s, George Fletcher had observed that 'functional resemblance … remains superficial': GP Fletcher, 'The Universal and the Particular in Legal Discourse' (1987) Brigham Young U LR 335, 350. For his part, Gunther Teubner, making specific reference to constitutional law, addresses '[t]he tunnel vision of function regimes': G Teubner, *Constitutional Fragments* (Oxford University Press 2012) 156. Meanwhile, Richard Hyland summarizes his detailed critique of functionalism in comparative law by indicating that '[f]unctionalism has generally proven to be incompatible with comparison': R Hyland, *Gifts* (Oxford University Press 2009) 101. Writing about comparative constitutional law, Ruti Teitel enters an analogous refutation as she remarks that 'the functionalist approach … is to abstract constitutional problems from their contexts' and as she observes that '[t]his approach does not pay adequate attention to the extent to which constitutional problems are informed by politics and culture': R Teitel, 'Comparative Constitutional Law in a Global Age' (2004) 117 Harvard LR 2570, 2578. I have nothing more to say on functionalism except that within an essay on comparative law method, the functionalist project ought to be confined to a relatively brief note only. Against Zweigert and Kötz's teleocracy, I unhesitatingly endorse an optimally anti-teleocratic comparative law.

6 Eg: Zweigert and Kötz (n 4) 31, where the co-authors contend, perfectly embarrassingly, that 'comparatists all over the world are perfectly unembarrassed about their method'.

method discourse has seduced comparatists-at-law, who have apparently assumed that the mobilization of a method could overcome their epistemic partiality, which they regarded as disreputable, and operate the delivery, with the brand of creditability that the biological and physical sciences seemed to them to be in a position to muster, of the sheer quantity of foreign information that otherness-in-the-law demands to harness. After all, it simply could not be, to transpose the preoccupation that Descartes expressed in his prominent seventeenth-century *Discours de la méthode*, that there would ultimately exist nothing more epistemologically trustworthy than the power of one's enculturation, that the outcome of one's research would, in the end, fall prey to the fact that one had been raised with 'the French', 'the Germans', 'the Chinese', or 'the Cannibals'.[7] For Descartes, it is nothing less than 'a condition of the self's authentic nature' that there should take place a process of 'unsituating the self from the world'.[8] As Janet Gunn underlines, however, '[t]he price exacted for the self's access to itself is very high: nothing less than the world, from which the subject must remove itself in order to think'.[9] Yet, according to Descartes, delocalization is a prerequisite to truth, and truth must suppose method.[10] Meanwhile, for Descartes method postulates 'arithmetic and geometry'.[11]

The parallels with the epistemological assumptions that Konrad Zweigert and Hein Kötz posit in their leading comparative law text are striking. Zweigert and Kötz, too, having stated that the comparatist-at-law must thoroughly delocalize himself,[12] and having claimed that comparative law stands as an 'école de vérité',[13] emphasize the centrality of method to the success of the

7 R Descartes, *Discours de la méthode* in *Œuvres philosophiques*, vol 1 (F Alquié ed, Garnier 1997 [1637]) II, 583–84.
8 JV Gunn, *Autobiography* (University of Pennsylvania Press 1982) 7.
9 ibid.
10 See R Descartes, *Regulæ ad directionem ingenii* in *Œuvres de Descartes*, vol 10 (2nd edn, C Adam and P Tannery eds, Vrin 1986 [1701†]) rule V, 379: 'The whole method consists entirely in the ordering and arranging of the objects on which we must concentrate our mind's eye if we are to discover some truth' [hereinafter *Regulæ*]. I adopt the English translation in R Descartes, *Rules for the Direction of the Mind* (D Murdoch tr) in *The Philosophical Writings of Descartes*, vol 1 (J Cottingham, R Stoothoff, and D Murdoch trs, Cambridge University Press 1985) 20 [hereinafter *Rules*]. The *Regulæ* were most likely written in 1628. A Dutch translation appeared posthumously in 1684. cf P Legendre, *L'Amour du censeur* (2nd edn, Editions du Seuil 2005) 96: 'Truth comes to light through method.' In this brief passage, the late Pierre Legendre is formulating a critique of the positivist mindset.
11 Descartes, *Regulæ* (n 10) rule II, 366: '[I]n seeking the right path of truth we ought to concern ourselves only with objects which admit of as much certainty as the demonstrations of arithmetic and geometry.' For the English translation, see Descartes, *Rules* (n 10) 12–13.
12 See Zweigert and Kötz (n 4) 11: '[T]he comparatist must unfasten himself from his own juridical-dogmatic preconceptions and his own cultural context.'
13 ibid 14. The expression appears in French and without italics in the German text.

comparative enterprise, which must aim for 'scientific exactitude',[14] just like 'physics', 'molecular biology', and 'geology'.[15] Zweigert and Kötz indeed describe the method that they favour as the 'basic … principle' informing comparative law,[16] and they expressly contend that its exercise must be kept 'pure'.[17]

But not only is the ambition of ascertaining 'the right method' ('*die richtige Methode*') yet another Kelsenian illusion,[18] the very idea of 'method' – of any method – is unable to offer comparatists-at-law the neutral epistemic zone within which they fantasize interpreting the foreign free from their enculturation, to present them with the scientific or mathematical vigour they somehow crave, in effect to redeem what positivists readily regard as a state of epistemological fallenness. Method simply cannot escape 'the basic cognitive failure of all representation'.[19] The empirical facts of the matter are, indeed, that every method is encultured, too, and that no method can eschew enculturation. If you will, *any method is someone's method*. And, if only because comparative law has nothing whatsoever to do with any practice remotely resembling a science, method – again, any method – is unsuitable to comparative analysis of law.

The argument that holds how method is not neutral, impartial, or objective requires little, it seems to me, beyond modest elaboration. In this regard, John Law, an influential sociologist, formulates the principal claim very well, and I cannot see that I am able meaningfully to improve on his observations. Orthodox comparative law's commitment to method effectively purports to implement 'the moralist idea that if only you do your methods properly you will lead a healthy research life'.[20] Method cannot be dissociated from 'its inheritance of hygiene'.[21] Recall how Zweigert and Kötz emphasize meracity as they stress the need for the comparative method to function 'purely'.[22] Beyond the fixation on sterility, Law remarks as follows:

> Method … is a system for offering more or less bankable guarantees. It hopes to guide us more or less quickly and securely to our destination, a destination that is taken to be knowledge about the processes at work in a single world. It hopes to limit the risks that we entertain along the way.[23]

14 ibid 44.
15 ibid 13.
16 ibid 33. For Zweigert and Kötz's full treatment of method, see ibid 31–47.
17 ibid 33.
18 The expression is in M García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford University Press 2013) 198. The words are meant to encapsulate Kelsen's argument in H Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze* (Mohr Siebeck 1911) iii–iv.
19 R Radhakrishnan, 'Derivative Discourses and the Problem of Signification' (2002) 7 Euro Legacy 783, 789.
20 J Law, *After Method* (Routledge 2004) 9.
21 ibid.
22 Zweigert and Kötz (n 4) 34.
23 Law (n 20) 9.

However, notes Law, no deed of procedural faith can detract from the fact that 'method does not "report" on something that is already there'.[24] Vis-à-vis method, there is simply no reality that is 'independent, anterior, definite'.[25] 'Contrary to common opinion, method shares, in fact, with logic the impossibility to be completely separate from context in its work.'[26] Specifically, '[m]ethod always works not simply by detecting but also by amplifying a reality'.[27] In other words, 'methods, their rules, and even more methods' practices, not only describe but also help to *produce* the reality that they understand'.[28] In particular, method 'determines' and 'shapes' the questions being asked, the tools being used to answer them, and the research process being deployed;[29] it is a fact that '[a]ll data sets are limited by the research methodology that produced the data'.[30] No belief in methodological virtue can therefore qualify the descriptive statement that 'method is not, and could never be, innocent or purely technical'.[31] Unalloyed technique being unavailable, it follows that 'method … unavoidably produces … arrangements with political implications'.[32]

Because I anticipate that, in the eyes of orthodox comparatists-at-law, my next claim to the effect that comparative law should operate *sans* method will prove even more contentious, I want to address this matter at greater length. The predictably adverse reaction to the argument that comparatists-at-law ought to work without a method arises from the following fact:

> [C]laims about the general importance of methodological rules … tend to get naturalised in … debate. *Particular* sets of rules and procedures may be questioned and debated, but the overall need for proper rules and procedures is not. It is taken for granted that these are necessary.[33]

24 ibid 143.
25 ibid 5.
26 G Agamben, *Signatura rerum* (Bollati Boringhieri 2008) 7.
27 Law (n 20) 116 [emphasis omitted].
28 ibid 5.
29 LT Smith, *Decolonizing Methodologies* (2nd edn, Zed Books 2012) 144.
30 E Darian-Smith and PC McCarty, *The Global Turn* (University of California Press 2017) 83.
31 Law (n 20) 143. For a detailed explanation of how constructivism inheres to method, see J Rancière, 'A Few Remarks on the Method of Jacques Rancière' (2009) 15 Parallax 114, 114 and passim.
32 Law (n 20) 143. cf K Mannheim, 'Die Bedeutung der Konkurrenz im Gebiete des Geistigen' in *Verhandlungen des 6. Deutschen Soziologentages vom 17. bis 19. September 1928 in Zürich* (L von Wiese ed, Mohr Siebeck 1929) 57: '[I]n methodology, too – in the guise of schemes of thought – social forces and impulses are, in the end, opposing one another.' For the standard English translation (which I have modified), see K Mannheim, *Essays on the Sociology of Knowledge* (P Kecskemeti ed and tr, Routledge & Kegan Paul 1952†) 206–7.
33 Law (n 20) 5.

It is precisely such ineluctability that I dispute, with specific reference to comparative law. I appreciate, of course, that orthodox comparatists-at-law are heavily invested in the seemingly unimpeachable and decisive appreciation of method as pre-emptive knowing, as explicitly introducing the answer before the question, that is, in the idea of 'method' as reducing experience to formula or system, as supplying a consoling freedom from thought or responsibility. The orthodox comparative legal mind, which has not wanted to feel its way forward otherwise than scientifically, which has had no ambition whatsoever to find value in tentative motions, which has been fearful of doubt, which has been repulsed by the very possibility of interpretive indeterminacy, which has been rather desperately searching for a reliable analytical framework allowing for untrammeled intellectual journeys, which has been so eager for final and warrantable resolution, which has been consistently unwilling, in sum, to adhere to Keats's 'negative capability' (we are jurists, are we not? We dwell in certainty, do we not?),[34] that orthodox mindset, then, has sought and has found reassurance, at least to its unintrospective satisfaction, in the belief in the importance of a fixed perspective (and in a correlative fixation of belief), in the conviction that such is provided by science (as comparatists-at-law understand scientificity),[35] and in the view that all that comparative law has to do is therefore to mimic, say, biochemistry and its method. Remember, indeed, how Zweigert and Kötz draw express parallels between comparative law and 'physics', 'molecular biology', or 'geology'.[36] I very much beg to differ.

If one is to conduct research into foreign legal cultures or foreign law-texts with integrity, and if one is to generate a significant interpretive yield (or affordance) out of such investigations, one must allow that the enculturation of the researching comparatist, not to mention the enculturation of the foreignly legal, ought to be factored into the comparative dynamics. To articulate the matter differently, fallibilism (yes, fallibilism!) must be woven into the fabric of the comparison – I have in mind, in particular, the fallibilism that must ensue from the comparatist intervening as an encultured interpreter of foreign law existing as culture. Method, to quote Henri Bergson, is 'destined to grasp the ready made'.[37] For an encultured comparatist-at-law purporting to ascribe

34 Letter from J Keats to G and T Keats in *The Letters of John Keats*, vol 1 (HE Rollins ed, Harvard University Press 1958 [21 or 27 December 1817]) 193: '[A]t once it struck me, what quality went to form a Man of Achievement … – I mean *Negative Capability*, that is when man is capable of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact & reason.'

35 cf H Collins, *Forms of Life* (MIT Press 2019) 22 and 20: '[I]nteresting science is not a matter of techniques or procedures'/'[S]cientific findings emerge from a social context driven by conventional social agreements.' For a thorough examination of method discourse in science through a fascinating case-study confirming the crucial role of *play*, see J Schickore, *About Method: Experimenters, Snake Venom, and the History of Writing Scientifically* (University of Chicago Press 2017).

36 Supra 11.

37 H Bergson, *La Pensée et le mouvant* (Presses Universitaires de France 1938) 138.

meaning to an encultured foreign law, however, the challenge lies elsewhere because culture is inherently fluid. Foreign-law-as-culture, for instance, is anything but 'the ready made'; it is, rather, the ever-becoming – and the comparatist-at-law's always-already culturally-situated formulations of it are ever-mobile.[38] To return to Bergson, method is useless when the governing epistemological strategy must be 'to enter into what is being made, follow the ongoing, adopt the becoming that is the life of things' – and, I would add, that is the life of the law.[39]

Stanley Fish expresses an analogous idea in more general terms, and I find that I can easily transpose his words to method, which 'claims to abstract away from the thick texture of particular situations with their built-in investments, sedimented histories, contemporary urgencies, and so on, and move toward a conceptual place purified of such particulars'.[40] However, Fish aptly remarks, 'this substitution of the general for the local has never been and will never be achieved'.[41] Indeed, if one considers method as replacement-for-the-comparatist-applying-his-enculturation-to-the-comparative-analysis-of-foreign-law-as-cultural-entity, one has to agree with Fish, and one has to say of method that '[it is …] always and already contaminated by the interested judgments [it] claim[s] to transcend'.[42] To turn to another relevant theorist, I find that Jacques Derrida's contrast between the orthodox and the critical views of method – that, within comparative law, ought roughly to tally with positivism and culturalism (I am not saying that the match is perfect, mostly since there are culturalists who continue to take method seriously)[43] – I find that such opposition, then, is most helpful in showing how method must be impatiently frustrated rather than incentivized. Derrida thus writes appositely that '[t]he idea of method supposes a set of regulated procedures preceding the experience of reading, of interpretation or of teaching, also a certain mastery'.[44] Meanwhile, there is the comparatist's interpretation, 'each time the singular law of a reading, which intimates to you the order to make yourself responsible, to account for your reading'.[45] Otherwise said, comparison is embedded, structurally so, in a process of experience – which, at the very least, encompasses the experience of interpreting the foreign. Now, let me assert the key

38 Jacques Derrida thus writes that 'what is peculiar to a culture is not to be identical to itself': J Derrida, *L'Autre cap* (Editions de Minuit 1991) 16 [emphasis omitted]. But I accept that for a culture to remain a culture, to continue to be ascertainable as this culture rather than that other, it cannot be 'deeply discontinuous with itself': N Kompridis, 'Normativizing Hybridity/Neutralizing Culture' (2005) 33 Political Theory 318, 340.
39 Bergson (n 37) 138.
40 S Fish, 'Theory Minimalism' (2000) 37 San Diego U LR 761, 762.
41 S Fish, *Doing What Comes Naturally* (Duke University Press 1989) 320.
42 ibid.
43 Eg: R Hyland, *Gifts* (Oxford University Press 2009) 107–8.
44 [J Derrida], 'Jacques Derrida, penseur de l'événement' (Interview with J-A Nielsberg) *L'Humanité* (28 January 2004) 13. The words are Derrida's.
45 ibid. The words are Derrida's.

contention without further ado: the attribution of heuristic value to experience must be incompatible with reliance on method.

