'*Das Zeitalter der Vergleichung*' — And Its Long Shadow

'[T]he telling in the present is haunted by the ghost of the past'.
—Kleinberg[1]

Not everyone would concur with Nietzsche's claim that, along with 'love', 'avarice', 'envy', 'conscience', 'piety', and 'cruelty', 'a comparison […] of laws' pertains to what 'give[s] colour to existence'.[2] To illustrate: comparative work about law has been described as 'a literature that feeds and grows, like a psychic cancer, upon logical classification and reclassification and technical refinement and sub-refinement, without limit and with a minimum of external reference and relevance'.[3] It is also said to 'tur[n] a blind eye to everything but surfaces',[4] castigated as 'superficial',[5] pronounced as marking 'a somewhat disappointing field',[6] or rejected as 'a grossly impoverished genre'.[7] Other references to the 'extremely problematical, if not precarious, condition' of comparative law,[8] 'the mediocre quality of analyses allegedly comparative',[9] the 'theoretical poverty' of comparative work,[10] or to comparative analysis of law as an 'exhausted scholarly tradition',[11] all such critiques remain current. Indeed, it is argued that '[comparative law] finds itself in the condition of

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[1] E. Kleinberg, *Haunting History* (Stanford, 2017), p. 2.

[2] F. Nietzsche, *Die fröhliche Wissenschaft*, in *Digitale Kritische Gesamtausgabe* (G. Colli, M. Montinari & P. D'Iorio, eds), 2d ed. (2009- [1887]), http://www.nietzschesource.org/#eKGWB/FW-4, I, §7 ['*Liebe*'/'*Habsucht*'/'*Nei(d)*'/'*Gewisse(n)*'/'*Pietät*'/'*Grausamkeit*'/'*eine (V)ergleich(ung) (…) des Rechtes*'/'*dem Dasein Farbe (gibt)*']. Nietzsche emphasizes a historical perspective.

[3] M.S. McDougal, 'The Comparative Study of Law for Policy Purposes: Value Clarification As an Instrument of Democratic World Order', (1952) 1 *Am. J. Comp. L.* 24, p. 29.

[4] L.M. Friedman, 'Some Thoughts on Comparative Legal Culture', in D.S. Clark (ed.), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on His Seventieth Birthday* (Duncker & Humblot, 1990), p. 52.

[5] A. Watson, *Legal Transplants*, 2d ed. (Georgia, 1993), p. 10.

[6] M. Shapiro, *Courts* (Chicago, 1981), p. vii.

[7] S. Roberts, 'Comment' [on L. Rosen, 'Islamic Law As Common Law'], in J. Feest & E. Blankenburg (eds), *Changing Legal Cultures* (Oñati International Institute for the Sociology of Law, 1997), p. 44.

[8] J. Hall, *Comparative Law and Social Theory* (Louisiana State University, 1963), p. 6.

[9] F. Rigaux, 'Le droit comparé comme science appliquée', [1978] *Revue de droit international et de droit comparé* 65, p. 73 ['*la médiocre qualité des analyses prétendues comparatives*'].

[10] L.-J. Constantinesco, *Traité de droit comparé*, vol. III (Economica, 1983†), p. 21 ['*misère théorique*'].

[11] J.H. Merryman, 'Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement', (1977) 25 *Am. J. Comp. L.* 457, p. 482.

botany and zoology before Linnaeus and of anatomy before Cuvier'.[12] It is plagued by composite empiricism; it is aggregative rather than interpretive; it is vexed with 'the restraint of serious thought within a groove', which Alfred Whitehead so deplored.[13]

Stigmatized as 'bankrupt', comparative law features 'scholarship that scorns ideas and fixes its gaze lovingly on the black-letter rules'.[14] In effect, one often finds oneself taken back to 1952 when Myres McDougal, in the very first issue of the *American Journal of Comparative Law*, wrote of comparative law that it was 'voluminous, obsessively repetitious, and sterile'.[15] Thus, '[o]ne of the enduring problems of comparative law has been its inability to demonstrate convincingly the theoretical value of doctrinal comparisons separated from comparative analysis of the entire political, economic and social [...] matrix in which legal doctrine and procedures exist'.[16] Richard Tur's indictment summarizes the position well: 'The not yet discredited conception of comparative law as the comparison of the law — that is, of the detailed content of the positive law — of two or more countries, a process which ends when one runs out of countries, as it were, ought by now to have been rejected as incompetence masquerading as jurisprudential expertise'.[17] That such banishment has not happened may explain why, beyond the legal academy, comparative analysis of law appears simply to be ignored. When the respected *Revue européenne des sciences sociales* devoted a special issue to comparative studies in the humanities and social sciences featuring, over more than two-hundred pages, sixteen contributions on linguistics, anthropology, history of religions, history, political science, psychiatry, economics, and sociology, it did not so much as nod in the direction of comparative law.[18] Likewise, while Rita Felski and Susan Friedman's *Comparison* assembles sixteen

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[12] Constantinesco, *supra*, note 10, p. 21, not. 5 ['*(le droit comparé) se trouve dans la situation de la botanique et de la zoologie avant Linné et de l'anatomie avant Cuvier*'].

[13] A.N. Whitehead, *Science and the Modern World* (Cambridge, 1926), p. 245.

[14] W. Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants', (1995) 43 *Am. J. Comp. L.* 489, p. 492. Although William Ewald refers specifically to 'private law', his remark can embrace other comparative pursuits that have thrived since he wrote, such as constitutional law. Writing with specific reference to this development, Ran Hirschl thus identifies an 'embedded tilt in favor of rules, formalism, court decisions, and vocational training': R. Hirschl, *Constitutional Matters: The Renaissance of Comparative Constitutional Law* (Oxford, 2014), p. 133.

[15] McDougal, *supra*, note 3, p. 29.

[16] R. Cotterrell, 'The Concept of Legal Culture', in D. Nelken (ed.), *Comparing Legal Cultures* (Dartmouth, 1997), p. 13.

[17] R.H.S. Tur, 'The Dialectic of General Jurisprudence and Comparative Law', [1977] *Juridical R.* 238, p. 238.

[18] See G. Berthoud & G. Busino (eds), 'La comparaison en sciences humaines et sociales', [1986/72] *Revue européenne des sciences sociales* 1-216.

texts ranging over three-hundred-fifty pages or so that address a host of theoretical and practical issues regarding comparative interventions — the contributors making copious reference to literature, anthropology, linguistics, history, philosophy, and politics — there is no discussion of law, that is, of comparative law.[19]

Being mired in the epistemic impoverishment of what so ostensibly exists, comparatists-at-law are in danger of forgetting how the situation became as unfortunate as it is. In order to parry such obliviscence, an archaeological inquiry must recuperate manifestations of enunciatory sites heralding the current discursive regimen, which it can in fact fairly easily do. Even as one is able to identify some salient instantiations of early comparative analysis having withstood positive law's bewitchment, one cannot deflate the power of a dominant and enveloping discourse that has operated a normalization of positivism or an institutionalization of law-as-rules and that has promoted, in the process, the disqualification of law-as-culture as both the legitimate and the pertinent focus for law's comparatists. Beyond the work of Fortescue, Budé, Bodin, Fulbecke, Montaigne, Bacon, Vico (I have in mind his restoration of memory, imagination, and history against Descartes's *mathesis universalis*),[20] Montesquieu, and Tocqueville, who all engaged, if episodically, in capacious comparative legal studies but founded no discipline (one could indeed retrace such pre-disciplinary inscriptions to Herodotus), institutional manifestations of a comparative agenda, some of them along indisciplined lines, mainly emerged in Germany and France during the first half of the nineteenth century.[21]

How, then, to explain the disastrous state of epistemic affairs visiting contemporary comparative law? I propose to trace the extant predicament to two converging trends, which began to materialize around two hundred years ago. I want to exemplify these persistent tendencies by making especial reference to Germany and France, with a sideways glance at neighboring jurisdictions like Italy, Spain, and England. As I engage in the excavation of an epistemic disappointment, I do not intend to propose a comprehensive historical narrative, if only because I emphasize almost exclusively the

[19] See R. Felski & S.S. Friedman (eds), *Comparison* (Johns Hopkins, 2013). Meanwhile *Common Knowledge* organized a special issue on 'Comparative Relativism' in 2011 (Vol. 17/1, pp. 1-165). Articles focus on philosophy, politics, anthropology, and the sciences (including the cognitive sciences). Law — comparative law! — is conspicuously absent.

[20] *E.g.*: J. Mali, *The Rehabilitation of Myth: Vico's 'New Science'* (Cambridge, 1992).

[21] Historical accounts include W. Hug, 'The History of Comparative Law', (1932) 45 *Harvard L.R.* 1027; M. Koskenniemi & V. Kari, 'A More Elevated Patriotism', in H. Pihlajamäki, M.D. Dubber & M. Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford, 2018), pp. 974-99.

period between 1800 and 1900. These years strike me as being key because the vernacularization of the law that had been steadily asserting itself since the sixteenth century then came to be accompanied by a process of legal nationalization, a new era that the coming into force of the French civil code on 21 March 1804 inaugurated in striking fashion. However, to paraphrase Jacques Derrida, there is always an earlier beginning intervening before any alleged beginning.[22] One could no doubt therefore trace the epistemic issues of concern to me further back in time.[23] Rather, the critical retrieval that I perform proceeds to identify individuals, moments, and texts that I consider at once seminal and salient for a significant understanding of the somewhat catastrophic epistemic trajectory that the emerging discipline of comparative law — I have in mind institutional materialization — followed after 1804 in order to maintain open the channels of communication across European national borders that the demise of the so-called '*jus commune*' now threatened to undermine. I want to argue that the itinerary that eventually led to the epistemic impasse that is so deplorable nowadays depends on two principal motions.

The first movement that I discern involves the attempt by early comparatists to make the foreign law that preoccupied them normatively relevant within their own legal 'community'. In the Europe of the Eighteen-Hundreds, the way for the proponents of comparativism to accede to normative relevance — and therefore to have national lawyers spontaneously occupied with national law take foreign law seriously — was

[22] Jacques Derrida's writes that '[e]verything begins before it begins': J. Derrida, *Spectres de Marx* (Galilée, 1993), pp. 255-56 [*'(t)out commence avant de commencer'*].

[23] And one could trace them closer in time, too. Consider the establishment of the *Institut de droit comparé* at the *Université de Lyon* in 1921 at the behest of Edouard Lambert, the first fully-fledged teaching and research centre for comparative law in France. Now, over the preceding fifteen years or so Lambert had fashioned a substantial profile as a comparatist largely on account of a continuous flow of Egyptian law students having come to Lyon to study with him. Lambert had previously held a very brief appointment as dean of the Khedivial law school in Cairo — the ancestor to the University of Cairo's Faculty of Law — from October 1906 to July 1907, when he resigned because of his disagreement with the educational policies being implemented by the British authorities, then the *de facto* rulers of Egypt. However, short as it was, Lambert's deanship made him popular with Egyptian law students (not least because his resistance to the British found favour with the students' nationalism). In short order, Egyptian students started making their way to Lyon — not to England or to the Sorbonne — in order to study with Lambert. This Egyptian following played an important role in Lambert being able to convince the university authorities to agree to the founding of his institute. With Egyptian law students keen to use Lambert's teaching in order to pursue the nationalist cause in Egypt, Lambert's comparatism found itself being pressed into the service of his students' political preoccupations. At first blush, there is no evidence, however, that this fascinating configuration led Lambert, his sociologically-inclined jurisprudence notwithstanding, to move significantly away from a focus on positivism and on universalization, very much the mainstream topics of the day. I draw closely on Amr Shalakany's exemplary study. See A. Shakalany, 'Sanhuri and the Historical Origins of Comparative Law in the Arab World (or How Sometimes Losing Your *Asalah* Can Be Good for You)', in A. Riles, *Rethinking the Masters of Comparative Law* (Hart, 2001), pp. 152-88.

to contend that knowledge of foreign law could procure a path to legislative amelioration locally. In effect, legislation was then the only law-text that mattered, and nothing other than a strategy that pertained to legislation could expect to make any epistemic impact. Whether in Germany, France, Italy, Spain, or England — even in England! — the journals, the books, the chairs, and the professional associations therefore expressly accentuated legislation. I identify a second operation, which relates closely to the first endeavour and whose deployment effectively merges with the tropism towards legislation. For their initiative to enjoy even modest institutional success, the new comparatists had to persuade national lawyers that foreign law was worth their while — that it would be in their interest to buy the books specializing in foreign law, or to subscribe to the journals featuring articles on foreign law, or to join the professional associations purporting to facilitate interaction with foreign jurists. How better to promote such expression of interest than by showcasing legislation (and its authorized interpreters, whether appellate courts or established doctrinal writers) in this respect also?

The jurists who would compare were effectively arguing for the intellectual denationalization of law — a claim that itself assumed the translatability of the legal across cultures and languages. Yet, at the same time as they were urging the case for the detraditionalization of legal discourse, proponents of comparative law were concentrating on legislation, the most traditional of all law-texts. To return to Derrida, the nineteenth-century comparatists were effectively engaged in a '"false exi[t]"'.[24] Even as they earnestly sought to distance themselves from legal positivism and its nationalist agenda, their insistence on (comparative) legislation meant that they were for all intents and purposes agreeable to subordinating themselves to the positivist mindset in its exclusionary disciplinary manifestations, if on the European scene — a case of positivism with a twist, so to speak. The story that follows tells not only of this overall surrender to positivism, but it reveals how mercantile reasons at times made even such abdication insufficient to salvage what can retrospectively be termed, if with some circumspection, '*Rechtsvergleichung*', or '*droit comparé*', or '*diritto comparato*', or '*derecho comparado*', or 'comparative law'.

In 1810, evidently prompted by the then recent publication of Georges Cuvier's *Leçons d'anatomie comparée* — the prominent French paleontologist's effort to relate the structure of fossil animals to that of living relatives — Anselm von Feuerbach (1775-1833), a leading criminal-law scholar of Kantian faith, exclaimed: 'Why has anatomy

[24] J. Derrida, *Marges* (Editions de Minuit, 1972), p. 162 ['*"fauss(e) sorti(e)"*'].

its comparative anatomy? And why has legal science not any comparative jurisprudence?'.[25] Even though it appeared in the modest setting of a book preface, this *cri de cœur* would be heard. Having complained that the conception of legal history prevailing in Germany was unacceptably narrow, Anton Thibaut, quite apart from pursuing his arch-positivist crusade in favour of the codification of German civil laws, was soon leading the assault on the *Pandektistik* programme and attacking its inimicality to comparative legal studies. He declared: 'Ten spiritful lectures on the constitutional law of the Persians and the Chinese would awaken in our students more real legal understanding than a hundred on the miserable bungles to which intestate successions from Augustus to Justinian has been subjected'.[26] Largely under the influence of Feuerbach and Thibaut,[27] Berlin-based Eduard Gans released his purportedly 'universal' history of inheritance law, a brand of historico-philosophical comparative analysis of law.[28] (Interestingly, he used Thibaut's exalted summons to the virtues of Persian and Chinese law by way of epigraph.) Meanwhile, in Heidelberg, Karl Zachariä was deploying his efforts in favour of the institutional legitimation of

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

[26] A.F.J. Thibaut, 'Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland', in *Civilistische Abhandlungen* (Mohr, 1814), p. 433, being a re-issue of his pamphlet, *Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (Mohr & Zimmer, 1814), which prompted Savigny's famous essay in favour of the codification of Germany's civil laws ['*Zehn geistvolle Vorlesungen über die Rechtsverfassung der Perser und Chinesen würden in unseren Studierenden mehr wahren juristischen Sinn wecken, als hundert über die jämmerlichen Pfuschereien, denen die Intestaterbfolge von Augustus bis Justinianus unterlag*']. Because the relevant passage does not appear in the Mohr & Zimmer text, one ought to approach the Mohr version as a second edition even though Thibaut does not explicitly present it as such. See generally J. Stern, 'Einleitung', in J. Stern (ed.), *Thibaut und Savigny: ein programmatischer Rechtsstreit* (Wissenschaftliche Buchgesellschaft, 1959 [1914]), p. 32. The forewords to Thibaut's two versions show a close chronological proximity: the Mohr & Zimmer preface is dated '19 June 1814' (*Id*., p. 3 ['19. Junius 1814']) and the subsequent one 'August 1814' (*Id*., p. [iv]).

[27] According to Giorgio Del Vecchio, Anselm von Feuerbach deserves to be regarded as the 'precursor' of comparative law: G. Del Vecchio, 'Sull' idea di una scienza del diritto universale comparato', in *Studi sul diritto*, vol. I (Giuffrè, 1958 [1909]), p. 51 ['*precursore*']. See also G. Radbruch, 'Anselme Feuerbach, précurseur du droit comparé', in *Introduction à l'étude du droit comparé: recueil d'études en l'honneur d'Edouard Lambert*, vol. I (L.G.D.J., 1938), pp. 284-91.

[28] E. Gans, *Das Erbrecht in weltgeschichtlicher Entwicklung*, vol. I (Scientia, repr. 1963 [1824]), p. [iv].

foreign law in the form of a doctrinal text on French law in the German language.[29] But the play of forces in that historical situation unfolded against Gans and Zachariä's power of affirmation as both legal intellectuals attempted to constitute a new terrain of legal study. These German comparatists were effectively unable to counter the relentless ascendancy of Savigny's (and of Georg Friedrich Puchta's and Bernhard Windscheid's) nationalist and positivist historicism. Indeed, in 1856, the comparative journal that Zachariä and his Heidelberg colleague Karl Mittermaier had launched in 1829, the *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes*, had to cease publication after the release of its twenty-eighth volume.[30] Overwhelmed by a predominantly classical, formalist approach — law's traditional discourse — the comparative enterprise in Germany largely fell silent.

To be sure, the strength of nationalistic thought was not confined to Germany as the condition of comparative legal studies in France around the same period well reveals. Possibly following the lead of Gaston Camus, a prominent voice who, but months after the enactment of the French civil code, had resolutely opined that knowledge of foreign law still mattered for a competent French jurist,[31] the editors of *Thémis*, the first law review ever to circulate in France, included sustained coverage of foreign law throughout the twelve years of existence of the journal from 1819 to 1831. In addition to offering an average of two articles each year devoted to foreign law (some of which

[29] K.S. Zachariä, *Handbuch des Französischen Civilrechts*, 3d ed. (Mohr, 1827-28), 4 vol. The first edition, comprising two volumes, appeared in 1808 in Freiburg-im-Brisgau. Interestingly, two French law professors based in Strasbourg would later adopt Zachariä's book as the basis for their own treatise on French law in the French language. At first, the French text was introduced as a translation from the German: [C.] Aubry & [C.] Rau, *Cours de droit civil français, traduit de l'allemand de M. C.S. Zachariae*, vol. I (Lagier, 1839). But the indigenization of the book proceeded steadily. While the third edition still acknowledged close inspiration (see *Cours de droit civil français d'après l'ouvrage allemand de C.-S. Zachariae*, vol. I [Cosse, 1856]), the fifth edition confined its German indebtedness to the methodological realm: *Cours de droit civil français d'après la méthode de Zachariae* (G. Rau & C. Falcimaigne, eds), vol. I (Marchal & Billard, 1897). When the sixth edition appeared, all apparent traces of a foreign past had disappeared: *Droit civil français* (E. Bartin, ed.), vol. I (Juris-Classeurs, 1936).

[30] For the pioneering role of Heidelberg scholars in the promotion of comparative law, see Hug, *supra*, note 21, pp. 1053-60; L.-J. Constantinesco, *Traité de droit comparé*, vol. I (L.G.D.J., 1972), pp. 68-88.

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

appeared as translations of texts having initially been published out of France in foreign languages),[32] the journal kept its readers informed of recent legislative developments abroad.[33] The editors regularly printed reviews and essays bearing on books released in other jurisdictions or concerning French books that had foreign law as their object. The journal also chronicled the life of foreign universities by publishing course-lists, reporting on awards of doctorates and promotions to chairs, and documenting essay competitions. Moreover, editors and readers occasionally engaged in correspondence with foreign scholars. This undisputable editorial presence notwithstanding, the part played by foreign law was still marginal within the journal at the time when *Thémis* stopped publication. In fact, it was not until Jacques Fœlix founded the *Revue étrangère de législation et d'économie politique* in 1834, the first French journal specifically devoted to comparative legal studies — albeit, strictly speaking, to legislation — that scholarship regarding foreign law was able significantly to raise its institutional profile.

Born in Germany, Fœlix had practiced law in Koblenz while conducting research in conflict of laws and foreign law generally. He had moved to Paris in 1826 when he was thirty-five years old and had become a French citizen shortly thereafter. The idea of establishing a law journal focussing exclusively on foreign law was seemingly inspired by Mittermaier's initiative. Traces of an intellectual connection can be found, for instance, in the fact that Fœlix's name appears as foreign correspondent on the cover of the *Kritische Zeitschrift* while that of Mittermaier figures even more prominently — the first of forty-six collaborators — in Fœlix's new journal.[34] Moreover, the very first article published by Fœlix in his *Revue étrangère* consisted in a translation of a piece by Mittermaier that had earlier appeared in the *Kritische Zeitschrift*. In the foreword to the first issue of his journal, Fœlix unambiguously stated the practical character of

[32] *E.g.*: [L.-A.] Warnkoenig, 'De l'état actuel de la science du droit en Allemagne, et de la révolution qu'elle y a éprouvée dans le cours des trente dernières années', (1819) 1 *Thémis* 7; [A.] Dufour, 'Rapprochement des principes de diverses législations relativement à cette question: est-il des cas où l'ivresse puisse être considérée comme un motif d'excuse?', (1819) 1 *Thémis* 101; [H. Blondeau], 'Sur le nouveau Code civil du royaume des Pays-Bas', (1824) 6 *Thémis* 53 & 288; [H. Blondeau], 'Sur le nouveau Code civil de l'état de la Louisiane', (1826/2) 8 *Thémis* 62 & 187; [K.] Mittermaier, 'Observations critiques sur les projets de Codes criminels publiés pendant les dernières années dans les divers états de l'Allemagne', (1829) 9 *Thémis* 189. The reason why volume 8 is dated 1826 while volume 9 appeared in 1829 is because the publication of the journal was interrupted for three years on account of the death of its founder, Athanase Jourdan, in 1826. See J. Bonnecase, *La Thémis*, 2d ed. (Sirey, 1914), p. 238.

[33] *E.g.*: [A.] Dufrayer, 'Notice sur les nouveaux Codes promulgués ou préparés dans divers Etats de l'Europe', (1819) 1 *Thémis* 90.

[34] See [K.] Mittermaier, 'Renseignemens nouveaux et récens sur l'efficacité du système pénal des Anglais, et spécialement de la transportation', (1834) 1 *Revue étrangère de législation et d'économie politique* 7.

his venture, which was 'to make known […] the improvements to which the national legislation is susceptible, the defects that disfigure it, and the means to make these disappear and accelerate those'.[35] He insisted on the fact that '[t]he knowledge of foreign laws is no less necessary for judges and for members of the bar'.[36] Because of the objectives that he sought to pursue, Fœlix emphasized that his journal would not report on French law properly speaking: 'There are enough series that deal with [French law], and ours speaks to persons to whom our national law is sufficiently known'.[37] Given this early insistence upon the uncontested primacy of foreign law, the succession of events that followed invites particular attention.

In 1836, only three years after commencing publication,[38] Fœlix changed the name of the journal to embrace a national focus. It was now to be called the *Revue étrangère et française de législation et d'économie politique*. The editor presented the inclusion of articles on French law in encouraging terms. In other words, he wanted his readership to accept that 'the Board [of Editors] has increased the scope of the *Revue Etrangère*'.[39] And although the French legal 'community' would now be getting more legal information (so the sub-text went), Fœlix specifically indicated that the subscription price would not be increased.[40] The fact that the new editorial policy effectively heralded the demise of foreign legal studies within the *Revue Fœlix*, as it had come to be known within legal circles, would only become progressively apparent.