There being no 'set of general instructions or a governing algorithm in a way that promises or guarantees a correct result', 'no sequence of steps that, if adhered to, generates a legitimated conclusion',[46] comparative law is emphatically an experiential process – an *Erfahrungsprozess*, if one wants it said by way of a German compound term. In sum, in the case of foreign-law research as with any other type of investigation, '[w]e know what we know from where we stand. We need to be honest about that'[47] – which means, incidentally, that one can staunchly defend a certain view provided that one is aware of the cultural contingency of one's position and therefore as long as one maintains one's argument as the encultured or situated being that one inevitably is. As unpalatable as this assertion may appear to orthodox comparatists-at-law, one must choose between the ubiquity of interpretation or metaphysics. For instance, it is not that one wants to deny the existence of facts, which would be silly. The point is, however, that no facts exist 'in the air'. Facts emerge and become established in the course of interpretations. And facts' interpreters do not exist 'in the air', either. They are grounded, somewhere, there or here. Thus, when comparatists-at-law seek to ascribe meaning to foreign facticity as it is and as it exists somewhere, they themselves are only contemplating the facts from '*somewhere where [they are]*', '*[s]omewhere where* … [they] believe [they are]'.[48] Otherwise said, a facticity's enculturation is inexorably filtered through a comparatist's enculturation. Yes.

Although method appears to stand as the sturdiest beam supporting comparative law's orthodox edifice, such as it still holds epistemologically speaking, 'the naivety of faith in method', in effect, hardly makes any more sense than the view that there are loud blankets or angry cucumbers.[49] Moreover, this delusion risks 'an actual deformation of knowledge'.[50] Extraordinarily, Zweigert and Kötz expressly advocate such distortion as they enjoin comparatists-at-law, bringing to bear a heavily positivist world-view, to sever foreign law from its local moorings, what they chastise as 'all the systematic concepts of these legal orders' and 'their solely-national dogmatic encrustrations'.[51] Derrida's crisp exhortation is therefore pertinent: 'No method: this does not exclude certain directions for use.'[52] Indeed, to want to overcome the doubting of doubt that

46 S Fish, 'The Intentionalist Thesis Once More' in G Huscroft and BW Miller (eds), *The Challenge of Originalism* (Cambridge University Press 2011) 99.

47 M Kovach, *Indigenous Methodologies* (University of Toronto Press 2009) 7.

48 J Derrida, *De la grammatologie* (Editions de Minuit 1967) 233.

49 H-G Gadamer, *Wahrheit und Methode* (5th edn, Mohr Siebeck 1986) 306.

50 ibid.

51 Zweigert and Kötz (n 4) 43. The reference to 'dogmatism' is specifically German. A foreigner wanting to render the term into English might want to employ 'doctrinal'. Of course, much is lost, not least the doctrinaire dimension.

52 J Derrida, *La Dissémination* (Editions du Seuil 1972) 303.

has been one of the hallmarks of positivism, to suggest the acknowledgement – the valorization – of fallibility, is not at all about encouraging the comparatist to make careless mistakes or rashly to jump to erroneous conclusions. Is it necessary to ask: who would be promoting *that*? 'No-method' comparative law is no excuse for shoddiness. To return to Derrida's expression, it is these 'directions for use' – or these 'protocols', as I style them – that beseech the comparatist-at-law, for example, to deploy 'a clear strategy for gathering evidence',[53] to engage in 'the attentive reading of texts, the reference to the original, patience, slowness'.[54] Think of these instructions as aiming to inform the comparative construction. And while I find it hugely important to resist the lure of databases that would feature surveys and their series of closed questions that respondents are explicitly directed to answer with yes or no,[55] I do not have any difficulty with the empirical generally provided that it is understood in a way that befits the practice of comparative law.

I have in mind, for instance, what anthropologist Danilyn Rutherford names a 'kinky empiricism',[56] that is, '[a]n empiricism that admits that one never gets to the bottom of things, yet also accepts and celebrates the disavowals required of us given a world that forces us to act'.[57] What Rutherford calls 'a kinky kind of empiricism … [is] an empiricism that takes seriously the situated nature of what all thinkers do'.[58] 'Kinky empiricism is always slightly off kilter, always aware of the slipperiness of its grounds and of the difficulty of adequately responding to … ethical demands.'[59] Now, pace positivism, '[b]eing off-kilter is a strength, not a weakness. … [I]t is what comes with getting real'.[60] I hasten to add that these observations strike me as being particularly crucial in the face of trendy numerical comparative law and its unsubstantiated claims to neutrality, impartiality, and objectivity, not only an uninspired postulate (what scholarly interest incognito information?), but a utopian premiss – as if charts or diagrams could somehow be inscribed bereft of all the baggage of interest, desire, aspiration, or belief, that is inseparable from the human condition.[61]

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Because I am committed to moving away from methodological thinking, I do not want this essay to appear as an alternative user's manual. Indeed, I firmly

53 Darian-Smith and McCarty (n 30) 130.
54 J Derrida and M Ferraris, *Le Goût du secret* (A Bellantone and A Cohen eds, Hermann 2018 [1994]) 59. The words are Derrida's.
55 For an example of how not to do comparative law, see A Jakab, A Dyevre, and G Itzcovich, *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 798–820. I discuss this book at 180–91.
56 Eg: D Rutherford, 'Kinky Empiricism' in O Starn (ed), *Writing Culture and the Life of Anthropology* (Duke University Press 2015) 105–18.
57 D Rutherford, 'Kinky Empiricism' (2012) 27 Cultural Anthropology 465, 465.
58 ibid 466.
59 ibid.
60 ibid.
61 See 128–91.

believe that there is no right way in which the bits of glass in the kaleidoscope ought to be arranged.[62] My primary concern lies with the articulation of information within the comparison, inevitably a crucial part of any project that consists in the theoretical refurbishing of the dialectical strategy in which orthodox comparative law has long tranquilly found unexamined solace. Specifically, I focus on the framing of the interface allowing the comparatist to structure his interaction with the foreign legal culture or the foreign law-text with which he chooses to engage after having forged the view that the foreign – and a particular instantiation of it – holds a significant and indeed crucial measure of normative relevance for academics, lawyers, or judges operating locally, not, to be sure, as binding law, but as persuasive authority.[63]

I find it important readily to observe that the framing of the interface by the comparatist must intervene against his constant appreciation that the foreignly legal cannot be represented and that all that can ever be achieved is a *re-presentation* of it, that is, a mediation through the comparatist's 'own' language, which is always-already inadequate to the production of a narrativization that would be rigorously exact, that would tell the foreign law-world as it is, as it exists, as such. Indeed, the comparatist-at-law must concede that no inscription on his part in 'his' language can operate the transfer, without interpretive accretion or loss, of a semantic content having been constituted before him, elsewhere, in another language. As he attempts to restore indicative signifiers through words that he must know are destined to fail, the comparatist-at-law proceeds to elaborate his construction – what I think can be termed, more beneficially, his *invention* of foreignness. Etymologically, invention helpfully attests to the fact that the comparatist finds and fashions, at once, the foreign legal culture or foreign law-text that interpellates him; invention simultaneously captures the discovery and the elaboration of the foreignly legal.[64] In

62 cf S Beckett, 'Three Dialogues' in *Disjecta* (R Cohn ed, Grove 1984 [1949]) 144: 'There are many ways in which the thing I am trying in vain to say may be tried in vain to be said.'

63 Note that, viewed from a local vantage point, foreign law arguably does not qualify as law. cf P Goodrich, '*Interstitium* and Non-Law' in PG Monateri (ed), *Methods of Comparative Law* (Elgar 2012) 213–29.

64 The idea of invention involves a set of contradictory processes that put the comparatist-at-law in a 'double bind'. This expression, which Derrida presses into service in a variety of settings, is indebted to Gregory Bateson, who coined the phrase in 1956 as an explanation partaking of the etiology of schizophrenia, but more broadly – as, indeed, it has come to be received – to illustrate the complexities of communication. Bateson had in mind the idea of a paradox, whereby contradictory messages are being emitted simultaneously so that the receiver cannot satisfy one injunction without breaching the other – all the while finding himself in a position where he is enjoined not to disobey any of the messages and not to comment on the absurdity of the situation. See G Bateson, *Steps to an Ecology of Mind* (University of Chicago Press 1972 [1956]) 201–27. A classic illustration is the statement 'Be spontaneous' uttered, say, by an army colonel to a low-ranking soldier. If the infantry soldier decides to be spontaneous as ordered, he is

effect, what the comparatist names in his report 'The English Law of X' or 'The Brazilian Law of Y' is what he himself articulates and inscribes, in words that he himself chooses out of 'his' language and through sentences that he himself crafts, having garnered 'data' from his necessarily selective aggregation of information out of the published documentation that he has had available to him, before him, in the time at his disposal – his inevitably partial appreciation of the amassed material and his understanding, inescapably different from other possible understandings,[65] arising out of the passages that he has elected to analyse and possibly quote (instead of others).

In the process, the comparatist readily depends on the views of individuals whom he is prepared to consider as foreign experts in foreign law even as there are no criteria within the field of comparative law that one can marshal in order to ascertain the reliability of a foreign author as a dependable source of information in an area in which the comparatist himself, being from elsewhere, cannot, ex hypothesi, act as an authoritative local source of knowledge. Having ascertained what he is prepared to treat as trustworthy texts, it is rare that the comparatist inquires very far into the chain of authority, for instance, by undertaking to verify the texts upon which his sources base themselves or by deciding to assess the further texts upon which the sources' sources choose to rely. Faced with the urge to produce information concerning the foreignly legal, the comparatist is mostly content to use material rather than question it. He is typically reluctant to seek a 'first knower', which means that, in effect, he *satisfices*, that is, he operates within the confines of a minimalist creditability regime. At times, the fact that the comparatist's concern for efficiency prompts him to leave so many statements uninvestigated, in a setting where the main material for comparative law writing is foreign law writing, compels one to ask, as regards the outcome of the negotiation between the comparatist and the foreign law-world that he has made into his focus of study, whether one ought

disobeying the message since being spontaneous on account of an order is not to be spontaneous. Otherwise, the soldier can acknowledge that he cannot be spontaneous under those circumstances, but he then finds himself disobeying the order. Yet, all along, one is talking about a command, which therefore eliminates the possibility that it should not be followed and also the further option that its absurdity should be open to discussion. For my part, I use the expression 'double bind' to refer to the fact that the comparatist-at-law's invention is at once a finding and a fashioning, two antagonistic configurations.

65 cf Gadamer (n 49) 302: 'It suffices to say that one understands *differently, when one understands at all*.' Gadamer's differential understanding arises in a context where he approaches meaning as being ultimately fixable and views a 'fusion of horizons' ('*Horizontverschmelzung*') between *interpretans* and *interpretandum*, a synthetic idea of Hegelian inspiration, as both achievable and desirable: ibid passim. Over many years, Derrida perspicuously challenged such postulates. Eg: J Derrida, *Papier machine* (Galilée 2001) 306–7. For a general discussion of deconstruction's advantage over hermeneutics as a strategy of interpretation, see P Legrand, 'Derrida's Gadamer' in S Glanert and F Girard (eds), *Law's Hermeneutics: Other Investigations* (Routledge 2016) 144–67.

not to be talking about the comparatist holding a *belief* about a foreign legal culture or a foreign law-text rather than having 'knowledge' of it. At any rate, it should be obvious that the comparatist-at-law's avouchments concerning the foreign are framed as the outcome of adventitious and messy tactics.

One important implication of the interpretive process that is being unfurled within comparative law is that the comparatist is not extraneous to his enunciation of the foreignly legal, which stands, well, as *his* enunciation. Again, any intervention taking the form of a statement concerning the foreign law-world that has been investigated must be seen to fall short of consisting in a loyal replication of that foreign law-world. Even as he unfolds 'his' language ('his' vocabulary, 'his' syntax, and 'his' rhythm also, his 'tone') in search of 'the' foreign, the writing of the foreign legal culture or foreign law-text that the comparatist propounds, 'his' writing, interrupts, segments and carves, channels and condenses the foreign. The ways of writing that the comparatist-at-law follows – which necessarily imply detours, false starts or false leads, drifts and wanderings – materialize, in part, through the selection of a register of enunciation, that is, by way of discernment of an appropriate behaviour to hold vis-à-vis the foreign legal culture, the foreign law-text, the other law, the other-in-the-law, in brief, the foreign law-world. These attitudinal strategies of meaning-ascription, of structuration of the foreign law-world's singularity, evoke the comparatist's commitment as interpreter: they thus herald a primordial ethico-discursive stance (which is also a politico-discursive bearing).

It is key to appreciate – hence, my emphasis – that the foreign law-world that the comparatist avers is, in effect, but 'his' narration of the foreign based on 'his' understanding of the foreignly legal (which, of course, assumes a prior understanding of what stands as 'foreign' in contradistinction to what does not).[66] The foreign law-world being narrated is thus a foreign law-world that, inescapably, will have been filtered by the situated comparatist.[67] It is a foreign law-world that will therefore have become 'his' foreign law-world along the reading, interpreting, and scribbling way. The quotation marks want to recall the fact that the comparatist mobilizes his socialization and his institutionalization (his epistemologization) – in effect, his enculturation – to inform his appreciation of the foreign legal culture or foreign law-text and his writing on

66 My stock illustration refers to the case of a Romanian jurist writing a doctoral dissertation on Romanian law in the Communist era *as a comparatist* on the understanding that the totalitarian ideology that detains him is best understood as foreign to 'Romanian' legal experience. See CS Cercel, *Le Droit saisi par la politique: l'expérience communiste roumaine*, 2 vols (Ecole de droit de la Sorbonne, unpublished doctoral dissertation 2012). cf C Cercel, *Towards a Jurisprudence of State Communism* (Routledge 2018).