The seventh volume of the journal, published in 1840, saw the replacement of Fœlix as sole editor by a triumvirat consisting of two experts in French civil law ('*droit civil*'), Jean-Baptiste Duvergier and Auguste Valette, in addition to Fœlix himself. Moreover, the journal was henceforth to be divided into two discrete parts, one of them being exclusively devoted to French law. As Duvergier and Valette would be responsible for the 'French section' ('*la partie française*'), Foelix's authority was now limited to the

[35] [J. Fœlix], 'Du système et de l'objet du Journal', (1834) 1 *Revue étrangère de législation et d'économie politique* 1, p. 2 ['*faire connaître (...) les améliorations dont la législation nationale est susceptible, les défectuosités qui la déparent, avec les moyens de faire disparaître celles-ci et d'accélérer celles-là*'].

[36] *Id*., p. 3 [*'(l)a connaissance des lois étrangères n'est pas moins nécessaire aux magistrats et aux membres du barreau"*].

[37] *Id*., p. 6 ['*Il existe assez de recueils qui s'en occupent (la législation française), et le nôtre s'adresse à des personnes auxquelles notre droit national est suffisamment connu*'].

[38] The cover of the relevant issue indicates the year '1837', but this is clearly a typographical error.

[39] [Anon.], 'Avis', (1836) 3 *Revue étrangère et française de législation et d'économie politique* 1, p. 1 ['*le Comité (de rédaction) a augmenté le cadre de la Revue Etrangere*'].

[40] *Ibid.*

'foreign section ('*la partie étrangère*'). The so-called 'Chronological table of articles' ('*Table chronologique des articles*') with respect to the 1840 volume reveals that, in that year, sixteen out of the fifty articles published in the journal concerned French law, practically thirty-three per cent of the annual contents. Nonetheless, in 1844, the editors felt that they had to do yet more in order to enhance the fortunes of the journal within the French legal 'community'. The name was changed again so that the publication would thereafter be known as the *Revue de droit français et étranger.* Eight years after its foundation as a specialist journal on foreign law, the *Revue Fœlix*'s new designation thus explicitly acknowledged that French law had assumed priority. Despite a perfunctory bow to continuity,[41] a new departure was urgently sought. In fact, the sequencing would begin afresh so that the 1844 issue could be introduced as 'volume one'. The editors made the matter plain: 'The series that begins is independent from the volumes that have been precedently published'.[42] The journal lowered the price of the subscription,[43] and the focus was squarely put on the publication of 'studies out of which the practicing bar can draw a positive and immediate utility'.[44] How did this ambition fare?

The volume for 1850, which was to be the last issue, began with a survey of the work that had appeared in the journal in the course of the preceding year.[45] The aim was to reveal 'the current spirit of the Review'.[46] The index was divided into eight categories, six of which were specifically concerned with full-length articles. The last of these six categories to be mentioned was entitled 'Foreign Law and Comparative Legislation' ('*Droit étranger et législation comparée*').[47] It consisted of five texts. By contrast, the other five categories, all explicitly devoted to French law, listed forty-six papers. Accordingly, the number of articles concerning foreign law now constituted less than ten per cent of the total contents of the journal. It had amounted to sixty-eight per cent only ten years earlier. As they sought to expand further still their treatment of French law and to make the journal even more attractive to French practitioners,[48] the editors must have sensed that their enterprise was doomed. In

[41] [Anon.], (1844) 1 *Revue de droit français et étranger* [iii], p. [iv].
[42] *Id*., p. [v] ('*La série qui commence est indépendante des volumes qui ont été précédemment publiés*').
[43] *Id*., pp. [iv-v].
[44] *Id*., p. [v] ['*travaux dont la pratique peut retirer une utilité positive et immédiate*'].
[45] [Anon], 'Aperçu des travaux publiés par la revue dans l'année 1849', (1850) 7 *Revue de droit français et étranger* 1.
[46] *Id.*, p. 1 ['*l'esprit actuel de la Revue*'].
[47] *Id*., p. 4.
[48] *Id*., p. 5.

fact, no eighth volume was ever released. The progressive — and, ultimately, drastic — marginalization of foreign legal studies had come too late to permit the survival of the *Revue* in a context where the main preoccupations of the French legal 'community' emphatically revolved around the ascription of meaning to France's newly-enacted civil code. Other journals better captured local expectations and were better received, thus the *Revue pratique de droit français*, which released fifty-six volumes between 1856 and 1884, and the *Revue de législation et de jurisprudence*, which began in 1835 and was still publishing one hundred years later as the *Revue critique de législation et de jurisprudence*.[49] There were some jurists to lament the loss of the *Revue Fœlix* and, in the language of distinguished French legal historian Firmin Laferrière, openly to blame its demise on the 'domination of the positivist mind'.[50] Laferrière indeed attacked the myopia of the bar in scathing terms: 'Blinkered practitioners! I respect you, because you form the large battalion of our subscriptions, but I deplore your domination all too absolute. It is you who have killed the *Revue* [...] or at least who have allowed it to die through your neglect or your indifference!'.[51]

Even as the *Kritische Zeitschrift* and the *Revue Fœlix* foundered, new locales of comparative research emerged within legal circles. Reflecting the age of codifications, these initiatives however revolved around the pursuit of largely instrumental aims and emphatically privileged the juxtaposition of legislated laws.[52] Only rarely was this approach challenged by jurists as unduly narrow. Perhaps the only instance of institutionally significant resistance to the rules-oriented paradigm concerned the very first chair in the field of comparative legal studies, which was styled '*Chaire d'histoire générale et philosophique des législations comparées*'. Established in 1831 at the *Collège de France* — that is, outside the province and jurisdiction of the *Université de Paris* and of its *Faculté de droit* and, therefore, very much on the margins of the legal academy — the chair was occupied from its inception by a disciple of Gans, Eugène Lerminier, who was forced to resign in 1849 on account of student riots

[49] Another journal having aimed to incorporate at least some coverage of foreign law, not unlike the *Revue Fœlix* but on a much more modest scale, also found itself a victim of conjuncture. Thus, Edouard Laboulaye's *Revue historique de droit français et étranger* (1855-69) eventually changed its name to *Revue de législation ancienne et moderne française et étrangère* (1870-76) before billing itself as the *Nouvelle revue historique de droit français et étranger* from 1877 until it stopped publication in 1885.

[50] [F.] Laferrière, 'Introduction', in *Tables analytiques de la Revue de législation et de la Revue critique de législation et de jurisprudence [etc.]* ([J.-B.] Coin-Delisle & [C.] Million, eds) (Cotillon, 1860), p. xxx ['*domination de l'esprit positif*'].

[51] *Id*., p. xxviii ['*O praticiens trop exclusifs! Je vous respecte, parce que vous formez le gros bataillon pour les abonnements, mais je déplore votre domination trop absolue. C'est vous qui avez tué la* Revue *(...) ou qui du moins l'avez laissée mourir par votre abandon ou votre indifférence!*'].

[52] *E.g*.: L. Aucoc, 'De l'usage et de l'abus en matière de législation comparée', (1892) 21 *Revue critique de législation et de jurisprudence* 25.

against his politics.[53] Soon after, in 1846, the *Université de Paris* inaugurated its first chair devoted to comparative analysis of law, then understood very much in the positivist mold, a '*Chaire de droit criminel et de législation* comparée'. Elzéar Ortolan was first to hold the position and would devote his teaching to comparative legislation although aiming to analyze legislated texts philosophically and historically.[54] The fact that both French chairs (including, therefore, even the philosophically oriented post at the *Collège de France*) expressly focussed on 'legislation' — the most obvious manifestation of posited law — was not accidental. Indeed, anthropologist Henry Sumner Maine, holder as of 1869 of an Oxford chair in 'Historical and Comparative Jurisprudence', himself took the view that 'the chief function of Comparative Jurisprudence [was] to facilitate legislation and the practical improvement of law'.[55] As Frederick Pollock would later confirm,[56] Maine's view of comparative analysis of law as *ancilla legislatoris* very much represented the dominant position. It is this legislation-oriented mindset, for instance, that animated Emerico Amari when he published his *Critica delle legislazioni comparate* in 1857,[57] and it is this same focus on legislation that guided the writing of Gumersindo de Azcárate's *Ensayo de una introduccion al estudio de la legislacion comparada*, released in 1874.[58] Likewise, both the Belgian *Revue de droit international et de législation comparée*, launched in 1869, and the Italian *Rivista di diritto internazionale e di legislazione comparata*, founded in 1898, pursued editorial ambitions displaying an abiding interest in legislation.

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[53] See generally B.G. Smith, 'The Rise and Fall of Eugène Lerminier', (1982) 12 *French Historical Studies* 377; F. Audren, 'Note sur la carrière d'Eugène Lerminier au Collège de France (1831-1849)', (2001) 1/4 *Revue d'histoire des sciences humaines* 57. Lerminier's successor was Laboulaye who, in addition to his editorship of a journal (see *supra*, note 49), published a number of books including *Essai sur la vie et les doctrines de Frédéric Charles de Savigny* (Durand, 1842) & *Recherches sur la condition civile et politique des femmes, depuis les Romains jusqu'à nos jours* (Durand, 1843).

[54] Ortolan's early series of lectures was published as *Cours de législation pénale comparée: introduction philosophique* (Joubert, 1839) & *Cours de législation pénale comparée: introduction historique* (G. Narjot, ed.) (Joubert, 1841). These titles and sub-titles immediately remind one of Lerminier's chair at the *Collège de France*, and it is hard to believe that Ortolan did not get his inspiration from around the corner, so to speak.

[55] H.S. Maine, *Village-Communities in the East and West*, 2d ed. (Murray, 1872), p. 4.

[56] See *infra*, text accompaning note 62.

[57] E. Amari, *Critica delle legislazioni comparate* (Edizioni della Regione Siciliana, repr. 1969 [1857]), 2 vol. See generally E. Jayme, 'Emerico Amari: il diritto comparato come scienza', (1988-89) 22 *Annali della Facoltà di Giurisprudenza di Genova* 557; E. Jayme, 'Das Zeitalter der Vergleichung — Emerico Amari (1810-1870) und Friedrich Nietzsche (1844-1900)', in A. Mazzacane & R. Schulze (eds), *Die deutsche und die italienische Rechtskultur im 'Zeitalter der Vergleichung'* (Duncker & Humblot, 1995), pp. 21-29.

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

In the meantime, in Paris, the French had instituted the *Société de législation comparée* on 16 February 1869, the *Société* purporting to act as a professional body specifically concerned with the promotion of comparative analysis of law. Most interestingly — and not unsurprisingly for a common-law jurisdiction — the British would heed the French prioritization of legislation by establishing the Society of Comparative Legislation on 19 December 1894 in London.[59] The positivistic postulates of the *Société de législation comparée* were clearly stated in its constitutive charter, which defined its object as 'the study of the laws of the different countries and the search for the practical means to ameliorate the diverse branches of legislation'.[60] These goals were echoed by the British association through the Chairman of its Executive Committee, Sir Courtenay Ilbert: '[O]ur Society was formed to meet a specific and practical need — a need the existence of which had obtained general recognition: the need of obtaining better, fuller, more accurate information about the course of legislation in different parts of the world. It was this need which it was our immediate and primary object to supply".[61] In Frederick Pollock's words, 'comparative jurisprudence was regarded wholly or mainly as a handmaid to the theory of legislation'.[62] Nowhere, perhaps, was this attitude more evident than in the acclaimed work of Anthoine de Saint-Joseph — a two-thousand-page variation on the Leibnizian theme of the *Theatrum Legale* correlating by way of grid charts the legislative provisions of some sixty jurisdictions with those of the French civil code.[63]

[59] The name of the British society was copied on that of the French organization: C. Ilbert, 'The Work and Prospects of the Society', (1908) 9 *J. Society Comp. Legislation* 14, p. 15.

[60] 'Statuts', [1869] *Bulletin de la Société de législation comparée*, no. 1, art. II, p. 11 ['*l'étude des lois des différents pays et la recherche des moyens pratiques d'améliorer les diverses branches de la législation*'].

[61] Ilbert, *supra*, note 59, p. 15. For the text of the relevant resolution underwriting the Society — the first of three constitutive resolutions — see 'Statement of the Objects of the Society', (1896) 1 *J. Society Comp. Legislation* vi, p. vi: 'That it is expedient to establish a Society of Comparative Legislation, with the object of promoting knowledge of the course of legislation in different countries, more particularly in the several parts of her Majesty's Dominions, and in the United States'.