67 cf Gadamer (n 49) 401: 'Wanting to avoid one's own concepts in interpretation is not only impossible, but blatant absurdity. To interpret means precisely to bring one's own preconcepts into play so that the meaning of the text can really be made to speak for us.'

the foreign, which means that he applies readerly and writerly identities that are in significant part constituted through otherness, say, through the law teachers who have instructed him or the authors who have influenced him. The other is present within him, *as him*: the comparatist-at-law *in-corporates* or *em-bodies* the other.

Incidentally, the epistemic filtering that I address means that the foreign law-world is not nearly as 'foreign' to the comparatist as is customarily assumed, for the foreignness that there is within the comparative analysis is effectively what subsists after the comparatist has sought to overcome the distance that separates him from the foreign, after his decision to subtract or withdraw one or the other dimension from the foreign in order to contain the scope of his narrative, after the articulation of the foreign's cultural embeddedment by way of his interpretive motions and of his inscribed words. If you will, the other law is doomed to a process of othering from itself: it will be made other than what it is on account of the comparatist's co-presence, necessarily so. Only the genuinely foreign, that which will ultimately escape the comparatist's recounting ability, will resist this alteration, a fact entailing that the foreign, in the strict sense of the term, must be confined to what pertains to ineffability, that is, to what lies beyond the comparatist's mastery.

It follows from these observations that any idea of research into foreign law being neutral, impartial, or objective is unsustainable since no comparative reading or writing, no narration, can legitimately claim for itself the status of an indifferent transcript that would simply transport information from there to here, without generating any interpretive increment or deficit along the way. There is no possibility of impersonality or of detachment, for the comparatist's comparison is inevitably 'his' comparison – it is the comparison into which *he* has invested *himself* – which means that the text that he is offering as a comparative account of the foreign law-world thoroughly depends upon *his* research, upon *his* reading, upon *his* interpretation, and upon *his* writing. (Observe that the use of the possessive is not meant to convey subjectivity. Instead, there is primarily enculturation.) And the epistemic dependencies that I address inevitably, structurally, imply a transformation, a domestication, a taming, of what will have started comparative life as 'the foreign', elsewhere. A close examination of the comparatist-at-law's analytical process reveals how 'objectivity' is but one of these 'elevator words' that would seemingly ameliorate the 'scientific' status of whatever is at stake,[68] while, in effect, 'the invocation of objectivity gets [one] nowhere'.[69] Indeed, the fact of the matter is that there is always a for-the-sake-of-which dimension to comparative research, an ineliminable human expenditure, that no honest interpretation can honestly fail to acknowledge.

68 I Hacking, *The Social Construction of What?* (Harvard University Press 1999) 22–23.
69 I Hacking, 'Let's Not Talk About Objectivity' in F Padovani, A Richardson, and JY Tsou (eds), *Objectivity in Science* (Springer 2015) 28.

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Comparison assumes 'more than one' entity within the comparative dynamics – say, more than one legal culture or more than one law-text. Indeed, '[t]here is only one thing in this world which cannot be compared, and that is "one thing"'.[70] Otherwise said, '[c]omparative analysis becomes meaningless in conditions of identity'.[71] Derrida formulates the argument well: '[T]o compare[:] [t]hen again, there must be a difference permitting it.'[72] And, in the disciplinary manner in which the field of comparative law has developed, one of the entities in comparative play requires to be foreign to the other, that is, one law within the comparative investigation must qualify as a law existing as law beyond what is locally apprehended as local law (the concept of the 'local' inevitably lending itself to … local interpretation).[73] And this is why a study by a Dutch jurist featuring only Dutch administrative law and Dutch civil law or research by a US jurist involving exclusively the laws of Texas and Michigan cannot 'count' as comparative law since both investigations are dwelling strictly in local law. Comparative law's insistence on the foreign replicates the epistemic exigency that prevails in other comparative fields such as comparative literature (an English literary critic engaging in a comparison of Wordsworth and Coleridge is not involved in *comparative* literature) or comparative politics (a French politist articulating a comparison of gender patterns on municipal councils in Marseille and Lille is not undertaking *comparative* politics).

On the assumption that more than one entity must assume difference between them (even as there cannot be complete incomparability),[74] any purported understanding of otherness requires the threshold contrivance of a 'cue-equivalence' or 'cue-commonality' between the laws being compared.[75] It is therefore little exaggeration to speak of the elaboration of the comparatist's cue-equivalence or cue-commonality across laws, of the cue-equivalence or cue-commonality materializing pursuant to the comparatist's interested gaze, as an elementary comparative motion. Indeed, one can hold that one fashions

70 FJM Feldbrugge, 'Sociological Research Methods and Comparative Law' in M Rotondi (ed), *Inchieste di diritto comparato*, vol 2 (Cedam 1973) 213.

71 M Cappelletti, M Seccombe, and JHH Weiler, 'Integration Through Law: Europe and the American Federal Experience – A General Introduction' in M Cappelletti, M Seccombe, and JHH Weiler (eds), *Integration Through Law*, vol 1, bk 1 (De Gruyter 1986) 9.

72 J Derrida, *La Vérité en peinture* (Flammarion 1993) 429 [emphasis omitted].

73 cf B Latour, *Reassembling the Social* (Oxford University Press 2005) 179: 'There exists no place that can be said to be "non-local".'

74 My claim regarding difference evokes Leibniz, and I return to Leibniz's philosophy presently. See 24–25. For the argument about incomparability, see eg D Shapere, 'Evolution and Continuity in Scientific Change' (1989) 56 Philosophy of Science 419, 422: 'How can *any* two things be *completely* incomparable?'

75 See W Dilthey, *Der Aufbau der geschichtlichen Welt in den Geisteswissenschaften* in *Gesammelte Schriften*, vol 7 (Teubner 1927 [1910]) 141. Dilthey's term is '*Gemeinsamkeit*'.

oneself *as a comparatist* not only by rejecting the autarky of localized understandings of the legal, although not denying each law's singular force and assurance, but by formulating, through the contrivance of a cue-equivalence or cue-commonality, what one will treat as an intersecting semantic location. Without duplicating the foreign law-worlds being researched, such a framed interface is designed to constitute an enunciative site contesting the bordered territories of each of the law-worlds in play, thus presenting itself as an expressive glocalized venue *besides*. Observe that, unlike the machination and imposition of sham-equivalence or sham-commonality across laws with a view to promoting the ideology of legal unification in its various guises, the contrivance of cue-equivalence or cue-commonality in order to unlock the comparison through the framing of a comparative interface very much stands as the lesser epistemic violence. (A contrivance – an ingenious epistemic endeavour to authorize the comparison – requires to be distinguished from a sham, which is a hoax, an imposture.)

It is important to appreciate that this third space cannot emerge *sua sponte*. Rather, it must be designed through the *contrivance* of a cue-equivalence or cue-commonality, which is in fact a contrived equivalence or commonality, and through the framing of an interface, which is thus effectively a contrived interface. One can think of the third space, then, as a constructed/structured articulation/configuration to assure the negotiation/transaction that is being enacted/implemented in order to produce/generate/deliver a comparison of laws. It is not so much therefore that the third space *names* reality, but that it is to be approached from a performance-based, possibility-making angle. If you will, the framed interface – again, strictly speaking, a fabricated interface – stands as a situation of epistemic calculation, which 'is worth only by way of the presence and the activity of thought of the irreducible subject who promotes it': 'It is [the third term's] singularity that constitutes the comparison and gives it its strength.'[76] Not only does the comparatist invent the foreign legal culture or the foreign law-text through a double motion of finding/fashioning, then, but he also invents, through the contrivance of a cue-equivalence or cue-commonality, the framed interface where he transports the laws for the purposes of comparison. In other words, the comparatist engages in invention incessantly.

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Assume a Californian comparatist writing a report in English featuring the inscription of an interaction, of an 'assemblage' (of an alchemy?), between '*Schuld*' in the Austrian law of divorce ('*Scheidungsrecht*') and 'fault' in the Californian law of divorce, through, say, the (non-unilateralist) notion of 'transgression' that he himself is contriving. I am postulating a comparatist whose

76 P Bayard, 'Pour une nouvelle littérature comparée' in P Bayard (ed), *Pour Eric Chevillard* (Editions de Minuit 2014) 117. For my part, I would avoid the use of the term 'subject' ('*sujet*') in favour of, say, 'individual'.

work is informed by an edifying comparative sensibility, someone who, having invented the laws before him (that is, having found/fashioned them), is aware that the (Diltheyian) cue-equivalence or cue-commonality that he must now contrive in order to unlock the comparison requires not to be framed in the language of one only of the laws being addressed, that his 'comparison … must not be conducted in the language of just one of the parties',[77] that a comparative endeavour cannot resort to this kind of predatory approach and inflict words, definitions, or categories on another law that do not concern it.[78] As regards my example, it is therefore excluded that the comparison should be unfolding only either out of the term '*Schuld*' or exclusively after the word 'fault', since each of these approaches would effectively signify an unwarranted and hierarchical infliction of one law unto the other. Again, the comparatist must avoid compelling one law into the other's order of meaning.

Observe that the ascertainment of the notion of 'transgression' – to name the cue-equivalence or cue-commonality bringing Austrian law and California law 'not-together' (crucially, the two laws are not being merged or anything of the kind) – is emphatically the work of the comparatist himself; the interface is thus his invention: he frames it, he contrives it. In order 'to supplement, to substitute, and therefore to represent, to replace, to put an *Ersatz* in the place of that which the [comparison] inhibits or forbids' – that is, instead of the foregrounding of one of the laws only – it is the comparatist who, in my illustration, concludes that 'transgression' is the form due to generate an optimal interpretive yield (or affordance) through comparative analysis.[79] To be sure, this interpretive response to the laws that the comparatist is finding/fashioning into his focus of study is inherently contestable, without the emergence of such contestation however having to prompt either consternation or disappointment. For instance, a critic could well maintain that 'transgression' effects an undue repression of one of the laws that the comparatist is bringing into comparative play, into the play of comparative language. Be that as it may, once more, the comparatist's contrivance, which unlocks the possibility of achieving a comparison, must be carefully distinguished from the machination and imposition of a sham-equivalence or sham-commonality, an assignment that problematically pertains to the ideology of legal unification in its various guises.

Properly speaking, then, the cue-equivalence or cue-commonality, which is based on such understanding as the comparatist will have gathered of the

77 I Stengers, 'Comparison as a Matter of Concern' (2011) 17 Common Knowledge 48, 56.

78 For a defective strategy, see J Waldron, 'Indigeneity? First Peoples and Last Occupancy' (2003) 1 New Zealand J Public Int'l L 55. For an insightful critique of Jeremy Waldron's mobilization of his own epistemology in the light of which he proceeds to adjudicate on the claims of indigenous peoples and reach a non-indigenous outcome, see R Nichols, 'Indigeneity and the Priority of the Settler Contract Today' (2013) 39 Philosophy & Social Criticism 165.

79 J Derrida, *La Carte postale* (Flammarion 1980) 420.

foreign, finds itself being fashioned somewhere in an in-between void: it is being elaborated in a semantic space that is neither Austrian law's nor Californian law's, an hitherto unoccupied or empty space, an interface – a fabricated interface, really – that I am calling a 'third space'. Since I am raising the issue of the comparatist's understanding of foreign law, I find it opportune to insist, however, that the proposed interface depends on an understanding of the laws the comparatist is studying that can never reach beyond the verge of the foreign because, ultimately, the self cannot be the other. It follows that the work of contrivance of a cue-equivalence or cue-commonality – of an interface, a contrived interface – that the comparatist is undertaking must rest on an understanding of the foreign law-world that will, at best, have stopped on the verge of otherness. Even though comparative research offers the possibility, always renewed, of infinite interpretation, of a mad striving purporting to come as close as possible to the foreign within the ineliminable critical distance, in the end there will always have remained a slit, no matter how faint, between the self and the other, that is, between the self and the other's law so that the self will never have been the other, equivalently or commonally, so that he can, at the most, say 'it' as he imagines the other saying 'it', that is, so that he must utter 'it', in effect, differently from the other.

Again, as befits a configuration featuring more than one law, the Austrian and Californian laws that I address in my example are, inevitably, different from each other. They are different laws heralding different histories, different politics, different philosophies, different epistemologies, in sum, different cultures. Also, these laws exist in different languages. Let me indicate at this juncture how Leibniz's argument for the inevitability of differential co-presence – 'Leibniz's Law' – accounts for the fact that *the co-presence of more than one law, which means that there is not one law only anymore, must assume difference between them.*[80] In Leibniz's words (which he wrote in French, as it happens), 'by virtue of imperceptible variations, two individual things … must always differ'.[81] This principle of analytic ontology stands for the proposition that only indiscernibles are identical or that the diverse is necessarily 'other than' (that distinct entities are never exact replicas of one another, that is, if there is X and Y, X is at least minimally something that exists as not-Y). Alfred North Whitehead famously 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

80 I draw on J Derrida, *Memoires for Paul de Man* (2nd Eng edn, C Lindsay tr, Columbia University Press 1989) 15. The English translation was released before the French text and is more specific on point, hence this reference.

81 GW Leibniz, *Nouveaux essais sur l'entendement* in *Die philosophischen Schriften von Gottfried Wilhelm Leibniz*, vol 5 (CI Gerhardt ed, Olms 1965 [1764†]) 49. This text was written in 1704. Leibniz expresses the idea in some of his other work also. For a summary of the analytical debate as to whether Leibniz's Law is contingently true or necessarily true – a discussion that need not detain me – see P Forrest, 'The Identity of Indiscernibles' in *Stanford Encyclopedia of Philosophy* (2010) <https://plato.stanford.edu/entries/identity-indiscernible/>.