[62] F. Pollock, 'The History of Comparative Jurisprudence', in *Essays in the Law* (Macmillan, 1922 [1903]), p. 2.

[63] A.de Saint-Joseph, *Concordance entre les codes civils étrangers et le Code Napoléon*, 2d ed. (Cotillon, 1856), 4 vol. For an illustration of the praise lavished on Saint-Joseph, see E. Moulin, *Unité de législation civile en Europe* (Dentu, 1865), p. vi, who argued that the author had shown 'the perfect concordance that exists between the various modern legislations' ['*la parfaite concordance qui existe entre les différentes législations modernes*']. For Leibniz's programme, see G.W. Leibniz, *Nova Methodus discendae docendaeque Jurisprudentiae*, in *Sämtliche Schriften und Briefe* (Akademie der Wissenschaften der DDR, ed.), vol. VI/1 (Akademie-Verlag, 1990 [1667]), pp. 293-364.

From Savigny's nationalistic agenda to the fashioning of national codifications, the radical instrumental tendencies that interrupted and relegated to obsolescence any committed quest for the *Sprachfeld* of the posited law, and that delineated so narrowly the programme promoted by late nineteenth-century comparatists, continue to govern the field. In fact, they have reached us almost *ne varietur* — a situation that was assisted by the emigration of a number of Germany's law professors after Hitler's rise to power, many having left to occupy influential teaching positions in comparative law in England and the United States (and having trained the next generation of comparatists, for example, those who began teaching in the 1960s, 1970s, and 1980s).[64] I argue that comparatists still operate nowadays in the long shadow of post-Heidelberg nineteenth-century comparative law, the positivistic avarice of which they stubbornly re-enact with compulsive alacrity. What counts as comparative knowledge today is thus in important ways the result of the specific historical trajectory that was traced by comparatists who lived long ago and engaged in the configuration of the space within which they worked as they responded to the pressure of events in their time. The obscured, repressed, reprieved, and auxiliary

[64] For a collection of studies regarding the situation in England, see J. Beatson & R. Zimmermann (eds), *Jurists Uprooted* (Oxford, 2004). For a series of portraits with specific reference to the U.S. experience, see M. Lutter, E.C. Steifel & M.J. Hoeflich (eds), *Der Einfluß der deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland* (Mohr Siebeck, 1993). See also K. Graham, 'The Refugee Jurist and American Law Schools, 1933-1941', (2002) 50 *Am. J. Comp. L.* 777; B. Großfeld & P. Winship, 'The Law Professor Refugee', (1992) 18 *Syracuse J. Int'l L. & Commerce* 3. For a more general overview with respect to the United States, see D.S. Clark, 'Establishing Comparative Law in the United States: The First Fifty Years', (2005) 4 *Washington U. Global Studies L.R*. 583. As regards early U.S. comparative law, see also A. Riles, 'Legal Amateurism', in J. Desautels-Stein & C. Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge, 2017), p. 501, where one finds a peremptory statement to the effect that '[t]he first comparative law article in an American law review appeared in the *Harvard Law Review* in 1897 under the title, "The Pledge Idea: A Study in Comparative Legal Ideas" [...]. The author was one John Henry Wigmore, the Dean of Northwestern University School of Law'. Now, even leaving to one side publications styling themselves bulletins, reporters, recorders, digests, gazettes, repositories, proceedings, news, chronicles, or surveys, in order to focus strictly on U.S. 'law reviews' — and within those parameters, even leaving to one side editorials, case comments, book notices or reviews, accounts of statute-law reform, abstracts of all kinds, and miscellany in general, so as to emphasize 'articles' only — the year 1897 does not at all play the inaugural role that is being claimed for it. For instance, see J.D. Meyer, 'On the Judicial Institutions of the Principal Countries of Europe', (1831) 1 *Carolina L.J.* 242; R. Foster, 'Peculiarities of Manx Law', (1884) 18 *Am. L.R.* 53; G. Schmidt, 'The Federal Courts', (1876) 2 *Southern L.R. (N.S.)* 140. In fact, in the volume immediately preceding the one where Wigmore's text was released, the *Harvard Law Review* featured a comparative piece: J.C. Gray, 'Judicial Precedents — A Short Study in Comparative Jurisprudence', (1895) 9 *Harvard L.R.* 27. While I deliberately confine myself (without any pretence at exhaustivity) to original scholarship in English, nineteenth-century U.S. law reviews also published English translations of foreign work, specifically of German legal scholarship, well before 1897. *E.g.*: [K.] Mittermaier, 'On the Progress of Penitentiary Improvement in Europe and North America' (B.R., transl.), (1842) 28 *Am. Jurist & L. Magazine* 110; (1843) 28 *Am. Jurist & L. Magazine* 340; R. von Jhering, 'The Value of the Roman Law to the Modern World' (B.T.C., transl.), (1880) 4 *Virginia L.R.* 453. Perhaps one could advantageously modify Derrida's insight, then: 'Everything begins before *it is said* to begin'. For the original formulation, see Derrida, *supra*, note 22.

position of comparative law — a condition of almost painful intensity — is therefore only partially linked to the fact that comparison is diametrically opposed to the ethnocentric structure of every legal 'community', which unconsciously wishes to radiate self-sufficiency, if not to appropriate the other's signifying patrimony.[65] The kind of *Ordnungsdenken* that continues to prevail within the field and that is conducive to the strong normativism inherent in mainstream comparativism shows how, to apply Gans's distinction, comparative analysis of law remains driven by a wearisome industry of '*Rechtskunde*' (or legal information) rather than by an ethos of '*Rechtsgelehrsamkeit*' (or legal erudition).[66] It also illustrates how current epistemic practices prevailing within orthodox comparative law must be squarely seen as an impediment to what Martin Heidegger called, in one of his well-known essays on Hölderlin, 'the experience of the foreign'.[67]

It is the case, however, that the architectonic and atomistic model endorsed by positivistic dogma, with all its entrapments, is denied by the resources of perception from the moment that these are insightfully applied to his craft by the comparatist. As Michael Salter observes, '[p]ositivism is tied to a materialist ontology and realist epistemology of "facts-in-themselves" existing independently of their constitution, interpretation and both the contingencies and contexts of their recognition. Hence, positivism represents an unacknowledged form of metaphysics that assumes that subjective contingency can only operate as an unwelcome mediating source of scientific error, bias and distortion, and thus as something which stands between the perception of the observer and what exists in itself "out there"'.[68] In effect, enhanced

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[65] Recall Cicero, *De Oratore*, Latin-English ed. (E.W. Sutton & H. Rackham, transl.) (Harvard, 1942 [55 B.C.E.]), I.xliv.197, pp. 136-37: 'For it is incredible how disordered, and wellnigh absurd, is all national law other than our own' ['*Incredibile est enim, quam sit omne ius civile, praeter hoc nostrum, inconditum, ac paene ridiculum*'].

[66] *E.g.*: E. Landsberg, *Geschichte der Deutschen Rechtswissenschaft*, vol. III/2 (Oldenbourg, 1910), p. 357.

[67] M. Heidegger, *Erläuterungen zu Hölderlins Dichtung* (F.-W. von Herrmann, ed.) (Klostermann, 2012 [1944]), p. 115 ['*die Erfahrung des Fremden*']. Heidegger's '*Erfahrung*' is of particular interest for comparatists. *E.g.*: M. Heidegger, *Unterwegs zur Sprache* (Neske, 2001 [1959]), p. 159: 'To undergo an experience with something, whether it be a thing, a human being, or a god, means that we let it befall us, strike us, come down on us, jostle us, and transform us' ['*Mit etwas, sei es ein Ding, ein Mensch, ein Gott, eine Erfahrung machen heißt, daß es uns widerfährt, daß es uns trifft, über uns kommt, uns umwirft und verwandelt*']. Interestingly, the French translation for the Heideggerian '*Erfahrung*' is '*épreuve*'. *E.g.*: A. Berman, *L'Epreuve de l'étranger* (Gallimard, 1984), p. 147. This rendition has been saluted as 'much richer' than '*expérience*': A. Berman, *The Experience of the Foreign* (S. Heyvaert, transl.) (S.U.N.Y., 1992), p. vii. The English language is seemingly confined to the bland 'experience', the extravagant 'ordeal', or the equivocal 'challenge'.

[68] M. Salter, 'A Dialectic Despite Itself? Overcoming the Phenomenology of Legal Culture', (1995) 4 *Social & Legal Studies* 453, p. 456.

sensitivity for the act of comparison allows nothing less than 'an inversion of the positivistic method of direct observation of external behavioural facts from the standpoint of a detached third-person observer, to that of a culturally immersed, interactive participant with insiders aimed at a purely reconstructive description of the actor's own subjective understanding of immediate meanings and ongoing definitions of situations'.[69] Observations are experiences saturated with theory so that the observer's sensory apprehension of the world cannot be segregated, as an act of observation, from his theoretical input. In sum, the theoretical imbibes the experiential so thoroughly that it is almost as though theory and experience were one. At any rate, they operate seamlessly, *sans* suture.

Upon reflection, it becomes apparent that the revival of a legitimate and pertinent comparative space must assume an appreciation for the fact that the task of the scholastic perspective is to generate a meta-discourse on the discourse of practice and that only the comparatist's withdrawal from the-law-as-it-is-practised (in the sense of there being an adjournment of external ends with thought being its own end) can make meaningful comparative reflection possible and allow comparative research to exert an influential action on the world.[70] In other terms, the comparative enterprise cannot purport to be serviceable in the sense of providing an instrumental programme oriented towards technical ends only. The point of comparative legal studies cannot be to engage in the dogmatic, if derisory, enunciation of formal rules that will somehow, through '[t]he flat presentation of bankable findings' or 'knowledge as it is *supposed* to look',[71] make the practice of law more efficient or less patriarchal — or whatever. Rather, comparative law must subscribe to a very different cognitive project. In particular, it requires to understand what rules or precepts there are as sites for capturing, channelling, and framing the operations of a legal 'community'. It has to ask, therefore, how it is that a 'community' has made these rules or precepts what they are (and has *not* made them otherwise). In other words, comparative analysis of law must seek to localize experiences of the legal by relating them to the background of a normalized way of thinking about the law, that is, to the epistemological possibilities that a particular 'govern-*mentalité*',[72] or institutionalized discourse, has permitted in the light of event and conjecture.

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[69] *Id*., p. 455.

[70] *E.g*.: P. Bourdieu, *Raisons pratiques* (Editions du Seuil, 1994), pp. 221-25.

[71] C. Geertz, *After the Fact* (Harvard, 1995), p. 62 [my emphasis].

[72] For the notion of 'govern-*mentalité*' (or '*gouvernementalité*'), see M. Foucault, 'La "gouvernementalité"', in *Dits et écrits* (D. Defert & F. Ewald, eds), vol. III (Gallimard, 1994 [1978]), p. 655.

My reference to 'epistemology', here as elsewhere, goes beyond the focus on mental re-presentations as they do not offer — because they *cannot* — accurate or exact renditions of reality or 'truth'. In other words, I am not concerned with identifying the conditions that have to be met for a knowledge-claim to be regarded as 'true'. Indeed, the very spelling of the word 're-presentation' that I propose deliberately aims to emphasize, through the insertion of the hyphen, the move away from any correspondence theory of truth suggesting an intrinsic nature of things being *a priori* knowable and to underline that what happens in the course of the imaging process involves agency. If you will, my epistemological preoccupations therefore concern unconscious presuppositions, unquestioned terminology, characteristic interrogations and paths of reasoning, paradigmatic assumptions, explanatory schemes, implicit narrative structures, frames of reference, specific theories and their typical scope and rhetorical mode of application, memories and expectations, cognitive and affective homologies — *contingencies all*.

Comparative law wishes to be a *scholarly* enterprise, not another instance of commodification of knowledge. Thus, comparative work about law is best apprehended as a deconstructive investigation aiming to achieve active and responsible understanding about the foreign life of the law and life in the foreign law through the *invention* of meaning. (The study of another law is not the passive endeavour that it is so often assumed to be since there is re-arrangement or re-configuration and, of course, diversion. In brief, the foreign law that the comparatist finds is law that he then experiences interpretively.) For comparatists, the connection between the foreign law-world of texts and practices and their *ex post* discursivity must be better articulated than through the reductionist framework of causality, which supposes that foreign texts and actions would mimetically engender the comparatist's thoughts and words. In other terms, the plausible understandings emerging from the comparatist's personal (and always provisional) encounters with other laws can be more profitably configured than as narrowly pertaining to the 'causal' chains that one more readily associates with physics.[73] To be sure, the

[73] For an influential theory to the effect that the social sciences (and humanities) are fundamentally distinct from the natural sciences and should remain so, see P. Winch, *The Idea of a Social Science* (Routledge and Kegan Paul, 1958). For Peter Winch, the social sciences (and humanities) are concerned with understanding: '"Understanding" [...] is grasping the *point* or *meaning* of what is being said or done. This notion is far removed from the world of statistics and causal laws: it is closer to the realm of discourse and to the internal relations that link the parts of a realm of discourse': *Id*., p. 115. See also C. Taylor, 'Interpretation and the Sciences of Man', (1971) 25 *R. Metaphysics* 3, whose argument convincingly establishes that the formulation of invariant causal laws is precluded in the social sciences

comparatist's appreciation may then be used to encourage new forms of problem-solving, but it can never be the aim of comparative law to address the practitioner's calendar.[74] In this respect, it is regrettable that William Ewald, even as he advocates a programme for 'comparative jurisprudence', continues to justify comparative law through the benefits that it can generate for the practicing lawyers. Indeed, for Ewald, the 'practical legal payoff' is 'especially important'.[75] I repeat that comparatists must actively strive to decouple their scholarly work from strictly practical preoccupations.[76]

The comparative enterprise also demands that comparatists shake the yoke of a brand of studies championed by René David, which effectively reduces comparative analysis of law to a Cook's tour of a variegated amalgam of legal 'systems' ranging from those of China and Brazil to those of Canada and Mauritius.[77] While it is the case that the dangerous ineffectuality of an approach better suited to secondary schools than to universities has been properly castigated,[78] the 'great legal systems' model remains deeply ingrained within the field of comparative law.[79] In Continental Europe, for example, law professors steeped in the civil-law tradition, who have only the most limited first-hand experience of English and U.S. law, feel competent (or are institutionally made to feel competent) to expound on the common-law tradition, all being justified in the name of a commitment to the virtues of a sound *culture générale* (which, inevitably, remains unmindful of concrete situations-in-the-foreign-law and of their interpretive exigencies). One can surmise that the verifiably and drearily precarious condition of comparative law in French universities, for instance, is not

(and in the humanities) because they study 'objects' that are thinking, acting, and reflecting beings unlike the objects examined by the natural sciences.

[74] Ewald, *supra*, note 15, pp. 2139-46.

[75] *Id*., p. 1956.

[76] *Cf*. P.W. Kahn, *The Cultural Study of Law* (Chicago, 1999), p. 3: '[T]he intellectual project of understanding a culture of law should not be held hostage to the question of its practical consequences'

[77] David's book first appeared in 1964. The last edition that David wrote himself was published in 1978. See R. David, *Les Grands systèmes de droit contemporains*, 7th ed. (Dalloz, 1978). David's disciple and his disciple's disciple have since released a number of French editions. While the book continues to enjoy a French life, not least on account of the fact that Konrad Zweigert and Hein Kötz's *Einführung in die Rechtsvergleichung* was (deliberately) never translated into French, the English career of the text has long deservedly stopped. For the last English version, see R. David & J.E.C. Brierley, *Major Legal Systems in the World Today*, 3d ed. (Stevens, 1985). Note: *1985*.

[78] See B. Markesinis, 'Comparative Law — A Subject in Search of an Audience', (1990) 53 *Modern L.R*. 1, p. 21 [hereinafter 'Comparative Law']; B.S. Markesinis, 'A Matter of Style', (1994) 110 *L. Q. R*. 607, p. 607 [hereinafter 'Style'].

[79] For a spectacular illustration, see H.P. Glenn, *Legal Traditions of the World*, 5th ed. (Oxford, 2014). As regards the point that I am making, Glenn's analytical move from 'systems' to 'traditions' is cosmetic.

only attributable to the hardened positivism that still governs legal education in France, but is at least in part a reflection of the learned incapacity of French comparatists to sustain a minimum threshold of intellectual creditability within the academy. In this respect, the *David*, having pursued a programmatic vocation, cannot escape a substantial share of the blame. It does not help, of course, that the professional society responsible for the furtherance of comparative law in France persists, as if time had stood still, in styling itself the *Société de législation comparée* and remains largely preoccupied with the dissemination of French law abroad and with the adoption of the French model by foreign jurisdictions.[80]

Not surprisingly, when it turns to theory, comparative analysis of law as it continues to be practised soon becomes banal and distracted. It should be a measure of the cavalier vacuity of theoretical contributions that what has long been saluted as the principal doctrinal text in the field, Konrad Zweigert and Hein Kötz's *Einführung in die Rechtsvergleichung*, promotes 'a deepening of the belief in the existence of a unitary

[80] Proselytization, understood here as a contemporary variation on the theme of colonization, figured most prominently in the report of the *Secrétaire général* to the annual meeting of the *Société* on 18 December 1995, in Paris, which I attended by invitation as the year's keynote speaker (and which I distinctly recall). In effect, the *Secrétaire général*'s speech consisted in a list of the countries that he had recently visited and in an evaluation, in each case, of the chances that French law stood of serving as a souce of inspiration in the context of a forthcoming local law reform. The colonial agenda also emerges vividly from a 21 December 1998 letter by one François Terré, a French professor of law and erstwhile candidate to the *Société*'s presidency, which its author circulated to the membership. In this document, Terré bemoaned 'the dark times that French law's influence in the world is experiencing today' (in 1998!) and argued that the *Société* had 'a role to play not only for the maintenance but for a return of [French] legal culture's influence in the countries of Eastern Europe that are earnestly soliciting it; within the [European] Community's institutions in order to suggest models preferable to those constantly produced by Brussels authorities only; with and through all those in the Middle East who wish the development of French influence; without forgetting, of course, [France's] role in French Africa or in Asia — and not only in the countries of the old Indochina — as well as in the South Pacific' ['*les temps si sombres que connaît aujourd'hui l'influence du droit français dans le monde*'/'*un rôle à remplir non seulement pour le maintien mais pour le retour de l'influence de notre culture juridique: dans les pays de l'Europe de l'Est qui le demandent instamment; au sein des instances communautaires afin de proposer des modèles préférables à ceux que produisent constamment les seules instances bruxelloises; avec et par tous ceux qui dans le proche Orient souhaitent le développement de l'influence de la France; sans oublier évidemment notre rôle en Afrique francophone ou en Asie — pas seulement dans les Etats de l'ancienne Indochine — ainsi que dans le Pacifique sud*'] (on file). For an argument in favour of a greater role for comparative analysis in French legal education, which remains thoroughly current despite the fact that the claim was released more than two decades ago, see P. Legrand, 'Notes inspirées par une gêne persistante à l'égard de la fascination exercée par l'habitude, l'autorité, la loi et l'Etat dans les facultés de droit françaises', [1998] *Revue trimestrielle de droit civil* 303. See generally P. Legrand, *Le Droit comparé*, 5th & final ed. (Presses universitaires de France, 2015). The fact that I decided to stop publication of this text is perhaps revealing, however, of what I have come to regard as the utter hopelessness of any project seeking to enhance the intellectual sophistication and legitimacy of comparative law in French law faculties.

thinking of justice',[81] advocates 'the investigation of the truth',[82] asserts that comparative work about law can form 'the basis for a universal legal science',[83] and declares that, through comparison, legal solutions, because they can be 'unfastened from their solely-national dogmatic encrustrations',[84] and since they can be addressed 'above all without critical evaluation',[85] may further 'scientific exactitude' in comparative accounts.[86] In fact, comparative law would pave the way for law to become 'an international legal science'.[87] Such bromides betray an almost complete absence of theoretical insight into the subtle yet compelling challenge of comparative analysis of law (Mary Ann Glendon aptly points to 'so many factors affecting comparability'),[88] reveal an outmoded formalism (in the sense of an exaggerated faith in the virtues of deduction and abstraction), and show an even more archaic allegiance to natural law as constituting the necessary foundation of all posited law and as denying, ultimately, any relevance to the differentiation of posited laws *inter se*.[89]

The statements that I excerpt out of Zweigert and Kötz's book are compounded by a keen desire on the part of these co-authors to indulge the German predilection for the dogmatization (or '*Dogmatisierung*') of a given area of legal studies through an insistent advocacy of conceptualization and systematization in line with a local conception of justice,[90] although in apparent disregard for the fact that the design of

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[81] K. Zweigert & H. Kötz, *Einführung in die Rechtsvergleichung*, 3d ed. (Mohr Siebeck, 1996), p. 3 ['*eine Vertiefung des Glaubens an die Existenz eines einheitlichen Gerechtigkeitsgedankens*'].

[82] *Id*., p. 3 ['*die Erforschung der Wahrheit*'].

[83] *Id.*, p. 46 ['*de(r) Boden für eine universale Rechtswissenschaft*'].

[84] *Id.*, p. 43 ['*aus ihren nur-nationalen dogmatischen Verkrustungen zu lösen*'].

[85] *Id*., p. 42 ['*vor allem ohne kritische Wertung*'].

[86] *Id.*, p. 44 ['*wissenschaftliche Exaktheit'*].

[87] *Id.*, p. 13 ['*eine internationale Rechtswissenschaft*'].

[88] M.A. Glendon, 'Comparative Law in the Age of Globalization', (2014) 52 *Duquesne L.R.* 1, p. 16.

[89] Indeed, a critic has written of the co-authors' 'tendency to be atheoretical, notwithstanding the fact that [their] conclusions have implications for theories of law and of legal development'. This observer adds that Zweigert and Kötz's book 'stumbles upon the broader theoretical issues only by accident, and randomly': J. Hill, 'Comparative Law, Law Reform and Legal Theory', (1989) 9 *Oxford J. Legal Studies* 101, p. 111.

[90] *Cf.* J. Esser, 'Dogmatik zwischen Theorie und Praxis', in F. Baur *et al*. (eds), *Funktionswandel der Privatrechtsinstitutionen: Festschrift für Ludwig Raiser* (Mohr Siebeck, 1974), p. 536, where the author presents dogmatic reasoning as 'an abbreviation of the argument from the accepted justice-content [out] of a conflict-resolution proposal' ['*(eine) Verkürzung der Argumentation aus dem konsentierten Gerechtigkeitsgehalt eines Konflikt-Lösungsvorschlags*']. For an introduction in English to the German approach to dogmatization, see R. Alexy, *A Theory of Legal Argumentation* (R. Adler & N. MacCormick, transl.) (Oxford, 2010 [1989]), pp. 250-73.

logical structures within which concepts are ordered and which themselves are subsumed under series of taxonomic hierarchies is less than propitious for the writing of a comparative text when, within the European Union alone, the field of comparison embraces two major legal paradigms, one of which, the common law, boasts a 'tradition of working disorder'.[91] In effect, the common-law tradition displays 'an instinctive [...] acceptance of genuine indeterminacy', thus revealing an inner conviction that the absolute elimination of adventitious elements is an ideal that cannot obtain and that should not be pursued — hence the absence of an English civil code (which, I never tire of telling my students, the English could very well have devised if they had wanted to do so).[92] The notion of '*Rechtswissenschaft*' itself (often, if somewhat awkwardly, translated as 'legal science'), which dictates Zweigert and Kötz's approach, is simply foreign to the common-law world. Plainly, the common law is distinctly *Unwissenschaftlichkeit*.[93] It becomes clear, then, that the illusory goals of 'disinterestedness' and 'objectivity' explicitly promoted in a comparative text can readily find themselves deflected by prevalent investments (whether deliberate or not) in the drive to Germanization. *In nomine scientiae*, Zweigert and Kötz's asseverations amount to a form of intellectual imperialism that neither a general rhetoric of abstraction nor a presentation conducted under the guise of rational respectability can abet — this, from the preponderant text in the field of comparative law that a commentator feels compelled, somewhat extraordinarily, to hail as '[c]risp, specific, complete, and reliable' and to commend for its 'rich and focused material'.[94] *Sans rire*.