B purports to mimic situation A, the fact is that when B comes along, A has already taken place, which entails that event B features as one of its constitutive elements the pastness of event A and therefore, if on that ground alone, differs from event A.[82] Both Leibniz and Whitehead are showing that the Austrian and Californian laws thus structurally differ from one another – and must so differ. In other words, Austrian and Californian laws are separated by a differend, which is *what there is, what is the case*: 'In the beginning, difference; there is what happens, there is what has already taken place, *there*.'[83] This differend – John Paul Ricco's 'shared-separation'[84] – is embedded in the very factical 'there-isness' of the Austrian and Californian laws-in-co-presence.[85] As such, this differend is 'irreducible'.[86]

In effect, the Austrian and Californian sets of interpretive experiences refer to more than one law-world. It is not that the Austrian and Californian legal cultures are offering different experiences of the one-and-only law-world there is or evoking different points of access into the one-and-only law-world there is. Rather, these legal cultures are signifying the existence of more than one law-world, which are different inter se.[87] Importantly, the idea of 'world' is not to be confused with that of 'planet Earth'. While there is one planet Earth only, the planet Earth on which all human beings (and therefore all comparatists-at-law) dwell,[88] this planet Earth accommodates a plurality of law-worlds, all of them different from one another, which one must allow since multiple law-worlds, while they may not be desired by all, are necessary to the extent that they stand as the only possible interpretive way to face the inconsistent versions that there are in co-existence, all of them being simultaneously (locally) rational.[89] Otherwise said, to quote philosopher Nelson Goodman, a prominent advocate of this articulation,

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

83 J Derrida, 'Deux mots pour Joyce' in *Ulysse gramophone* (Galilée 1987 [1984]) 44.

84 For an insightful exploration of the trope of 'shared-separation', see JP Ricco, *The Decision Between Us* (University of Chicago Press 2014). Ricco draws on Jean-Luc Nancy, who applies himself to the semantic tension inherent in the French term '*partage*' (the French '*partager*' means, at once, 'to share' and 'to separate'). Eg: J-L Nancy, *Le Partage des voix* (Galilée 1982). Other words feature an analogous *double entendre* simultaneously heralding the ideas of 'inclusion' and 'exclusion'. Consider 'to cleave', which means at once 'to remain attached' and 'to separate'. For its part, 'twin' refers to a couple (as in 'twin stars'), while 'to twin' signifies 'to separate'.

85 I borrow the word 'differend' from the English translation of J-F Lyotard, *The Differend* (G Van Den Abbeele tr, University of Minnesota Press 1988 [1984]).

86 J Derrida, *Limited Inc* (E Weber ed, Galilée 1990) 253.

87 Pace Gadamer (n 49) 451; H Putnam, *Renewing Philosophy* (Harvard University Press 1992) 122; D Davidson, 'On the Very Idea of a Conceptual Scheme' in *Inquiries into Truth and Interpretation* (2nd edn, Oxford University Press 2001 [1973]) 187.

88 Eg: N Goodman, *Of Mind and Other Matters* (Harvard University Press 1984) 31: '[I]n any one world there is only one Earth.'

89 I approach the matter within an ontic rather than an ontological mindset. Indeed, ontology, at least according to its habitual understanding, readily connotes abstractness and invariance, which is precisely the opposite of the concrete and the

'if there is any actual world, there are many'.[90] Goodman holds that even if the idea may appear strange and disagreeable, one is theoretically compelled to the conclusion that there is a multiplicity of law-worlds, equally rational even if in conflict ('[w]orlds are distinguished by the conflict or irreconcilability of their versions'),[91] without there being a meta-criterion allowing for a selection or ranking of the best law-world. Goodman adds:

> While I do not know what is meant by saying that *the* world is simple or complex, I have some idea what is meant by saying that among the many worlds there are, … some are simple and some complex, some ingenuous and some ingenious, and even by saying that some are prosaic and some poetic.[92]

Once more, the one-world alternative is indefensible, because it would entail that there would exist inconsistent versions of the one-and-only law-world – which cannot be, all versions being simultaneously rational. In effect, then, the multiplicity of law-worlds is not a hypothesis but a conclusion: it is empirically inevitable (these law-worlds exist *hic et nunc*; they are co-present and co-local; they constitute 'reality'), which means that this interpretation does not rest on any transcendentalization.

The specificity of Goodman's claim – '[there is] no such thing as *the* world'[93] – is that he introduces the idea of 'more-than-one-world' for pragmatic reasons, that is, he feels logically constrained to do so rather than proceed on account of a particular ideological or aesthetic inclination. Along converging lines, philosopher of science Paul Feyerabend asserts that '[n]ot everybody lives in the same world'.[94] And Derrida perspicuously writes that '[t]here is no world, there are only islands'[95] – the islandy metaphor wanting to deny the

90 Goodman (n 88) 31. Goodman's most extensive formulation of this argument is in N Goodman, *Ways of Worldmaking* (Hackett 1978). See also D Lewis, *On the Plurality of Worlds* (Blackwell 1986); P Otto, *Multiplying Worlds* (Oxford University Press 2011); TS Kuhn, *The Plurality of Worlds* in *The Last Writings of Thomas S Kuhn* (B Mladenović ed, University of Chicago Press 2023† [1996]) 103–265. Adde: A Barrau, *Chaos multiples* (Galilée 2017) 185–95.

91 Goodman (n 88) 31.

92 ibid 44.

93 ibid 125. And what pre-exists the multiple worlds? It is the 'Khôra', which would be the structure necessary to the emergence of the multiplicity of worlds. The 'Khôra' stands as a latent, informal, insipid, inaudible matrix, the imprint of the future. Eg: J Derrida, *Khôra* (Galilée 1993) 31, where Derrida refers to '"something" [that] is not a thing and evades this order of multiplicities'.

94 P Feyerabend, *Farewell to Reason* (Verso 1987) 104.

95 J Derrida, *La Bête et le souverain*, vol 2 (M Lisse, M-L Mallet, and G Michaud eds, Galilée 2010† [2002]) 31. For a more detailed analysis of the later Derrida's understanding of the dynamics between self and other, which, despite Derrida's ascertainable (and acknowledged) Heideggerian inclinations, is at significant variance with Heidegger's own approach holding that the individual primordially exists as a 'being-with'

existence of an identical framework of reference that would underlie, say, the two law-worlds (that is, the two legal/cultural configurations) that my illustration brings into co-presence, to reject an equivalence or commonality that would be there, empirically existent.[96] The fact of the matter is that in the absence of a 'one-world' equivalence or commonality undergirding the Austrian and Californian law-worlds that I address, the comparatist himself requires to frame an interface – a contrived interface, which means, effectively, his interface – in order to allow a comparison to materialize.

I suspect that orthodox comparatists-at-law are bound to find 'more-than-one-world' thinking counter-intuitive and that they are likely spontaneously to empathize instead with the 'one-world-and-different-perspectives-on-that-one-world' approach, which, I assume, they will readily regard as patently sensible and just as unproblematic. I find it important to show that, in effect, this disposition is neither innocent nor apolitical. Indeed, this seemingly straightforward interpretation stands as a subtle (or not-so-subtle) form of cultural hegemony, as a strategy serving, in sum, to marginalize or efface difference – an outcome that ought to cause the thoughtful comparatist-at-law significant concern. For my demonstration, I rely closely on Mario Blaser's highly persuasive case-study.[97]

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Consider Blaser's account of the facts that he deems relevant:

> On January 28, 2013, the government of Newfoundland and Labrador announced a five-year hunting ban on caribou. The ban was imposed after several surveys showed that the population of the George River Herd had been dropping precipitously, from eight hundred thousand individuals in 1990 to only twenty-seven thousand in 2012. While uncertain about the causes, the provincial government understood that a continued caribou harvest was not sustainable, even for the Innu and Inuit indigenous communities that live in Labrador. The day after the announcement, Prote Poker, the Innu Nation grand chief, said that the ban was unjustifiable; that Innu elders did not agree with it because it was a threat to their way

(or '*Mitsein*'), see P Legrand, 'Jacques in the Book (On Apophasis)' (2011) 23 L & Literature 282.

96 In this regard, it is a mistake to assume that there has to be only one world for disagreement to occur. Indeed, disagreement can straddle different worlds – otherwise said, when two individuals disagree, they can do so across worlds. In my music-world, I say that Hélène Grimaud is an exceptional pianist. In your music-world, you say that she is not. We disagree. However, our disagreement need not assume one music-world only. Specifically, we need not think equivalently or commonally about the idea of 'an exceptional pianist'.

97 See M Blaser, 'Is Another Cosmopolitics Possible?' (2016) 31 Cultural Anthropology 545.

> of life; and that the communities would continue to hunt as they always had … . Among other concerns, the Innu refusal to accept the ban was based on the insistence of knowledgeable hunters and elders who saw the decline in population as a symptom of the deteriorating relationship between the Innu and Kanipinikassikueu, the master of *atîku* (the word Innu use to refer to what Euro-Canadians call caribou). The extent to which established protocols for hunting are followed – such as the treatment of bones and the sharing of meat, among other prescriptions – determines the health of that relationship and the willingness of Kanipinikassikueu to keep giving animals to, and generally bless, the Innu. Hunters and elders had been complaining for several years by then that younger generations of Innu were not following these protocols, calling on the young people to recommit to them. In this context, for hunters and elders, the hunting ban would make it impossible to repair the relationship with *atîku* and its spirit master. In short, while for the wildlife managers in the provincial government hunting could mean the disappearance of the caribou, for the Innu hunters and elders, being prevented from hunting according to protocol almost assuredly would mean the disapperance of *atîku*.[98]

One option – arguably the most frequent reaction, so much so that Blaser styles it 'reasonable politics'[99] – is to assume that 'caribou and *atîku* … refer to different cultural perspectives on the same "thing"'.[100] This conclusion can be traced to '[the] assumption of an already unified cosmos, a single world (the common "thing")'.[101] 'In this conception the cosmos is transcendent and requires no discussion. What is debated (and has to be resolved) are the different views that, given their allegiance to their cultures and traditions, humans have about that cosmos.'[102] Indeed:

> [A] cosmopolitan call to resolve the disagreement between the Innu and the provincial government would appeal to the parties to abandon their respective parochial perspectives and focus instead on what is common to both: the 'thing' they worry about, a thing that one calls caribou and the other *atîku*.[103]

Ultimately, according to Blaser, this one-world view is deploying itself against the backdrop of what he calls 'Universal Science', a cognitive model that asserts 'the primacy of an epistemology predicated on the notion that knowledge is a relation between a real world out there and representations of it'.[104] Crucially,

98 ibid 545–46.
99 ibid 548.
100 ibid 546.
101 ibid.
102 ibid.
103 ibid.
104 ibid 550.

'Universal Science' does not regard itself as one knowledge practice only amongst many, but it perceives itself as a 'knowledge practic[e] that … claim[s] to know reality "as it is"'.[105] If you will, 'Universal Science plays the primary role of arbiter in reasonable politics, especially in the exercise of ranking the putative factuality of different perspectives'.[106] Intervening as a warrant for 'reasonable politics', 'Universal Science' articulates and consolidates 'a state of affairs whereby some concerns (rendered as perspectives) can be sidelined – like the claim that Innu are given *atîku* by a spirit master – because they are deemed unrealistic and, therefore, unreasonable or irrelevant'.[107]

Careful analysis thus discloses 'the exclusionary drive of reasonable politics' at work.[108] Grounding itself in 'Universal Science', 'reasonable politics' operates as follows:

> [It] turn[s] differences into perspectives on the world. Differences-made-into-perspectives are then amenable to be ranked according to putative degrees of equivalence between perspectival representations of the one-world and the one-world itself. This ordering, in turn, makes it possible to deem some perspectives irrelevant, erroneous, or dangerous, and thus dismissible or, worse, destroyable.[109]

In sum:

> [T]he power of reasonable politics rests precisely in its capacity to set the terms of contestation (or disagreement) as a matter of perspectives competing for factuality. This is particularly problematic for those who do not adhere to the epistemology derived from the ontological assumption of one factual world: because they are not engaged in a contest over factuality on the terms set by reasonable politics, their claims are automatically disqualified as being unreasonable or unrealistic.[110]

For instance, 'Innu concerns' would be ascertained 'according to supposedly commonsense criteria that distinguish reliable environmental information from cultural beliefs'.[111]

Pursuant to this illustration, the key question therefore becomes, in Blaser's terms, 'how to gauge utterances that appear to the researcher as manifestly counterfactual',[112] that is, 'how to grasp these differences without resorting to

105 ibid 566 n 6.
106 ibid 550.
107 ibid 548.
108 ibid 551.
109 ibid 549–50.
110 ibid 550.
111 ibid 560.
112 ibid 548.

notions of different perspectives on a single thing and thus falling into the trap laid by reasonable politics'.[113] For Blaser, the analysis must withdraw from an exclusionary strategy and allow for there to be 'more than one but less than two'.[114] To frame the matter differently, the analyst must appreciate that 'the material-semiotic assemblages from which the more than one less than many *atîku*/caribou emerges partially co-occur (most evidently in bodily presence) … but [that] they remain distinct' – and that the distinct formations can each claim ontic legitimacy in their own right, on their own terms.[115] Blaser draws an analogy with the famous duck-and-rabbit figure: 'There is a bird and a rabbit, and yet they are not two units; and while the traces overlap, there is not just one drawing.'[116] Observe that Blaser's example directly challenges Zweigert and Kötz's comparatism. Not only do these German comparatists refer to 'a unitary idea of justice',[117] and not only do they regard differences as 'not relevant',[118] but they expressly promote the ascertainment of the one 'better' law,[119] an outcome that, in their view, may well pertain to self-evidence, too.[120]

Mobilizing the work of philosopher of science Isabelle Stengers, Blaser thinks in terms of a 'pluriverse' rather than a 'universe',[121] as befits a comparatist, and agrees that Kantian 'cosmopolitanism', 'according to which a cosmopolitan is one who rejects parochial allegiances and embraces the common world (the cosmos) as the grounding to work out differences among humans',[122] must yield to cosmopolitism, or 'cosmopolitics'.[123] Before Blaser, Edward Sapir had already stated the matter well: 'The worlds in which different societies live are distinct worlds, not the same world with different labels attached.'[124] (Blaser's – and Sapir's – insistence on the need to adopt a more sophisticated view than 'one-cosmos-for-all', or 'one-world-only', suggests that there is merit in James Joyce's 'chaosmos', the term the writer coined to account for the paradoxical coincidence of order and disorder.[125])

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113 ibid 557.
114 ibid.
115 ibid.
116 ibid 557–58.
117 Zweigert and Kötz (n 4) 3.
118 ibid 60.
119 ibid 8: '[O]ne of the aims of comparative-law research is to find "better solutions".'
120 Eg: ibid 356: 'A critical consideration results here in the superiority of the German system.'
121 Blaser (n 97) 546.
122 ibid.
123 I Stengers, *Cosmopolitiques*, 2 vols (La Découverte 2003 [1997]). See generally P Cheah and B Robbins (eds), *Cosmopolitics* (University of Minnesota Press 1998).
124 E Sapir, 'The Status of Linguistics as a Science' in *Selected Writings of Edward Sapir* (DG Mandelbaum ed, University of California Press 1949 [1929]) 162.
125 J Joyce, *Finnegans Wake* (R-J Henkes et al eds, Oxford University Press 2012 [1939]) 118. See generally P Kuberski, *Chaosmos* (SUNY Press 1994).