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[91] T. Weir, 'The Common Law System', in *International Encyclopedia of Comparative Law*, vol. II/2 (R. David, ed.) (Mohr Siebeck, [n.d.]), no. 82, p. 77.

[92] M. Foley, *The Silence of Constitutions* (Routledge, 1989), p. 114. For a thoughtful outline of what he calls 'the distinctive constitutional psychology of the British people', see P. Allott, 'The Crisis of European Constitutionalism: Reflections on the Revolution in Europe', (1997) 34 *Common Market L.R.* 439, pp. 449-51. The quotation is from *Id*., p. 449.

[93] *E.g*.: P. Stein, 'The Tasks of Historical Jurisprudence', in N. MacCormick & P. Birks (eds), *The Legal Mind* (Oxford, 1986), p. 293: 'In Britain and in the English-speaking world generally law is not treated as a science, but in Germany, for example, law is a *Wissenschaft*'. See also J.H. Merryman, *The Civil Law Tradition*, 2d ed. (Stanford, 1985), p. 66, who notes that the common-law tradition is 'fundamentally inhospitable' to the idea of 'legal science'. I deliberately refer to the second edition of Merryman's classic text, the last that he himself authored. See also H.J. Berman, *Law and Revolution* (Harvard, 1983), p. 121. But see Zweigert & Kötz, *supra*, note 81, p. 13, who expressly analogize, albeit preposterously, '[a] supranational unity of law and legal science' and 'the unity of the Common Law' ['*(e)ine übernationale Einheit des Rechts und der Rechtswissenschaft*'/'*(die) Einheit (...) des Common Law*']. For another example of a typical misreading of the common-law tradition where it is observed without any supporting evidence that, along with French, German, and Italian jurists, common-law lawyers perceive their work as 'scientific', see P. Amselek, 'Propos introductif', in P. Amselek (ed.), *Théorie du droit et science* (Presses universitaires de France, 1994), p. 8 ['*scientifique*'].

[94] Markesinis, 'Style', *supra*, note 78, p. 607.

In the same manner as it is said that 'bilinguals are more sensitive to semantic relations between words, are more advanced in understanding the arbitrary assignment of names to referents, are better able to treat sentence structure analytically, are better at restructuring a perceptual situation, have greater social sensitivity and greater ability to react more flexibly to cognitive feedback, are better at rule discovery tasks, and have more divergent thinking',[95] the comparatist-at-law, operating in diverse legal 'communities' across frontiers and attending to possibilities and alternatives that the local lawyer immingled in the autistic contemplation of his own experience has no propensity to entertain, would be expected to produce work reflecting in its sophistication the wider conversation in which he partakes. Yet, comparative law, like the national legal studies that it is meant to enrich, shows a shockingly ambiguous allegiance to scholarship inasmuch as it remains largely the work of indifferent technicians overseeing the reduction of legal experience to the narrowest understanding of textuality, that is, to the quantifiable and the calculable. Now, the problem that I address is, in important ways, rooted in the fact that the comparatist always comes too late, that he is inevitably trained initially as a *local lawyer*.[96] — an institutional fact that no doubt accounts for the propensity of Fœlix, Amari, Maine, and other nineteenth-century precursors to have ultimately fallen for positivism, which they could effectively associate with their epistemological comfort-zone.[97] Burdened by the intellectual inertia that the emergence and application of a homely legal consciousness engenders,[98] the comparatist-at-law spontaneously sets

[95] F. Grosjean, *Life with Two Languages* (Harvard, 1982), p. 223. For fascinating autobiographical reflections on life-in-translation, see, *e.g.*, E. Hoffman, *Lost in Translation* (Minerva, 1991); L. Sante, *The Factory of Facts* (Granta, 1998); A. Kaplan, *French Lessons* (Chicago, 1993); A. Mizubayashi, *Une langue venue d'ailleurs* (Gallimard, 2011).

[96] The problem is not peculiar to law. Consider comparative literature, where it is observed that '[t]o be international, first one has to be national': B. Hutchinson, *Comparative Literature* (Oxford, 2018), p. 6.

[97] *Cf.* G. Bachelard, *La Formation de l'esprit scientifique* (Vrin, 1989 [1938]), p. 14, who observes that, as it accedes to the world of natural sciences, 'the mind is never young. In fact, it is very old, because it bears the age of its prejudices' ['*l'esprit n'est jamais jeune. Il est même très vieux, car il a l'âge de ses préjugés*']. Incidentally, Gaston Bachelard's work ought to be of keen interest to comparatists-at-law as he advocates a non-positivist epistemology that calls for the reflexive monitoring of the cognitive and social conditions making scientific work possible and of the assumptions that enter into the scientific construction process.

[98] With specific reference to the U.S. academic scene, this stagnation is suitably captured, *inter* many *aliases*, in R. Danzig, 'The Death of Contract and the Life of the Profession: Observations on the Intellectual State of Legal Academia', (1977) 29 *Stanford L.R*. 1125, p. 1127: 'Few law teachers write what I will call discursive books: books you can sit down and read, in one or more sittings, from cover to cover; books that make an argument; books that lay claim to expanding the horizons of the profession. Many do not write at all. Those professors who do write typically content themselves with

himself the minimalist goal of a logocentric description of the foreign that takes the form of an undue accentuation of signifiers inevitably leading to the development and repetition of received models, not least of his 'own'. Upon close examination, the comparatist's work is 'characterized by the formalist ordering and labeling and the ethnocentric interpretation of information, often randomly gleened [sic] from limited data'.[99] As intelligent engineers, comparatists are largely content to fulfill a documentary function for practitioners and civil servants. Their prosaicness limits them to (mendacious) 'thin descriptions' of other experiences of life-in-the-law and firmly forecloses the 'thick descriptions' that they ought to regard as indispensable to scholarly analyses of law.[100] There are, of course, exceptions.[101] *'Reusement*.

As long as the apparent intellectual demands associated with entry into the field remain so low, the situation is unlikely to improve: comparative work about law will continue to elide and occlude the difficulty of the comparative enterprise. No one will impersonate a physicist, because the extensive formation in mathematics is a well-known pre-requisite. Curiously, it is thought that comparative work about law can be achieved without particular skill or preparation. A smattering of a foreign language is sufficient for many of my colleagues and students boldly to engage in so-called 'comparative' legal analysis and, seemingly without any compunction, openly to style themselves as 'comparatists'. (Now, I know a number of comparatists who do not even have the least familiarity with any foreign language.) And, in many academic circles, the smallest dose of references to foreign law — I have in mind homeopathic

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detailed analysis of problems attacked piecemeal (in the form of articles) or they devote their energy to processing preexisting knowledge so as to render it teachable (as in casebooks) or authoritatively accessible (as in treatises). To any academic except a legal academic, this phenomenon is astonishing. Many law professors' reputations — indeed the most eminent reputations — are built on a casebook, a treatise that only elliptically or intermittently advances original ideas, or an article that canvasses a narrow problem. Many, perhaps most, students will graduate from our law schools without ever having read the whole of any book, save a casebook, about law. [...] The paucity of discursive books is important because it is a tangible surrogate for an intangible shortfall: the shortage of intellectually ambitious work in the law; the scarcity of overviews, of imaginative writing, of speculation and creativity clearly presented'. Observe that Danzig's revulsion focusses on the United States. What words would he have mobilized to describe the immensely worse predicament afflicting French or German legal writing?

[99] G. Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law', (1985) 26 *Harvard Int'l L.J.* 411, p. 421.

[100] C. Geertz, *The Interpretation of Cultures* (Basic Books, 1973), pp. 6-7. Clifford Geertz borrows the terms from G. Ryle, 'The Thinking of Thoughts: What is "Le Penseur" Doing?', in *Collected Papers*, vol. II (Hutchinson, 1971 [1968]), p. 480.

[101] *E.g.*: T. Ruskola, *Legal Orientalism* (Harvard, 2013); M.R. Damaška, *The Faces of Justice and State Authority* (Yale, 1986); L. Wood, *Islamic Legal Revival* (Oxford, 2016); U. Procaccia, *Russian Culture, Property Rights, and the Market Economy* (Cambridge, 2007); S. Esmeir, *Juridical Humanity* (Stanford, 2014); R.R. French, *The Golden Yoke*, 2d ed. (Snow Lion, 2002); L. Hilbink, *Judges Beyond Politics in Democracy and Dictatorship* (Cambridge, 2007); T. Ziolkowski, *The Mirror of Justice* (Princeton, 1997).

doses — can readily be deemed to make a work comparative. While the consequences of poor propaedeutics may be less spectacular for an apprentice-sorcerer playing comparatist rather than physicist, they remain no less present. The formalized and totalized description of those foreign rules or precepts of law regarded as relevant that will be offered as comparative analysis will suffer from distortions (such as the presentation of materials through a maladapted intellectual framework or the introduction of arguments from the 'system' under observation through a misconceived prioritization), but mostly from omissions; it will sin less through what it asserts than on account of what it will have failed to consider. For the comparatist, to formulate the apposite questions is at least as important as to devise a response. Any comparative analysis of law is a corollary of what counts as an interesting question for a comparatist operating in a certain place at a certain time. All the 'data' is in existence, if virtually so, before the comparatist comes to it. But it will be his to label and organize — to 'reify' — only if he thinks of asking the questions that will allow it to be fashioned in a way that will yield revealing information about the other-in-the-law.[102]

For instance, in enacting a *legge* for the reasons that they do and in the way that they do, as a product of the way that they think, with the desires and ambitions that they have, in enacting a particular *legge* (and not others), the Italians are not just doing *that*: they are also doing something typically Italian and are thus alluding to a modality of legal experience that is intrinsically theirs. In this sense, because it communicates the Italian sensibility to law, the *legge* can serve as a focus of inquiry into legal Italianness and into Italianness *tout court*. (Yes, there is *that*. Yes, *that* exists.) It need not be regarded only as a *legge* in terms of its effectivity as rule. There is indeed much more to *legge*ness than *legge*-as-rule. Indeed, *legge*-as-rule is a 'cognitive intoxicant' bound to entail persistent miscognition of the Italian experience of the legal.[103] Thus, a *legge* is necessarily an incorporative cultural form. As a compactly allusive accretion of cultural elements, it is supported by impressive historical and ideological formations.[104] A rule does not have any empirical existence that can be significantly detached from the world of meanings that characterizes a legal culture; on the contrary, it is 'encrusted, beyond lexical-grammatical definition, with phonetic, historical, social, idiomatic overtones and undertones. It carries with it connotations, associations, previous usages, tonal and even graphic, pictorial values and suggestions

[102] I paraphrase P. Veyne, *Comment on écrit l'histoire* (Editions du Seuil, 1971), p. 152.

[103] Mark A. Schneider, *Culture and Enchantment* (Chicago, 1993), p. 40.

[104] For an application of the notion of 'incorporative cultural form' to the mundane world of legal citation, see P. Legrand, 'Sigla Law', (1995) 23 *Int'l J. Legal Information* 123.

(the look, the "shape" of words)'.[105] The part never states its own meaning, for it is an expression and a synthesis of the whole assumptive background: it conveys morally and politically resonant ascriptions, for example.[106] And it is precisely this ability to see (aspects of) the whole in the part, to move away from the underbrush of detail and lead to a clearing of responsive perception, that defines the interpretive competence of the comparatist.[107] The task of the comparatist is the understanding of the semantic field to which the rule or precept belongs, the appreciation for the latent patterns of interest and struggle that shape the existence of postulated realities, the production of associations to which the rule or precept is a clue.These connections can be 'horizontal' or 'vertical', that is, they can take place across fields as the rule or precept is linked to what can be found elsewhere at the same time (including other rules or precepts) or within the same field as prior expressions of the rule or precept are highlighted in order to allow for a diachronic panorama.[108] A comparison is an archipelago.