In the light of Blaser's illustration, I find it helpful to reformulate the question of competing worlds in terms of incommensurability. In the words of Harry Collins, '*[i]ncommensurability* is a useful term when one is thinking about alternation'.[126] As I proceed, I have in mind, for example, Homi Bhabha, who writes of the third space and says that it 'creates a tension', since it represents 'the negotiation of incommensurable differences'.[127] Note that, for Thomas Kuhn, 'lack of a common measure does not make comparison impossible'.[128] Kuhn adds that the term 'incommensurability' works metaphorically. The phrase 'no common measure' thus effectively becomes 'no common language'.[129] According to Kuhn, '[t]he claim that two theories are incommensurable is then the claim that there is no language, neutral or otherwise, into which both theories, conceived as sets of sentences, can be translated without residue or loss'.[130] Again, '[n]o more in its metaphorical than its literal form does incommensurability imply incomparability'.[131]

It follows that '[t]he claim that two theories are incommensurable is more modest than many of its critics have supposed'.[132] Crucially, there remains comparability. In other terms, incommensurability is 'a state in which an undistorted translation cannot be produced between two or more denotational texts'.[133] Helpfully, in my view, Natalie Melas therefore refers to the idea of 'minimal incommensurability' – a lesser incommensurability of the kind that 'produces a generative dislocation without silencing discourse' – instead of arguing the sort of incommensurability that would paralyze the comparatist into aphasia, 'the radical absence of common ground between different orders', this being its 'maximal' sense.[134] In effect, Melas's argument converges with Charles Taylor's: '[T]otal unintelligibility of another culture is not an option.'[135] To kill 'the terrifying mythical beast of total and

126 Collins (n 35) 68. For a reference to alternation of laws, see P Legrand, *Negative Comparative Law: A Strong Programme for Weak Thought* (Cambridge University Press 2022) 131.

127 HK Bhabha, *The Location of Culture* (Routledge 1994) 218.

128 TS Kuhn, 'Commensurability, Comparability, Communicability' in J Conant and J Haugeland (eds), *The Road Since Structure* (University of Chicago Press 2000 [1982]) 35. For a detailed examination, by one of Kuhn's most authoritative exponents, of the misunderstanding according to which Kuhn would have held that incommensurability implies incomparability, see P Hoyningen-Huene, *Die Wissenschaftsphilosophie Thomas S Kuhns* (Vieweg 1989) 212–60. Adde: *The Last Writings of Thomas S Kuhn* (B Mladenović ed, University of Chicago Press 2023†) passim.

129 Kuhn (n 128) 36.

130 ibid.

131 ibid.

132 ibid.

133 E Povinelli, 'Radical Worlds: The Anthropology of Incommensurability and Inconceivability' (2001) 30 Annual R Anthropology 319, 320.

134 N Melas, *All the Difference in the World* (Stanford University Press 2007) 31 [hereinafter *Difference*]. See also N Melas, 'Versions of Incommensurability' (1995) 69 World Literature Today 275, passim.

135 C Taylor, 'A Gadamerian View on Conceptual Schemes' in S Glanert and F Girard (eds), *Law's Hermeneutics: Other Investigations* (Routledge 2017) 43. See also Shapere (n 74) 422. cf J Frow, *On Interpretive Conflict* (University of Chicago Press

irremediable incomprehensibility' entails, in effect, that one must exclude the idea that otherness would be located beyond any possible ascription of meaning whatsoever by the self's mind, that it would exist, literally, 'out of mind'.[136] Again, incommensurability may mean the incompatibility of paradigms and the incomprehensibility of experiential knowledges, but it does not entail incomparability. Interestingly – certainly for comparatists-at-law – Paul Feyerabend maintains that incommensurable alternatives offer a better means of comparing respective merits than what commensurability would allow.[137] In Blaser's narrative, despite the worlds in co-presence being incommensurable, a comparison between *atîku* and caribou can be articulated. For instance, the comparatist can show the differend between *atîku* and caribou, the fact that 'the former is a non-human person that has will, while the latter is an animal driven by instincts'.[138]

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The comparatist's theoretical challenge thus becomes the capacity to stage, within the third space, a scene of comparability over against the dissensus that necessarily exists across law-worlds. Again, the fact that the self cannot be the other does not entail – and, indeed, cannot reasonably be taken to imply – the complete unintelligibility of otherness. Less dramatically, then, my claim is that the self cannot be expected to have a full appreciation of otherness – say, a complete understanding of the total extent of the dissensus across law-worlds that he is investigating. However, this qualification, once more, must not be taken to mean that the comparatist-at-law can have no understanding whatsoever of otherness, a contention that would be excessive and, well, silly. There must be no question of monumentalizing the structural separation between selfness (or selfness-in-the-law) and otherness (or otherness-in-the-law) as a form of non-negotiable epistemological impasse. My schematization does not involve a total and permanent incompatibility across law-worlds, and the differend that I have in mind is not absolute. Rather, it points to the partiality, and therefore to the limits, involved in all forms of communication across discernible lines of legal/cultural division. If you will, my observation 'pertains to

2019) 24–25, where John Frow invites one to 'think in terms of a *relative relativism*, an articulation not of pure differences between fully self-identical formations, but of partial, incomplete, and constantly contested differences between formations which are themselves internally differentiated and heterogeneous'.

136 Taylor (n 135) 43.

137 PK Feyerabend, 'Explanation, Reduction, and Empiricism' in H Feigl and G Maxwell (eds), *Minnesota Studies in the Philosophy of Science*, vol 3 (University of Minnesota Press 1962) 66. See also E Viveiros de Castro, 'Perspectival Anthropology and the Method of Controlled Equivocation' (2004) 2 Tipití 3, 11: '[I]t is only worth comparing the incommensurable.' cf M Lambek, 'The Hermeneutics of Ethical Encounters' (2015) 5 Hau: J Ethnographic Theory 227, 228, where the author observes that incommensurability is not 'a preventable pathology of culture or thought'.

138 Blaser (n 97) 557.

the residue of the irreducibly particular that cannot, ultimately, be shared'.[139] Indeed, to return to Derrida's 'islands', while he denies 'all the attempts at passage, at bridge, at isthmus, at communication',[140] he observes that '[this] infinite difference, [this] interruption' exists 'initially',[141] which is not at all like opining that it is entire. Although, as I have indicated, difference is 'irreducible' – there will always be the differend – there is no question of difference being total.[142] Note that through recognition of the differend and the expression of respect for it, cosmopolitism, or 'cosmopolitics', heralds the democratization of the interpretive enterprise. To mention Blaser's account once more, Melas's ideas of weak incommensurability and comparability allow the interpreter to ascribe meaningfulness in co-presence not to caribou or *atîku*, but to caribou and *atîku*. Otherwise said (or other-wise said!), such analytical framework makes it possible to withstand the authoritarian imposition of one world over against the other.

It remains therefore to resist appreciations like Hans-Georg Gadamer's to the effect that '[t]he world is … the common … ground',[143] which fail to do justice to the differend that there is, there. Unlike what Gadamer holds, neither the caribou-world nor the *atîku*-world is 'accessible to others'.[144] John Law's conclusion is accordingly sound: if one belongs to one world, one cannot be a part of the other.[145] I am immediately reminded of Martin Heidegger's metaphor of language unfolding as monologue.[146] Yes. Again, though, the co-presence of more than one monologue does not disqualify a third party from staging a space of comparison, a third space.

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Crucially, I must add, the immanence that concerns me is not found only within human awareness, and it is thus not to be approached strictly in terms of the psychological texture of the comparatist's 'own' understanding of foreign law. Rather, the differend acts as an interpellation of the comparatist in advance of any concern of his vis-à-vis foreign law or of any appropriation on his part of foreign law with a view to proceeding to the construction and deployment of a comparison. Even as the comparatist undertakes his excavational investigation into foreign legal cultures or foreign law-texts and as he proceeds to the disclosure of the foreignly legal that constitutes his focus of study – the precept governing his comparative work is that 'the way of access to the present necessarily takes the form of an archaeology'[147] – foreignness pre-exists his

139 I Ang, 'The Uses of Incommensurability' (1997) 23 Signs 57, 59.
140 Derrida (n 95) 31.
141 ibid.
142 Derrida (n 86) 253.
143 Gadamer (n 49) 450.
144 ibid 451.
145 See Law (n 20) 135.
146 See M Heidegger, *Unterwegs zur Sprache* (Neske 1959) 265. Once more, I disagree with Gadamer: there is not 'a common language'. I refer to Gadamer (n 49) 384.
147 G Agamben, 'Che cos'è il contemporaneo?' in *Nudità* (Nottetempo 2009 [2006]) 29.

endeavour. To be sure, such work of excavation, elicitation, and rendition intervenes *performatively* (in a way that remains programmable or controllable, since it manifests itself, for example, from the point of view of language and thus on the thither side of a certain semantic horizon).[148] It follows that the comparatist, as he targets his alertness towards the differend across law-worlds (and, correlatively, towards the singularity of each law-world), as he enters the fray in his capacity as enabler of meaning purporting to bring the laws that he is studying into signifying existence (and into meaningful existence from the standpoint of 'his' comparison), and as he registers specific captures and framings of those laws within a space where possibilities are tested, the comparatist, then, always-already enacts his 'own' re-presentation.[149] Yet, it remains that the comparatist comes *to* the differend, which is not a figment of his imagination: his excavation is *of* something.

Again – and without in the least contradicting what I have just observed – it is very much the comparatist himself who frames the comparable as he harnesses the 'weak' incommensurability, while he pursues his research across the law-worlds that beseech him.[150] In the face of the insistence on the part of comparative law's orthodoxy's regarding the achievability and desirability of neutrality, impartiality, or objectivity, I find that I can hardly exaggerate the significance of my claim to the effect that what cue-equivalence or cue-commonality the comparatist-at-law contrives, say, through the idea of 'transgression' (to track the illustration I have introduced), remains the speculative

148 See J Derrida, *L'Université sans condition* (Galilée 2001) 74–75.

149 The quotation marks underline the fact that the comparatist's re-presentation cannot be foreign to the institutionalization to which he has previously subordinated himself. In this precise meaning, his re-presentation, because it is encultured, is thus not strictly his 'own'.

150 There *is* incommensurability. Consider the French statute on religious attire in public schools and the Canadian case on the *kirpan* in the schoolyard. See Legrand (n 126) 263–69. The French and Canadian laws are not regulating an equivalent or common matter. Rather, they are addressing different matters pertaining to different law-worlds. Indeed, the wearing of a *kirpan* in a Canadian (public) school is not the wearing of a headscarf (or of a *kirpan*) in a French (public) school. Moreover, a French (public) school differs from a Canadian (public) school. Could one not claim therefore that since there are two different enunciations about two different matters – a French enunciation about a French matter and a Canadian enunciation about a Canadian matter – the French and Canadian appreciations are travelling along independent semantic lines that never meet, which would mean that they cannot, and do not, ever clash? It might arguably follow that there could not be any incommensurability between the French statute and the Canadian case, not even of the 'weak' type. But this conclusion assumes that the two matters would somehow exist 'as such', irrespective of any account of them – a concession that I am not prepared to make. In a meaningful sense, and although foreignness precedes the comparatist, the French and Canadian matters can only meaningfully exist in the comparatist's language and through the comparatist's account. And within the comparatist's language and the comparatist's account, they do meet, and there will be an interpretive clash.

outcome of his own translations/transactions across laws. The tale of 'transgression' is thus the narrative receptacle of the tales of '*Schuld*' and 'fault', themselves the receptacles of other tales recounted, say, by Austrian judges or Californian law teachers locally.

It is, then, the comparatist himself – and only him – who is compelling the Austrian and Californian laws to talk to each other, who is forcing these laws to engage in a *negotiation* with each other in a context where, at the outset, they have nothing to say to each other, lest each law should rehearse its own story in a language that the other can only imagine itself understanding. Indeed, 'to think interculturally, even if it means to see any two [legal] cultures as incommensurable, is to bring together two epistemic systems and to make them commensurable in *some* ways'.[151] Observe that not unlike Derrida,[152] I use the word 'negotiation' rather than 'dialogue', because there is no colloquy: the Austrian and Californian laws themselves are not speaking an equivalent or common language (neither literally nor metaphorically). The Greek prefix '*διά*' ('*dia*') suggests the idea of 'running through', and here, between these non-communicating vessels, nothing is 'running through' since each law is, in effect, uttering a monologue.[153] But, as Charlotte Girard perspicuously observes, provided that the comparatist can talk about more than one law, he can proceed to compare these laws in short order, that is, he can engage promptly in the delineation of a cue-equivalence or cue-commonality, of *his* cue-equivalence or cue-commonality – which means, once more, that since in terms of what is the case there is no equivalence or commonality across laws, there is an epistemic requirement for the comparatist's framing/contrivance of the interface, which is therefore both an intervention and an invention on his part.[154]

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Now, the idea that a method, 'the most effective and most durable anxiety reducing device',[155] would have to be followed in order to validate a given comparison or, worse, that a method would have to be applied to the exclusion of all others, need not detain one except, to write charitably, as a demonstration of 'a certain technologizing of thought',[156] as an illustration of the pervasive 'theo-technical thought' still informing orthodox comparative law, largely under the influence of the seemingly insatiable German homiletic yearning for

151 M Xie, *Conditions of Comparison* (Bloomsbury 2011) 90.

152 See J Derrida (with P-J Labarrière), *Altérités* (Osiris 1986) 85. The passage is Derrida's. See also J Caputo, *Hermeneutics* (Penguin 2018) 139: '[A]n interpretation is always a negotiation.'

153 cf Heidegger (n 146) 265: '[L]anguage *is* monologue.' For further reference to 'the irreducible mis-understanding in successful human communication', see GC Spivak, *An Aesthetic Education in the Era of Globalization* (Harvard University Press 2012) 518.

154 C Girard, 'L'énigme du lieu commun' in P Legrand (ed), *Comparer les droits, résolument* (Presses Universitaires de France 2009) 316: '[I]f we can speak *of* it, we can compare.'

155 G Devereux, *From Anxiety to Method* (Mouton 1967) 97.

156 J Derrida, 'La langue et le discours de la méthode' (1983) 3 Recherches sur la philosophie et le langage 35, 46.

a dystopian world where epistemological certainty would reign,[157] and (it is well worth emphasizing) as a case of '[t]echno-narcissism'.[158] Yes.

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Instead of manifesting itself through method (which, in any event, would fail to afford the neutrality, impartiality, or objectivity vaunted by its infatuates since, as I have indicated, *any method is someone's method*),[159] in lieu of a consecution of precepts that would lead to a more or less inevitable outcome, comparison emerges through experience – or 'flair'[160] – that the comparatist incessantly adjusts along the foreignly way, unceasingly seeking to make the comparison more *just*. The absence of '*οδος*' ('*odos*') involves the much higher levels of self-consciousness that come with the comparatist's assumption of responsibility, with his *response* to the foreign – at once assertive and companionate, sustaining and contingent, a rejoinder through an invention (finding/fashioning) of the foreign and then through the contriving of the third space by means of the enunciation of a cue-equivalence or cue-commonality, that is, owing to the framing of an interface.

As the comparatist, in order to stage the comparability of the laws that he has made into the focus of his examination, marshals a cue-equivalence or cue-commonality, a framed interface, he is doing epistemic violence to the laws in co-presence – even if the epistemic violence being deployed consists of a lesser violence – by constraining them into a 'commensuration' that will inevitably be informed by his tacit fore-understanding and thus, to that extent at least, refract his own power.[161] Since the comparatist's perspective is constrained by his facticity, by his enculturation, that is, by his 'thrownness' – by the discursive configurations that he has been 'thrown' into in a given place at a given time (language, tradition, law… culture!) – certain interpretive possibilities are open to him and others foreclosed.[162] (In Heidegger's terms, there is '[t]he thrown-character of understanding', which is very much an 'existential structure'.[163]

157 P Sloterdijk, *Sphären*, vol 1 (Suhrkamp 1998) 38.

158 G Deleuze and F Guattari, *Mille plateaux* (Editions de Minuit 1980) 33.

159 Derrida insists that 'any method … implies a kind of historicity': Derrida (n 156) 36. For critiques of method and of its most disputable enlistment as epistemological alibi with specific reference to comparative law, see S Glanert, 'Method?' in PG Monateri (ed), *Methods of Comparative Law* (Elgar 2012) 61–81; G Frankenberg, 'The Innocence of Method – Unveiled: Comparison as an Ethical and Political Act' (2014) 9(2) J Comp L 222. cf P Rabinow and A Stavrianakis, *Demands of the Day* (University of Chicago Press 2013) 110, where the co-authors chastise method as 'false comfort'.

160 Derrida (n 48) 233.

161 See WN Espeland and ML Stevens, 'Commensuration as a Social Process' (1998) 24 Annual R Sociology 313, 332.

162 The notion of 'thrownness' ('*Geworfenheit*') is Heidegger's. Eg: M Heidegger, *Sein und Zeit* (Niemeyer 2006 [1927]) 383. For instance, Heidegger refers to the self being 'constituted through … the throwing': ibid 145. In other words, the self finds himself 'being dependent on a "world"', '[being] lost in the "one"'.

163 ibid. Another key Heideggerian term, '*Befindlichkeit*', helpfully underscores the primordial embeddedness of every understanding. In German, a usual way of

It is a matter of considerable significance, for example, that a comparatist – the individual determining to claim such status for himself – should have been instituted into French law through many years of alienation in a French law school rather than having been educated elsewhere.[164]) The comparatist-at-law's cue-equivalence or cue-commonality, his framed interface, will indeed arrange and display itself as autobiography, that is, as an act of *life-writing-in-the-*

asking someone 'How are you?' is to say '*Wie befinden Sie sich?*'. Literally, this formulation means 'How do you find yourself?'. In a medical environment, one can also ask a sick person '*Wie ist Ihr Befinden?*' – which can translate as 'How do you feel?'. More metaphorically, one can state that someone or something is situated somewhere, or one can refer to one's situation. For example, one can say 'The White House finds itself in Washington, DC' ('*Das Weisse Haus befindet sich in Washington, DC*'), or 'I find myself in Chicago' ('*Ich befinde mich in Chicago*'). Indeed, one can also exclaim: 'I find myself in happy circumstances' ('*Ich befinde mich in glücklichen Umständen*'), which stands for 'I am pregnant'. Inspired by these diverse meanings, Heidegger coins a noun, '*Befindlichkeit*', let us say, somewhat clumsily, 'finding-oneself-feeling-in-a-situation'. Note that Heidegger's sense is not completely 'intra-psychic' as it embraces the idea of 'living-in-the-world'. It is not, then, that Heidegger draws a stark division between the 'inward-looking' and 'outward-looking' dimensions of 'feeling' or 'finding oneself in a situation', but that he seeks to convey an all-embracing, fully-integrated idea. Importantly, the understanding that Heidegger has in mind is not, strictly speaking, cognitive. Rather, it is arising at an even more primordial, emotional, affective level than that of awareness, which means that one's 'finding-oneself-feeling-in-a-situation' may be unconscious. If you will, the idea evokes a mood. Observe also that '*Befindlichkeit*' refers to an active disposition. It is not at all therefore a merely passive or receptive condition. In sum, for Heidegger '[u]nderstanding is never free-floating, rather always finding-itself-feeling-in-a-situation': ibid 339. The word 'attuned' is usually substituted for the literal (and awkward) formulation 'finding-itself-feeling-in-a-situation' as in 'He is attuned to the situation'. See generally B Baugh, 'Heidegger and *Befindlichkeit*' (1989) 20 J British Society for Phenomenology 124.

164 While any law school experience seemingly involves alienation, there is compelling evidence that French legal education proves especially discombobulating. Eg: Legendre (n 10) 20, where the author refers to a process of 'dressage'. See also ibid 51: '[The] learning [of the jurist] is there to propagate submission, nothing else.' Along analogous critical lines, two French law professors, in an extremely rare disclosure of institutional introspection (in France, teaching and scholarship are very largely reduced to the exposition of the state's laws), talk of the congregation of French jurists as '[t]he French doctrinal entity': P Jestaz and C Jamin, 'L'entité doctrinale française' Dalloz 1997 Chron 167. cf S Beckett, *The Unnamable* (S Connor ed, Faber & Faber 2010 [1958]) 71: '[T]hey all say simultaneously the same thing exactly, but so perfectly together that one would take it for a single voice, a single mouth.' To return to the argument from submission, the French 'doctrinal entity' operates in 'connivence' ('*connivence*') with the state: Jestaz and Jamin, 172. I must insist on the fact that by the light of local standards of obsequious collegiality, the critique of French legal academia I mention remains well-nigh unique. It is, in fact, so inhabitual that even these academics' subsequent publications fail to sustain it. But see L Fontaine, *Qu'est-ce qu'un 'grand' juriste?* (Lextenso 2012). Adde: L Fontaine, *La Constitution maltraitée* (Editions Amsterdam 2023).

law.[165] As the 'I' cannot fully forfeit the form of his selfness, every interpretation being autobiographical, every interpretation a self-portrait, I argue for the ineliminability of the self's inscription within comparative law.[166]

As I have indicated, the cue-equivalence or cue-commonality that I am discussing is but a contrivance of equivalence or commonality. In order to delineate the cue-equivalence or cue-commonality that he eventually contrives, the comparatist operates through a process of prelation of information about the laws he is analyzing, which allows him formally to assign a cue-equivalence or cue-commonality across the differend (observe that ascription of cue-equivalence or cue-commonality does not, and cannot, cancel difference): he retains some 'data', which he channels into his constructed onement, and he discards other, which allows him to preserve his constructed onement.[167] Properly speaking, therefore, through this organized subsumption, on account of what is effectively a contrived 'fusion of (legal) horizons' that will afford him the desired comparative opportunity,[168] the comparatist performs an exercise in formulaic reductionism – a manifestation of coercion vis-à-vis the laws under examination, which demands to be acknowledged as a forcible process of imputation in order to recall the ethical implications of such interpretive violence (even if a lesser violence). In fact, one could talk about 'the ethics of the "and yet"': one is not entitled to do violence to foreign law, *and yet* one must frame an interface (in effect, a contrived interface) in order to facilitate a comparative intervention that will, for instance, allow foreign law to be ascribed epistemic visibility, that will permit it to be expressed comparatively – not unlike *atîku* vis-à-vis caribou.[169]

At this juncture, one key precision is in order. Again, I disagree with Gadamer as he writes that '[e]very conversation postulates a common language, or better: it generates a common language'.[170] In effect, no common language is produced through conversation or comparison, and the only 'common' language there can be is that of the interpreter – say, the comparatist – contriving a cue-equivalence or cue-commonality, which is but a contrived equivalence or commonality, allowing for the framing of an interface, that is, for the contrivance of a third space. The third space is the interpreter's 'own', and the

165 Derrida further observes how '[i]n a minimal autobiographical trait can be gathered the greatest potentiality of historical, theoretical, linguistic, philosophical culture': J Derrida (with D Attridge), '"Cette étrange institution qu'on appelle la littérature"' in T Dutoit and P Romanski (eds), *Derrida d'ici, Derrida de là* (Galilée 2009 [1989]) 262.

166 See P Legrand, 'Foreign Law as Self-Fashioning' (2017) 12(2) J Comp L 7. cf Devereux (n 155) 148: 'All research is … self-relevant and represents more or less indirect introspection.'

167 Espeland and Stevens (n 161) 317.

168 Once more, the idea of 'fusion of horizons' is in Gadamer (n 49) passim.

169 J Gallop, *The Deaths of the Author* (Duke University Press 2011) 72.

170 Gadamer (n 49) 384. Ultimately, the English language must fail to capture Gadamer's wordplay between '*voraus*' (evoking assumption) and '*heraus*' (connoting production).

interface is crafted in the interpreter's 'own' language. If the third space is going to be a space where epistemic justice is sought for the law-worlds in co-presence – and it is hard to imagine how it could legitimately claim to be anything else – it must be that the third space '*holds together*, without hurting the dis-jointure, the dispersion, or the difference, without effacing the heterogeneity of the other'.[171] The interpreter, say, the comparatist-at-law, cannot forget that his contrivance, the interface that he is framing as the third space, effectively remains a disjunction inasmuch as it is necessarily out of joint vis-à-vis each law – which it must be, lest there should take place a hierarchization whereby one entity carries over the other and does so at the expense of the other. Otherwise, or other-wise, said, one frames an interface-as-disjunction in order to allow for the arranged conjugation of the laws in co-presence. The delineation of the third space thus becomes a way to attempt to narrow the gap between re-presentation and justice.[172]

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I argue that while the contrivance of a cue-equivalence or cue-commonality – the framing of an interface, of a third space, of an epistemic platform authorizing the launch of the comparison – is a key intervention, while this construction work through language directed at more than one law-world separated by a void has to happen, *the comparatist must, as a necessary comparative commitment to re-presentative justice, proceed beyond it forthwith*. Indeed, the only epistemic work that the formulation of a would-be 'equivalent' or 'common' feature by the comparatist-at-law can be allowed to do is to mark the necessary installation of a (constructed) 'connector' across (or, more accurately, 'not-across') the differend that there is across laws. To be sure, this 'connector' acts as the indispensable point of entry (or '*Sprengpunkt*') allowing the comparative enterprise to materialize – hence my reference to cue-equivalence or cue-commonality. However, if the comparatist were to authorize the 'connector' to

171 J Derrida, *Spectres de Marx* (Galilée 1993) 58.

172 The epistemic sensitivity that must visit the comparatist-at-law's intervention and invention as he configures the third space, slowly and deliberatively, is very hard to reconcile with the rash ideological pronouncement that the interface would be about 'how similar [laws] can be made to look with the help of some skilful (and well-meaning) manipulation': BS Markesinis, 'Why a Code Is Not the Best Way to Advance the Cause of European Legal Unity' (1997) 5 Euro R Private L 519, 520. To my knowledge, Markesinis's encouragement to mendacious comparatism in the name of legal unification – even leaving to one side the question of whether any 'manipulation' can ever prove 'well-meaning' – has attracted no attention and even less opprobrium within comparative law. What does this quietness mean? Is it a reflection of the extent of the moral apathy that would have taken hold of comparatists-at-law? Or is it that Markesinis is, if in somewhat crude terms, attesting to the mindset that informs the machination and imposition of sham-equivalence or sham-commonality across the laws under scrutiny by most comparatists-at-law – which means that they would have no substantive ground to complain about his statement?

do more work than simply to serve as an epistemic platform on the way to the comparison, the legal cultures or law-texts being compared would have their singularity effaced for the sake of a generalization that would then rapidly act as a hegemonic and totalizing dissimulation of what there is, there – consider orthodox comparative-law's addiction to legal unification and attendant variations on the broad theme of 'oneness' – rather than as just a just articulation of it. In other terms, the cue-equivalence or cue-commonality cannot be allowed to transform itself into sham-equivalence or sham-commonality, that is, the contrivance cannot be permitted to become a hoax, the ingenuity an imposture. Through the cue-equivalence or cue-commonality, the comparatist is, in effect, fostering a relation between his self-in-the-law and the other-in-the-law that is, upon closer examination, but a disrelation or a not-relation or a relation-without-relation – Rahel Jaeggi's 'relation of relationlessness'[173] – an *irrelation*. Since it is inherently contrived, and therefore forced, the 'constitut[ion]' or 'stabiliz[ation]' of a cue-equivalence or cue-commonality must be envisaged as revealing a persistent epistemic tension across law-worlds, and it thus requires to be apprehended as a structurally ever-'relative, provisional, precarious' mapping rather than a definitive cartography.[174] Once more, I accept that the cue-equivalence or cue-commonality at issue is in order so as to provide a plausible epistemic platform launching the comparison. Yet, the epistemic platform must accept its prompt displacement for the sake of justice being done to law's singularity in the act of re-presentation – what must incessantly remain an abiding comparative value. Paradoxically, if you will, the cue-equivalence or cue-commonality, the interface, the epistemic platform, has to be in place, but there can only be so much place for it: the comparatist-at-law must throw it away after he has entered the comparison through it.[175]

Moving forward beyond his cue-equivalence or cue-commonality (in effect, a contrived equivalence or commonality), returning to the laws that he has made into the focus of his examination, the comparatist, in consolidating his engagement with the foreignly legal, requires assiduously to uphold the recommendation of Rudolf Bultmann, one of Heidegger's colleagues and influential disciples, who advocates 'listening to [the] claim [of the text]'.[176] Mobilizing heightened epistemic vigilance, the comparison must heed the foreign legal culture's or foreign law-text's 'speaking-to-us' that calls for the comparatist's critical insights to scrutinize singularity with full recognition and

173 R Jaeggi, *Entfremdung* (Suhrkamp 2016) 20 [emphasis omitted]. For detailed treatment, see ibid 20–70. cf Whitehead (n 82) 228: 'What are ordinarily termed "relations" are abstractions from contrasts.'