Because a manifestation of posited law inevitably exists in a larger cognitive framework, the comparatist must apprehend it as being more than a short-lived instantiation with a clearly ascertainable beginning and an identifiable end and relate it to other legal/cultural phenomena, whether prior or concurrent, in a way that will make the particular proposition look less like an arbitrary incident and more like the manifestation of a (relatively) coherent and intelligible pattern. Thus, the rule or precept becomes the unknowing articulator or vector of a cultural sensibility that, while it is actually inscribed in the textual fragments themselves, requires the observer's ampliative acts of interpretation to come to light. A rule or precept can be regarded as compressed knowledge. As the comparatist invests meaning into the

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[105] G. Steiner, *Errata* (London: Weidenfeld & Nicolson, 1997), pp. 18-19.

[106] *Cf*. J. Bell, 'English Law and French Law — Not so Different?', in *Current Legal Problems 1995*, vol. XLVIII/2 (Oxford, 1995), p. 82: 'If an English lawyer says that his legal system does not accommodate "gratuitous contracts", because a "contract" is conceptually a promise for reward, what he is really saying is that English law is not convinced, as a matter of values, that gratuitous promises, as such, should be enforced (though they may be enforced sometimes as trusts, bailments, etc.)'. John Stuart Mill made an analogous point in more general terms as he observed that '[d]ifferences of legislation are not inherent and ultimate diversities; are not properties of Kinds'. Rather, he wrote, '[i]f [...] two nations differ in this portion of their institutions, it is from some difference in their position, and thence in their apparent interests, or in some portion or other of their opinions, habits, and tendencies; which opens a view of further differences without any assignable limit, capable of operating on their industrial prosperity, as well as on every other feature of their condition, in more ways than can be enumerated or imagined': J.S. Mill, *A System of Logic Ratiocinative and Inductive*, in *Collected Works of John Stuart Mill* (J.M. Robson, ed.), vol. VIII (Toronto, 1974 [1843]), bk VI, ch. 7, p. 882.

[107] See Taylor, *supra*, note 73, p. 6.

[108] See C.E. Schorske, *Fin-de-siècle Vienna* (Cambridge, 1979), pp. xxi-xxii.

language of the text through a process of abstraction from the particular, he discloses the effect of compression by showing the rule or precept to be expandable. This observation points to the fact that meaning is not supplied by the rule or precept itself. Concretely, meaning can *only* be located in the interpreter's mind. While meaning emerges *from* the text through the reader, it is also being placed *into* the text by the reader as he invents the traces out of which the text arises.[109]

I maintain that the habitual tendency of most comparatists to focus on comparisons of substantive or adjectival law can only be made expressive if their analysis will embrace the traces of the discourses (historical, political, philosophical, economic — cultural!) from which the rules or precepts emanate, of which they are the juridical manifestation. The tracing must extend to an understanding of why what has been textualized is in the mode that it is, why it could not in important ways be otherwise, and how this textualization differs from other textual experiences of the legal, elsewhere. Along the way, one must 'los[e] the ability or the willingness to see law as a series of so-called "authorities"' and 'mov[e] out of a world in which a piece of judicial reasoning is the ultimate explanation of why the law is what it is'.[110] Otherwise

[109] These remarks can be linked to the matter of so-called 'legal transplants'. Consider a legislated rule. If one agrees that the rule (inevitably) receives its meaning from without and if one accepts that such investment of meaning by an interpreter effectively partakes in the ruleness of the rule (and how could it not?), it must follow that there could only occur a 'legal transplant', properly speaking, when the rule, *including its invested meaning* (which is a constitutive part of its ruleness), is transported from one culture to another. But, given that the meaning invested into the rule is itself culture-specific, it is hard to see how this could ever happen. Rather, the rule, as it finds itself indigenized by another legal culture, sheds its original meaning and is imbued with a new culture-specific meaning at variance with the earlier one. Accordingly, a crucial element of the ruleness of the rule — its meaning — does not survive the journey from one legal culture to another. The rule that finds its way into the host culture is effectively a new rule, a different rule. *No 'transplant' of any rule has therefore occurred*. See generally P. Legrand, 'The Impossibility of "Legal Transplants"', (1997) 4 *Maastricht J. Euro. & Comp. L.* 111. See also G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', (1998) 61 *Modern L.R*. 11, where the author shows through a compellingly indisciplined study how the notion of 'good faith' as understood in German law (that is, the notion of '*Treu und Glauben*') can never be 'transplanted' onto British soil. *Adde*: M. Damaška, 'The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments', (1997) 45 *Am. J. Comp. L.* 839, who observes that the different institutional frameworks governing the administration of justice in the civil-law and common-law worlds effectively constrain the 'transplantation' of evidentiary doctrines across legal traditions. Effectively, Teubner and Damaška are making the case for the inevitability of acculturation, or translation, or differentiation — for allomorphism instead of isomorphism.

[110] O. Kahn-Freund, 'Comparative Law As an Academic Subject', (1966) 82 *L. Q. R.* 40, p. 43. But see Markesinis, "Comparative Law", *supra*, note 78, pp. 13, 16 & 16, who writes that '[c]ase law can reveal what the law really is and why it is what it is' and that '[c]ase law can reveal what are the real problems that concern a legal system at a given period of time', an observation that is 'so obvious [...] that it needs no stressing'. For a rewarding critique of academic obsession with judicial decisions, see R.M. Unger, *What Should Legal Analysis Become?* (Verso, 1996), p. 112: 'The standard of serviceability to judges imposes a paralyzing constraint upon the reinvention of legal analysis'.

(other-wise!) said, '[o]ne must focus on assumptions, attitudes, aspirations and antipathies'.[111] In fact, no rule or precept can be understood deductively by reference to an extra-cultural dimension of experience. Culture is pansophic, that is, all-embracing: *extra culturam nihil datur*.

Yet, consider a sample of the questions that comparatists typically leave unasked: What governed the selection of materials and its treatment by the foreign court? Why did the court elect to privilege the particular social, political, or economic groups that profit from its decision? Why did it choose to disadvantage the particular groups that do not benefit from the judgment? Why does the decision favour the values that it does? Why does it ignore the values that it does? Why does the court make use of empirical data in the way that it does? What alternatives to the decision could have been envisaged within the range of what is possible for *that* culturally-conditioned court operating within *that* legal culture and within *that* culture *tout court*? In the words of Joseph Vining, 'what is significant beyond the particular, concrete decision that rapidly recedes into the past is not so much what factors were taken into account and what weights were given to them, as what made the decision maker choose to take those factors into account rather than others, and choose to give them the weight he did. That is what is solid and persistent. That is the law, that is what governs us'.[112] The argument, of course, is that he who comes to comparative law without an adequate intellectual preparation simply cannot look for what is being said in what is said because, not being able to conceive them, he cannot pose the crucial questions that will allow *legge*ness, to return to the earlier example, to emerge in its manifold guises.

Now, who, amongst the small army of academics professing to decorate their work, thus nodding to the fashion of the day, with a spasmodic sprinkling of foreign data, has determined, after thorough study of the relevant issues, whether the act of comparison should favour an actor-oriented perspective that tries to render the world as it appears from the observed's point of view, that is, that attempts a realization of '*his* vision of *his* world',[113] or whether comparative law should adopt an observer-oriented perspective, therefore providing an analysis from a standpoint that is located other than within the observed's lifeworld, in a language that is not that of the

[111] P. Legrand, 'European Legal Systems Are Not Converging', (1996) 45 *Int'l & Comp. L. Q.* 52, pp. 60-61.

[112] J. Vining, *The Authoritative and the Authoritarian* (Chicago, 1986), p. 92.

[113] B. Malinowski, *Argonauts of the Western Pacific* (Routledge & Kegan Paul, 1922), p. 25.

'natives' but rather that of the comparatist himself, that of his world?[114] In my view, Paul Rabinow is right to argue that, in the final analysis, the position of the observer must inevitably find itself involved and favoured, notwithstanding that the self is constantly being placed into jeopardy through the defamiliarization that it confronts.[115] Yet, who, amongst comparatists, whether the seasoned or the aspiring, has shown awareness of the disturbing political consequences that follow from this sovereignty of the self as the other-in-the-law is required to contend with the fact of being re-presented as an *object* of study?

Who has envisaged epistemological strategies whereby the narrator, although ratifying his status as an 'I-witness',[116] may decenter himself so that a measure of contemporaneity is restored between the two experiences being implicated in the power relationship linking observer and observed? Should the comparatist attend to the re-presentation that the legal 'community' under observation has pursued and achieved of its own culture through its own processes of fashioning and re-fashioning? Is not a meaningful way to avoid ethnographic *author-ity* for the comparatist to attempt to operate a significant change in the re-presentational register and move from a 'subject-object' to a 'subject-subject' dynamic by giving a voice to the observed so as to unmake them as 'objects' and remake them as 'subjects' — in the sense of 'selves' — so that the comparatist would be speaking *with* them rather than *of* them?[117] In addition to participant observers, the comparative process would thus include, say, 'participant readers' on the ground that '[n]either the concreteness nor the otherness of the "concrete other" can be known in the absence of the *voice* of the other'.[118] No longer disqualified from participating in the negotiations aimed at the re-presentation of their legal culture by the observer, the members of the observed 'community' could then intervene — and contest — what is being written about them. Indeed, should comparatists, in order to overcome their (often inchoate) *Besserwisser* attitude, give effect to a 'rejection criterion' whereby the decision by a competent individual situated within the 'community' under observation not to recognize the

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[114] Anthropologists have long captured this distinction by referring to *emic* and *etic* perspectives, respectively.

[115] See P. Rabinow, *Reflections on Fieldwork in Morocco* (California, 1977), pp. 79-80. *Cf.* B. Latour & S. Woolgar, *Laboratory Life*, 2d ed. (Princeton, 1986), pp. 38-39: 'An analysis of a tribe couched entirely in the concepts and language of the tribe would be both incomprehensible and unhelpful to all nonmembers of the tribe'. See also Q. Skinner, 'Conventions and the Understanding of Speech Acts', (1970) 20 *Philosophical Q.* 118, pp. 136-37.

[116] C. Geertz, *Works and Lives: The Anthropologist As Author* (Stanford, 1988), pp. 73-101.

[117] Because the term 'subject' is problematic (see *NCL*, *supra*, ch. IV, p. 00), I use it here strictly under erasure, so to speak, in order to heighten the contrast with 'object'.

[118] S. Benhabib, *Situating the Self* (Polity, 1992), p. 168.

comparatist's understanding would be regarded as *prima facie* evidence of the inadequacy of the account and shift the burden of proof to the comparatist-as-observer who would then have to state why his interpretation should be preferred?[119]

Moreover, the comparatist, who, after all, deals with the foreign — with what may well defy belief — must convince his audience, if not himself, of the creditability of his message. Since his exposition can never afford to assume the existence of a 'truth' that could speak for itself and that would not, therefore, require any rhetorical support, the success of the comparatist's hortatory endeavour depends on how effectively he can proceed to the constitution of his authority through the establishment of his competence and reliability. Thus, the comparative discourse includes inevitable interlocutory affects, that is, an appellative dimension whereby the comparatist-as-author enjoins his interlocutors to allow themselves to be persuaded by his narrative. In the process of securing assent, the primary voice of the other's experience (meant to be preserved through the act of re-presentation) risks finding itself, once again, obfuscated by the experience that the comparatist wishes to engender in his interlocutors through his own interpretive strategies. In an attempt to address such cognitive impediments, the comparatist's inevitably partial discourse — a text that is always engaged and incomplete — may want to envisage the merits of purposively resorting to quotations that, because they constitute 'the ultimate accomplishment of the mimetic or representational process',[120] validate and accredit the discourse of the other, that is, produce enhanced reliability by allowing the other to be *on his own terms* (if in the comparatist's language!) and thereby foster a measure of equipollence between the two experiences in play. (This strategy does not deny, of course, that the carving of a quotation remains a function of the observer's choice, a fact that once more raises the matter of the fidelity to the observed's thought and, indeed, that of the integrity of the process as a whole. For instance, does the observed, through the quotation, assume any ethical responsibility, or rather co-responsibility, for the re-presentation? In sum, I argue that, in effect, for a comparatist to warrant information on the basis of first-hand experience means to warrant information on the basis of his *memory* of that experience. This is why he must analyze the empirical facts that mark the limits of his empiricism, such as the existence of an aporetic dynamics arising between the time of field research and the allochronic time

[119] See W. Schmaus, U. Segerstrale & D. Jesseph, 'A Manifesto [for a "Hard Program" in the Sociology of Scientific Knowledge]', (1992) 6 *Social Epistemology* 243, p. 247.