174 J Derrida, *Politique et amitié* (M Sprinker ed, Galilée 2011 [1993]) 112.

175 cf L Wittgenstein, *Tractatus Logico-Philosophicus* (German–English edn, CK Ogden ed and tr, Routledge 1981 [1922]) s 6.54, 189: 'He must so to speak throw away the ladder, after he has climbed up on it.' I use Charles Ogden's translation.

176 R Bultmann, 'Das Problem der Hermeneutik' (1950) 47 Zeitschrift für Theologie und Kirche 47, 65.

respect – to ensure that his act of re-presentation ultimately honours this epistemic indebtedness as a matter of the justice that he owes the other.[177] Again, the comparatist's response is a *responsibility*, and he has 'to attend to the other's otherness',[178] that is, he must re-present the foreign law's foreignness as foreignly as he possibly can. Yes.

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The fabrication of the initial and transitional cue-equivalence or cue-commonality that I have been explaining – the elaboration of such contrivance – thus involves a *thirding* of legal 'knowledge'.[179] As I have been indicating, it is the cue-equivalence or cue-commonality that allows for the framing of an interface – which is a contrived interface – that is, of a third space where there takes place the comparatist's staging of the differend between the more-than-one-law-world being brought 'not-together'. Crucially, the cue-equivalence or cue-commonality remains a contrivance, and its articulation does not efface the differend. (Just as decisively, it *must* not efface the differend.) When I mention a 'third space', I do not have in mind, of course, a space that can be physically entered or exited, but a metaphorical space of contention and contestation, a translational space, where local meanings are deconstructed and reconstructed. Note that the third space – in my example, the demarcation beyond the Austrian and Californian law-worlds of a third area of meaning by the thirding comparatist-at-law operating through the notion of 'transgression' – remains distinguishable from each of the laws being compared, while not being reducible to a composite of them either. It is, then, another space where no unification of laws takes place – and, in this sense, the third space stands as a 'heterotopia'.[180] In the third space, there materializes a projection of meaning beyond any signification obtaining in the situated laws themselves. The third space can thus properly be regarded as an epistemic platform allowing for the *othering* of those laws beyond any simple logic of exclusion or inclusion of any one of them. In the third space, the laws being compared become other than what they have been. If you will, they are reprised *contrapuntally*.

In effect, in addition to the Austrian and Californian laws that the comparatist is studying, the third space introduces another other to the comparison-at-law (when it comes to comparison, one plus one makes three). Emerging beyond any antecedent legal configuration, beyond any 'either/or' or 'both/and' scenario ('transgression' is neither '*Schuld*' nor 'fault', and it is not '*Schuld*'-and-'fault' either), the third space promotes a reconstitution that not only

177 M Heidegger, *Holzwege* (Klostermann 2015 [1950]) 369.

178 J Derrida, *Le Toucher – Jean-Luc Nancy* (Galilée 1998) 218.

179 In many respects, I follow EW Soja, *Thirdspace* (Blackwell 1996) 61 and passim. Edward Soja fulsomely acknowledges his debt to H Lefebvre, *La Production de l'espace* (Anthropos 1974). See also H Bhabha, 'The Third Space' in J Rutherford (ed), *Identity* (Lawrence & Wishart 1990) 207–21.

180 'Heterotopia', as '*hétérotopie*', is in M Foucault, 'Des espaces autres' in *Dits et écrits*, vol 4 (D Defert and F Ewald eds, Gallimard 1994 [1984]) 752–62.

disrupts each situated law's (locally) assumed totalization, but acts as a powerful locus of meaning productivity. In the third space, new information is fabricated.[181] It is therefore important not to envisage the third space as a dialectical arrangement *à la* Hegel, which would be much too strongly predicated on an ideal temporal sequencing and on the no less ideal unfolding of the thesis/synthesis scheme suggesting the termination of a rigorously linear process. Instead, what there is in the third space as it proves constitutive of a heterocosm is a *heterothesis*.

Despite its specificity, it is important that the heterothesis being edified out of the singular laws that the comparatist has brought into play on his epistemic platform should be heard to be resonating with those laws themselves. To that extent, the third space must be seen as an ordering that, appropriately, is not fully autonomous.[182] It interrupts legal knowledge produced locally through a re-inscription of it *otherwise* – and, because this re-inscription must wisely do justice to localism, *other-wise*. The third space thus becomes the local laws' host, even as it is also hostage to them. If you will, the cue-equivalence or cue-commonality is informed by the trace of each law-world being a focus of the comparison, which means that it presents itself as an iteration of the local laws that the comparatist is having interact with one another: it iterates the singular, that is, it repeats the laws' singularity differentially.[183] (Later, as the comparatist will be inscribing his account of the laws that he has been studying, he will find himself re-iterating this iteration.) Although the cue-equivalence or cue-commonality is other than the laws that it incorporates or embodies, its illeity is therefore also *of* them in the sense that it cannot be isolated from them any more than the present moment can be detached from the past. In fact, this contrived consonance acts as an antidote to an 'anything-goes' comparison, and it helps to ensure that comparatists-at-law do not confuse the epistemic

181 cf R Barthes, *Le Lexique de l'auteur* (A Herschberg-Pierrot ed, Editions du Seuil 2010 [1973–74]) 307: 'This third term is not a term of synthesis or a middle term: in no case a *compromise*; it is not either an *unthinkable* term: nothing metaphysical; it is the term *about which one was not thinking*, the term invented, the term unheard.'

182 It follows that the language of the third space cannot be understood as a 'meta-language'. cf J Derrida, *Le Monolinguisme de l'autre* (Galilée 1996) 43: '[A]bsolute impossibility of a meta-language. Impossibility of an absolute meta-language.'

183 The motif of repetition-as-transformation is central to Derrida's work. Using the lemma '*iter*' that he claims to derive from the Sanskrit '*itara*', meaning 'other', Derrida coins 'iterability', a neologism connoting both 'repetition' and 'otherness', that is, repeatability with a difference, which means that renewal of expression does not cancel singularity. See eg Derrida (n 95) 120, where Derrida observes that the idea of 'repetition' *tout court* is 'fantasmati[c]', 'ideolog[ical]', and 'metaphysica[l]': ibid. As often, Jorge Luis Borges's philosophical literature proves helpful. Thus, Pierre Menard's 'admirable ambition was to produce a number of pages that coincided – word for word and line for line – with those of Miguel de Cervantes'. In the event, '[t]he Cervantes text and the Menard text are verbally identical, but the second is almost infinitely richer': JL Borges, 'Pierre Menard, autor del Quijote' in *Ficciones* (Alianza Editorial 1999 [1944]) 47 and 52.

openness or hospitality characteristic of the third space with anarchy.[184] (The idea that absent method, comparative law would have to prove less rigorous or less acute pertains to the realm of unexamined – and, once examined, unsustainable – assumptions.)

I find it important to stress that the third space does not, cannot, and ought not to provide a place for the resolution of the differend within the comparison.[185] Imagine a French translation of *Hamlet* in 2020. Whatever there is in the third space can neither be the original Shakespeare play in sixteenth-century English nor a piece of contemporary literature in French. Within the third space, one remains 'confronted with at least two divergent systems of belongings that cannot be reconciled'.[186] To return to the Austrian and Californian law-worlds: irrespective of what a word like 'transgression' may suggest on a superficial reading, the 'negotiation of incommensurable differences' that intervenes in the third space – a 'negoti[ation] with the non-negotiable' – ultimately fails, strictly speaking, to engender an economy of equivalence or commonality.[187] In other terms, while the third space offers 'a ground of comparison', it does not supply a 'basis of equivalence' (or, indeed, of commonality).[188] Rather, it features cue-equivalence, which is not equivalence, or cue-commonality, which is not commonality. Think, instead, along the lines of a sketch-equivalence or sketch-commonality.

Not only is it therefore a fact that no idea of 'transgression' does, can, or should overcome the differend within the comparison, but the staging of the third space is set to generate additional difference.[189] Even as it purports to 'bracket' the differend between the localized law-worlds, the third space indeed

184 The 'interface' is therefore more akin to a 'crossing of all … origins' than to a 'destruction … of all origin'. Somewhat paradoxically, the two statements were written by one author, Roland Barthes, over a two-year period: R Barthes, *S/Z* in *Œuvres complètes*, vol 3 (2nd edn, E Marty ed, Editions du Seuil 2002 [1970]) 263 [hereinafter *S/Z*]; R Barthes, 'La mort de l'auteur' in *Œuvres complètes*, vol 3 (2nd edn, E Marty ed, Editions du Seuil 2002 [1968]) 40. For discussion, see Gallop (n 169) 32–33.

185 It is puzzling how Charles Taylor should suggest that the comparison be articulated using 'a language of perspicuous contrast': C Taylor, 'Understanding and Ethnocentricity' in *Philosophical Papers*, vol 2 (Cambridge University Press 1985 [1981]) 125. Taylor's formulation and its focus on 'a language', on one language, has been criticized for 'hid[ing] its own ethnocentrism' and for '*think[ing]* it is a neutral language': Xie (n 151) 58.

186 B Kalscheuer, 'Encounters in the Third Space' in K Ikas and G Wagner (eds), *Communicating in the Third Space* (Routledge 2009) 42.

187 Bhabha (n 127) 218; J Derrida, *Etats d'âme de la psychanalyse* (Galilée 2000) 83.

188 Melas, *Difference* (n 134) xii. See also ibid 31.

189 cf S Shih, 'Comparison as Relation' in R Felski and SS Friedman (eds), *Comparison* (Johns Hopkins University Press 2013) 79: '[T]he most likely conclusion to … compariso[n] is further pronouncement of differences and incommensurabilities between the entities. Comparing two entities … paradoxically produces further distances between them.'

finds itself effectively acting as a multiplier of difference. The result of intercultural tension, the third space becomes the source of further intercultural tension in its turn. In my illustration, a third-space notion such as 'transgression' can thus helpfully be called 'transdifferential'.[190] Consider, for instance, the differences between '*Schuld*' and 'transgression' (if only because 'transgression' conceals at least 'echoes' of 'fault', which '*Schuld*' does not) and between 'fault' and 'transgression' (that contains at least 'echoes' of '*Schuld*', which 'fault' does not)[191] – or, to return to the translation of *Hamlet*, envisage the differences between Shakespeare's 1600 text and the proposed French translation of it in 2020, on one hand, and between the translation being advanced and French literature, on the other. Accordingly, the comparison requires comparatists-at-law to think *trialectically*. Observe that, although the structure of power unfolding within the trialectic may prove difficult to read, it is never eliminated. Indeed, the comparatist-at-law's 'intervention in the here and now' through the edification of a third space can never express an innocuous act or be contemplated as such.[192] (While the contrivance of the third space involves trialectics – which is my focus here – it remains that the laws being compared within the third space exist on a par, that they are coeval. It follows that the comparative process as a whole operates within a tetrachotomous framework.[193])

The ascertainment of the legal cultures or law-texts within the comparatist's purview, and their re-alignment according to what he deems them to share 'equivalently' or 'commonally', is an intervention allowing for a deconstruction of the metaphysical opposition purportedly demarcating life and death (no less!). While not present as such within the cue-equivalence or cue-commonality, the law-worlds being compared are not simply absent either. Neither alive nor dead, at once alive and dead, the law-worlds that the comparatist is studying *survive*.[194] Their *revenance* manifests itself on account of their traces 'haunting' the cue-equivalence or cue-commonality,[195] which means that their

190 For an introduction to 'transdifference', see H Breinig and K Lösch, 'Transdifference' (2006) 13 J for Study of British Cultures 105. The co-authors insist that '[transdifference] fills an important gap by not pointing in the direction of an overcoming of difference': ibid 106.

191 ibid 112, where the co-authors emphasize the fact that the transdifferential term 'contains at least echoes of the other's voice'.

192 Bhabha (n 127) 7.

193 See Legrand (n 126) 263–69.

194 The idea of survival is central throughout Derrida's work. A representative text is J Derrida, 'Living On' (J Hulbert tr) in H Bloom et al, *Deconstruction and Criticism* (Continuum 2004 [1979]) 62–142. Derrida's text appeared in English long before it was released in French, hence my reference.

195 'Spectrality' is a key Derridean motif. For instance, a text is always-already inscribed within a consecution. Derrida thus refers to 'a quasi-logic of the ghost that one ought to substitute, because it is stronger than it, to an ontological logic of presence': J Derrida, *Force de loi* (Galilée 1994 [1990]) 68. For a reference to what

phenomenalization and their inscription by the comparatist – the delineation of the epistemic platform that is the third space that is the interface that is effectively a contrived interface – can never be fully distinguished from an act of mourning. Because neither law is fully present as that cue-equivalence or cue-commonality (each law is at once more than that and less than that, each law is, inexhaustibly, *other* than that – the cue-equivalence or cue-commonality thus being either structurally deficient or excessive), the edification of the purportedly 'equivalent' or 'common' necessarily happens *towards* the law-worlds in play, which means that the cue-equivalence or cue-commonality, the interface, is, in effect, an artifice, an act of fiction, a montage, a bricolage,[196] but also, significantly, an act of epistemic violence (the law-worlds in play are interpretively coerced into the third space), if a lesser one. The interface is a counter-signature.

In this regard, I claim that every signatory, even a counter-signatory (perhaps *especially* a counter-signatory), must show exigent loyalty to the texts that he reads and ensure that he does not expropriate or appropriate textuality in ways that would suggest the grip of brute or totalitarian ideology (for instance, the hold of legal unification in its various declensions). Interpretation cannot evade or renounce the contents of the text. For example, the comparatist-at-law must disclose the patience to generate an appreciation of the law-worlds under his gaze in terms not dictated by sheer dogmatic concerns: '[T]he reading … cannot legitimately transgress the text towards something other than itself.'[197] Since *there is the law of the text*, '[n]ot to shirk from this law is thus to do everything not to betray, not to betray both the law and the other'.[198] The legal cultures and law-texts having been brought into comparative play demand to be interpreted slowly, unhurriedly and unharriedly, for their themes and their rhemes to be ascribed meaning through small insightful touches. In the illustration that I develop here, 'transgression' is precisely the interpretive

Derrida styles his 'hauntology' (or '*hantologie*'), see Derrida (n 171) 31 [emphasis omitted]. For a discussion of 'hauntology', see S Rongier, *Théorie des fantômes* (Belles Lettres 2016) 81–97. See generally P Legrand, 'Siting Foreign Law: How Derrida Can Help' (2011) 21 Duke J Comp & Int'l L 595.

196 The ideas of 'deficiency' and 'excess' allude to J Ortega y Gasset, 'La reviviscencia de los cuadros' in *Obras completas*, vol 8 (2nd edn, Alianza Editorial 1994 [1946]) 493. Writing about the limits of translation, José Ortega y Gasset famously uses the Spanish words '*deficiente*' and '*exuberante*'. The point regarding 'fiction' is cogently argued in R Bercea, 'Toute comparaison des droits est une fiction' in P Legrand (ed), *Comparer les droits, résolument* (Presses Universitaires de France 2009) 41–68. The more general observation is in B Clément, *Le Récit de la méthode* (Editions du Seuil 2005) 147: 'No theoretical proposition is purely without the fiction that renders it possible.'

197 Derrida (n 48) 227.

198 J Derrida, 'Contresignature' (unpublished 2000) [30] (on file). As of 1 May 2024, this text remains unpublished in its original version. I am grateful to Leslie Hill for supplying me with the French essay. For a published English translation, see J Derrida, 'Countersignature' (M Hanrahan tr) (2004) 27(2) Paragraph 7, 29.

transgression that must be kept to the 'meremost minimum'.[199] Specifically, it would be an unacceptable epistemic injustice towards the laws in play to extend the epistemic reach of the cue-equivalence or cue-commonality beyond the framed interface, to stretch this contrivance in order to machinate and impose sham-equivalence or sham-commonality *à la* Zweigert and Kötz with a view to concocting an argument in favour of legal unification over against the existent and exigent singularity of each law, what would be an instance of strong epistemic violence, of forceful epistemic injustice – indeed, of epistemicide.[200]

As I have indicated, the configuration that takes the form of a contrived equivalence or commonality through the figure of the cue-equivalence or cue-commonality needs to be rapidly supplanted by way of a comparison disposing itself as a differential investigation, that is, a comparison responding to the differend that there is, there – a comparison responding to the abyss across law-worlds,[201] a comparison therefore assuming its epistemic responsibility vis-à-vis the singularity of each law-world having been brought into comparative play. Beyond the emergence of a cue-equivalence or cue-commonality, this response is possibilizing what remains, in effect, impossible – which would be the edification of a *genuine* equivalence or commonality.[202] Any comparatist who is at all concerned with ethical responsibility and thus with the debt, with what one owes the other (including the other law-text), with *justice*, has in fact little choice in the matter, for one is simply not epistemically entitled to attempt an effacement of the differend across law-worlds through a dissimulation of the singularity of any law-world. Even in one's capacity as comparatist-at-law (*especially* in one's capacity as comparatist-at-law!), one cannot claim such epistemic ascendancy. In other words, one's author-ity cannot justify such authority. *What, indeed, would be the comparatist's epistemic warrant?*

I repeat that the comparatist's abiding task must be to bear witness to the differend across law-worlds and to attest to each law-world's singularity – to account for what is the case:

> [This thought] conditions *respect* for the other[-in-the-law] *as what he is*: other. Without this acknowledgement, which cannot be a (full)

199 S Beckett, *Worstward Ho* in *Company/Ill Seen Ill Said/Worstward Ho/Stirrings Still* (D Van Hulle ed, Faber & Faber 2009 [1983]) 82.

200 See also Markesinis (n 172) as the author haughtily holds 'how similar [laws] can be made to look with the help of some skilful (and well-meaning) manipulation'.

201 Rilke noted the abyss across languages. Eg: Letter from RM Rilke to C Rilke in *Rilke Briefe*, vol 1 (Rilke-Archiv ed, Insel 1950 [2 September 1902]) 41: 'And there stand those stupid languages, helpless as two bridges that go over the same river side by side but are separated from each other by an abyss. It is a mere bagatelle, an accident, and yet it separates… .' In this letter written from Paris, Rilke is commenting on the impossibility of communicating with Rodin on the occasion of his visit to the famous French sculptor. In 1905, Rilke would become Rodin's personal secretary for eight months.

202 cf Derrida (n 38) 43.

> knowledge, let us say without this 'letting-be' of a being (other) as something existing outside me in the essence of what he is (first and foremost in his otherness), no ethics would be possible.[203]

And this commitment cannot be only about 'making room' for otherness; it demands a recognition of the very structuring of one's comparative intervention by otherness, which in the end 'subsists, … persists; it is the hard bone to crack on which reason leaves its teeth'.[204] (Meanwhile, given the structuring role that the comparatist occupies through his invention of foreign law, there is also, to paraphrase Antonio Machado, the incurable *oneness* that the *other* must always endure,[205] which means that the act of mourning, even as it envelopes the other, fails ultimately to abide by the other's infinite otherness – however simultaneously protecting the other from appropriation.)

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I am therefore advancing three principal claims.

First, I argue that the bringing of local legal knowledge into the public phenomenality of the cue-equivalence or cue-commonality – into the epistemic platform, into the third space, into the interface (in effect, the contrived interface) – must be seen for the forcible interpretive intervention that it is, even as it remains an instance of the lesser epistemic violence. (Method is infinitely more violent, for each method intrinsically features an invasive quality: it strives for total appropriation and full order. It engages in a hostile take-over of facts. It is a single, unified, all-encompassing, exhaustive – totalitarian – form.) As it seeks to address the unsaturable demands of the differend and of singularity, strictly speaking, then, as a matter of duty to the epistemic integrity of the comparative inquiry, the interface, that is, the contrivance of the cue-equivalence or cue-commonality, requires, on account of its catachrestic character, to be written ~~*sous rature*~~ (thus, ~~interface~~) – a Heideggerian and, later, a Derridean motion indicating the intrinsic inadequacy of the relevant word. Not at all a fly in the formal ointment, such inscription would point to the personal, passionate, and prejudiced attributes of any comparison-at-law, that is, to its constituted traits, for any comparison is the comparatist's construction. On every comparative occasion, it will remain to be seen how interpretively edifying, if at all, the comparatist's deconstruction/reconstruction – his cue-equivalence or cue-commonality, his ~~interface~~ – proves to be. In this regard, very much will depend on how persuasive the comparatist-at-law's readership or audience finds the comparative motions being deployed.[206] Now, because

203 J Derrida, *L'Ecriture et la différence* (Editions du Seuil 1967) 202.

204 A Machado, 'Juan de Mairena – Sentencias, donaires, apuntes y recuerdos de un profesor apócrifo' in *Poesía y prosa*, vol 4 (O Macrì ed, Espasa-Calpe 1989 [1936]) II, 1917.

205 ibid, where Machado refers to 'the incurable *otherness* that the *one* endures'.

206 For a general exposition of the comparatist-at-law's optimal strategy, see Legrand (n 126) passim.

even the most allegedly faithful 'third-spacing' constitutes a response – and a responsibility – involving an act of epistemic violence, that is, an infidelity,[207] because the cue-equivalence or cue-commonality, which is the work of the comparatist-at-law, exists in a suspended irrelation to the meaning of the laws in play, and because the contrivance of the third space is therefore holding its readership in suspense,[208] the artificial invisibilization of the comparatist that positivism has long countenanced demands to be visibly terminated and his emphatic involvement in the staging of the comparison emphatically acknowledged as a gesture of epistemic integrity.

Secondly, I contend that every thirding of knowledge must be provisional or temporary and that no ~~interface~~ should be harnessed with a view to overcoming either the epistemic fact of the differend across laws or that of the singularity of the law-worlds under scrutiny, for example, by addressing the laws in play under the ideological auspices of some legal unification project or other. In sum, every cue-equivalence or cue-commonality is, perforce, agonistic, which means that no thirding of knowledge can achieve a complete disjointure with the locality of the law – nor is it destined to realize anything of the kind. To transform cue-equivalence or cue-commonality into something like sham-equivalence or sham-commonality, to convert contrivance into hoax, ingenuity into imposture, in order to pretend that the legal cultures or law-texts being compared pertain to equivalence or commonality (or to sameness, similarity, resemblance, or *vel sim*) would amount to an exercise in undue distortion of information, that is, to the configuration of epistemic injustice.

Thirdly, there is no methodical dimension to the comparative sequence consisting of invention (finding/fashioning) of foreign law; contrivance of a cue-equivalence or cue-commonality, of an interface; and differential investigation. Rather, these protocols are informed by experience or flair. And they must be.

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'There is no empirical methodology for learning how to disclose a world',[209] no regular, systematic, given, scientific path allowing to make the other othery in the way the artist seeks 'to make the stone *stony*'.[210] Note that far from being scientific, from amounting to a specific procedure purporting to lead to certain intended results, any comparative law strategy acts as a vehicle for an ascertainable ethical or political agenda. Recall that any intervention is inevitably some comparatist-at-law's intervention, which therefore necessarily reveals a committed perspective as regards the exploration of the matter under scrutiny. Indeed, an intervention gives effect to a particular world-view, which is why I

207 Derrida speaks of an 'unfaithful fidelity': J Derrida, *Points de suspension* (Galilée 1991) 331.

208 See Derrida (n 156) 48.

209 N Kompridis, *Critique and Disclosure* (MIT Press 2006) 108. Importantly, Nikolas Kompridis adds that 'disclosure is not *learnable* in the relevant sense': ibid 109.

210 V Shklovsky, 'Art as Technique' in *Russian Formalist Criticism* (2nd edn, LT Lemon and MJ Reis eds and trs from Russian) (University of Nebraska Press 2012 [1917]) 12.

claim that, ultimately, the only approach to the event of the foreignly legal must be based on experience or flair, which itself – this being the realm of the comparative, after all – can be expected to feature some nomadic errancy. *It is his experience or flair that the comparatist-at-law can bring to bear to inform his epistemic responsibility within the comparison.* On what other basis could he meaningfully contribute? (Meanwhile, comparatists-at-law who find it hard to overcome their attraction to scientificization may seek some comfort in the fact that the French language has a single word, '*expérience*', to denote both 'experience' and 'experimentation'.)

To be sure, an 'experience' is anything but banal, as Heidegger aptly reminds one: '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.'[211] Indeed, evoking the Heideggerian *Denkweg*,[212] Derrida equates experience with 'the trajectory, the way, the crossing'.[213] And he expressly distinguishes the 'way' ('*chemin*') from method.[214] Crucially, a 'way' neither features a point of departure nor a destination for thought inasmuch as thought unfolds as unceasing questioning and wishes to circumvent firm solutions. Indeed, I want to insist that the insistence on the way as a mode of thinking expresses 'the fact that thinking is thoroughly and essentially questioning, a questioning not to be stilled or "solved" by any answer'.[215] Holding that '[method] abides by the extreme perversion and degeneration of what is a way',[216] Heidegger thus felt able to admit as follows, unashamedly:

> I would presently be in the greatest embarrassment if I ought to describe my method or to release it as a methodology at all. And I am happy that I am thus far not obeying the shackles of a technique, but indeed the force of a predicament.[217]

The comparatist-at-law's 'predicament' – a circumstance irreconcilable with 'the chain of a technique' – is to make just sense of the foreignly legal and to

211 Heidegger (n 146) 159.
212 See generally O Pöggeler, *Der Denkweg Martin Heideggers* (Neske 1963).
213 Derrida (n 65) 368.
214 See J Derrida, 'Et cetera… (*and so on, und so weiter, and so forth*, et ainsi de suite, *und so überall*, etc.)' in M-L Mallet and G Michaud (eds), *Jacques Derrida* (L'Herne 2004 [2000]) 24.
215 J Stambaugh, 'Heidegger, Taoism, and the Question of Metaphysics' in G Parkes (ed), *Heidegger and Asian Thought* (University of Hawaii Press 1987) 80. In her text, Joan Stambaugh explores the affinities between Heidegger's '*Weg*' and Taoism (in Chinese/Mandarin, '*tao*' is 'way'). See ibid 79–91.
216 Heidegger (n 146) 197. cf M Heidegger, *Seminare* (C Ochwadt ed) in *Gesamtausgabe*, vol 15 (F-W von Herrmann ed, Klostermann 1986 [1973]) 399: 'We must learn to distinguish between *path* and *method*.' I quote from the Zähringen seminar.
217 Letter from M Heidegger to J Stenzel (2000) 16 Heidegger Stud 17, 19 [31 December 1929].

do so comparatively. If '[c]omparison no longer points to a method but rather to a scope and a disposition toward knowledge',[218] as Simone Glanert compellingly recommends,[219] Theodor Adorno finds himself vindicated once more: indeed, without encouraging an appeal to 'the arbitrariness of bare ideas and randomness', he holds that 'where we think in a pithy sense, we really think always-already unmethodically'.[220]

Like Gadamer, 'I propose *no method*, but I describe *what is*'.[221] Actually, I hasten to qualify this slogan by observing that I can only ever *attempt* a description. Yet, as they engage foreign law-worlds, comparative law's predicamentists ought to heed Gadamer's advice regarding the damaging inutility of method. In this regard, comparatists-at-law can beneficially remember how, early in his *Discours de la méthode* (a text indisputably regarded as one of the most celebrated arguments in favour of methodization), Descartes himself presents his essay as a 'fable', a 'story'.[222] Method as a story fabulating foreignness within comparative law! Indeed, 'there is no method except to be very intelligent.'[223] Yes.

218 Melas, *Difference* (n 134) 30.
219 See Glanert (n 159) passim.
220 TW Adorno, *Vorlesung über Negative Dialektik* (R Tiedemann ed, Suhrkamp 2007 [1965]) 214.
221 H-G Gadamer, 'Historismus und Hermeneutik' in *Gesammelte Werke*, vol 2 (Mohr Siebeck 1993 [1965]) 394.
222 Descartes (n 7) 571. Bruno Clément's title aptly evokes this fascinating Cartesian insight: Clément (n 196). Adde: Legendre (n 10) 92: '[M]ethod carries myth along.' See generally J Griffiths, *Fable, Method, and Imagination in Descartes* (Palgrave Macmillan 2018); E Gilby, *Descartes's Fictions* (Oxford University Press 2019).
223 TS Eliot, 'The Perfect Critic' (23 July 1920/4708) Athenæum 102, 103.