[120] L. Marin, *De la représentation* (D. Arasse *et al.*, eds) (Gallimard, 1994), p. 84 ['*l'accomplissement ultime du processus mimétique ou représentationnel*']. See generally A. Compagnon, *La Seconde main ou le travail de la citation* (Editions du Seuil, 1979), p. 12, who justifiably comments that 'the quotation represents a capital stake, a strategic and even political site in any practice of language' ['*la citation représente un enjeu capital, un lieu stratégique et même politique dans toute pratique du langage*'].

of exposition, and thus overcome the illusion of immediacy inherent to all complex negotiated engagements, indeed to all reflection.

Only such disposition to *l'enquête comparative* — paradoxically combining both an acute awareness of self and of its limitations and an inspired forgetfulness of self in an effort to display attentiveness to otherness — can allow the comparatist-as-observer to grasp a legal 'community' in some, at least, of its expressive intensity, perhaps even in terms of the invisible structures that serve to define its identity. Immense benefits may inure to the comparatist (for otherness can play a potentially considerable role with respect to the constitution of the individual self given that consciousness of self is only possible if experienced by contrast), to his audience, and possibly to the legal 'community' under observation itself as he directs his attention to given features of that 'community''s experience of law, symbolic or otherwise, which had remained concealed or obscured from view.[121] These outcomes, however, are largely a function of the degree to which the comparatist is prepared to allow himself to be questioned by the other and to show receptivity to the claims insistently made on him by otherness. To what extent, then, will the comparatist's understanding of another culture find itself transmuted into an experiment with his own, perhaps newly (re)discovered legal culture?

Other interrogations appear as basic to an informed practice of comparative analysis of law. Given his focus on 'law', it does not seem unreasonable to expect the comparatist to have elaborated a theory of the 'distinctively legal' prior to undertaking his comparative research.[122] In other words, where, why, and how will the observer draw the uneasy demarcation between the law and the non-law? Is an analysis that could justify law's claim to self-identity, that is, to unity, autonomy, and separateness from what it is not, even *possible*? What of the argument that nothing is intrinsically 'non-law', that to study economics or politics in order to reach a better understanding of a given legal configuration is still to operate within the field of law, that, say, to apprehend a contract also as a market transaction, remains 'law work', and that the comparatist has not thereby crossed the barrier into economics or politics, that is, into something else that would not be 'law'? And what of the idea that 'pure law' partakes in the oxymoronic? Is it not the case that whenever one tries to understand law better by tracing it to history or ideology, for instance, one provokes a conversation of the legal with *itself* pursuant to which law, therefore, does not leave itself? Is it not the case that the tracing process — a digging, an archaeology — takes

[121] I draw on P. Bourdieu, *La Misère du monde* (Editions du Seuil, 1993), pp. 903-25.

[122] P. Selznick, in D.L. Sills (ed.), *International Encyclopedia of Social Sciences*, vol. IX (Macmillan, 1968), *sub* 'Law: The Sociology of Law', p. 51.

place in its entirety within the four corners of the law-text, so to speak, so that there is ultimately no *hors-droit*?[123]

Consider the nationalization of private law as an illustration of the French *mentalité* of legalism for which the *loi* is the center of gravity of a post-revolutionary legal order resting upon the submission of citizens to the State and upon stable rules guaranteed by the State.[124] Would the comparatist not agree that the French legal *mentalité* as regards judicial restraint can be evidenced as convincingly through a painting depicting Napoleon writing the French civil code by candlelight as via the text of article 5 of the same code prohibiting judges from engaging in law-making beyond the litigation at hand?[125] Do not both signs or images — or 'cultural intermediaries'[126] — equally lend support to a view of the French civil code as an atavistic legacy from the Bible with the legislator effectively acting as Supreme Pontiff?[127] Does not Title VIII of

[123] *Cf*. F. Jameson, *The Political Unconscious* (Cornell, 1981), p. 20, who argues for 'the recognition that there is nothing that is not social and historical — indeed, that everything is "in the last analysis" political'. This observation would transposable to law.

[124] See P. Legendre, *Trésor historique de l'Etat en France* (Fayard, 1992), pp. 137, 397, 519 & 527. See also, *e.g*., L. de Saussure, *Psychologie de la colonisation française* (Alcan, 1899), p. 31; A. Siegfried, 'Introduction générale', in A. Siegfried (ed.), *Aspects de la société française* (L.G.D.J., 1954), pp. 21-22; J. Michelet, 'Origines du droit français cherchées dans les symboles et formules du droit universel', in *Œuvres complètes* (P. Viallaneix, ed.), vol. III (Flammarion, 1973 [1837]), p. 645; E. Boutmy, *Etudes de droit constitutionnel*, 2d ed. (Plon, 1888), pp. 16-17 & 76-77; L. Liard, *L'Enseignement supérieur en France*, vol. II (Armand Colin, 1894), p. 397; [T.] Ymbert, *Essais critiques sur le Code Napoléon: le portique du Code — étude sur le Titre préliminaire* (Cosse & Marchal, 1860), p. 201; F. Mallieux, *L'Exégèse des codes et la nature du raisonnement juridique* (Giard, 1908), p. 9: 'The Code Napoléon is a collection of orders given by the master of the State" ['*Le Code Napoléon est un recueil d'ordres donnés par le maître de l'Etat*']. There is nothing in the creative and normative role that the French private-law judge effectively assumes that detracts in a meaningful way from this *mentalité* of legalism. Incidentally, the idea of the civil code as a set of instructions rather than a mere arrangement of the law is also present elsewhere in the civil-law world, for instance, in Germany. See, *e.g*., *Motive zu dem Entwurfe eines Bürgerlichen Gesetzsbuch für das Deutsche Reich*, 2d ed., vol. I (Guttentag, 1896), p. 15: 'The legislator does not organize, but instructs' ['*Der Gesetzgeber (...) disponirt nicht, sondern unterweißt*'].

[125] I have in mind an 1812 portrait by Jacques-Louis David, now at the National Gallery of Art, in Washington, D.C., as 'Napoleon in His Study'. Other paintings pursue the same theme. A particularly famous illustration is Jean-Baptiste Mauzaisse's 1833 allegory where Napoleon, sitting on a cloud, is seen inscribing the French civil code on a stone tablet. The painting is on display at the Musée national du Château de Malmaison in Rueil-Malmaison, near Paris.

[126] M. Vovelle, *Idéologies et mentalités* (Gallimard, 1982), p. 177 ['*intermédiaire culturel*'].

[127] For an isomorphy between the civilian and canonical orders, see P. Legrand, '*Antiqui juris civilis fabulas*', (1995) 45 *U. Toronto L.J.* 311. In my essay, I help myself to the seminal and restorative scholarship of Pierre Legendre. *E.g*.: P. Legendre, *L'Amour du censeur*, 2d ed. (Editions du Seuil, 2005); P. Legendre, *Jouir du pouvoir: traité de la bureaucratie patriote* (Editions de Minuit, 1976). *Adde*: P. Legendre, *L'Autre Bible de l'Occident* (Fayard, 2009). With specific reference to the early history of the interaction between the temporal and spiritual realms, see also G. Dagron, *Empereur et prêtre: étude*

the 1958 French constitution positing the status of the judiciary as a mere '*autorité*' confirm the formal subjugation of the judge to the text and his confinement to the role of (a mere) public servant?[128] And beyond iconography,[129] what of the place of poetics broadly understood within legal studies?[130] I argue that law's comparatists need to add more territory to the empire of their imagination; '[o]nly a willful, tyrannical intelligence could believe that the only kind of knowledge we can aspire to is that represented by the physical sciences' — an ambition that happens to be, sadly, precisely Zweigert and Kötz's.[131]

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sur le 'césaropapisme' byzantin (Gallimard, 1996). A more wide-ranging exploration is in E.H. Kantorowicz, *The King's Two Bodies* (Princeton, 1957).

[128] In France, the dominion of the statute is unceasingly extolled, and adjudication is almost just as incessantly scorned and apprehended along the lines of a seemingly necessary evil. For instance, see C. Atias, *Devenir juriste* (LexisNexis, 2011), p. 3, who, having introduced 'legal rules' ('*règles de droit*') as 'answers' ('*réponses*'), writes that '[t]he judge is there to ascertain the right answer and to impose it' ['*(l)e juge est là pour retrouver la bonne réponse et pour l'imposer*']. Observe how the author's verb to designate the task that he assigns to the judge is '*retrouver*', which translates awkwardly into English on account of the range of senses it may carry. But whatever meaning one wishes to ascribe to the French verb, it subordinates the judge to an act of discovery or identification of 'the right answer' and denies any judicial initiative or creativity in the production of it. Speaking on 'France 2', one of France's public television networks, on Sunday, 7 October 2007, in answer to questions from the presenter of 'Vivement dimanche prochain', one of France's most popular programmes, then President Nicolas Sarkozy called *Cour de cassation* judges 'peas in a pod' ('*petits pois*') — the idea, it seems, being to underline through this characterization of French 'supreme court' judges, the matter of judicial indifferentiation and, correlatively, the ultimate irrelevance of the judge as individual. I am certainly not claiming that every analyst in France would subscribe to those specific terms, but the very fact that the President of the Republic feels able to express himself in this way before millions of viewers says much about the very limited regard in which French judges are held. No doubt, the statement that I mention also reveals something about the then French President.

[129] For studies on the iconography of French law, see generally R. Jacob, *Images de la justice* (Le Léopard d'Or, 1994); J.P. Ribner, *Broken Tablets: The Cult of the Law in French Art from David to Delacroix* (California, 1993). See also L. Marin, *Le Portrait du roi* (Editions de Minuit, 1981). For a consideration of the iconography of German law, see, *e.g.*, G. Köbler, *Bilder aus der deutschen Rechtsgeschichte* (Beck, 1988). For illustrative instances of iconographical research with specific reference to law, history, and philosophy, respectively, see D. Howes, 'In the Balance: Norman Rockwell and Alex Colville As Discourses on the Constitutions of the United States and Canada', (1991) 29 *Alberta L.R.* 475; F. Haskell, *History and Its Images* (Yale, 1993); L. Braun, *Iconographie et philosophie* (Presses de l'Université de Strasbourg, 1996), 2 vol. See generally C. Douzinas & L. Nead (eds), *Law and the Image* (Chicago, 1999). See also P. Goodrich, *Legal Emblems and the Art of Law* (Cambridge, 2014); D. Manderson (ed.), *Law and the Visual* (Toronto, 2018). See generally W. Gephart & J. Leko (eds), *Law and the Arts* (Klostermann, 2017).

[130] For revealing examinations of the re-presentations of the law in literature, see, *e.g.*, Ziolkowski, *supra*, note 101; P. Raffield, *The Art of Law in Shakespeare* (Hart, 2017). For an insightful study of the re-presentations of the law in song, see D. Howes, '"We Are the World" and Its Counterparts: Popular Song As Constitutional Discourse', (1990) 3 *Int'l J. Politics, Culture & Society* 315.

[131] H. White, *Tropics of Discourse* (Johns Hopkins, 1978), p. 23. For the reference to Zweigert & Kötz, see Zweigert & Kötz, *supra*, note 81, p. 13, where the co-authors extol 'physics', 'molecular biology', and 'geology' as models for comparative law ['*Physik*'/'*Molekularbiologie*'/'*Geologie*'].

It is a fact that some of the many interesting and helpful types of thought associated with the making of things and the understanding of reality are remote from rational discourse; thus, articulate reason is not the sole clue to a world. (To think otherwise is arguably to perpetuate the supremacy of a value — reason — which, if not essentially male, has traditionally been privileged and, indeed, appropriated by men.[132]) Given that 'cultures are spiritual creations of their relevant communities, and products of their unique historical experiences as distilled and interpreted over centuries by their unique imagination',[133] there are shared narrative structures operating within a legal culture that serve to shape the legal mind, often beneath consciousness or at the threshold of awareness,[134] by creating interactive social meaning.[135] These narratives 'can explain whole reaches of cultural tradition that are not susceptible to any other kind of explanation'.[136]

Mythologies, for instance, perform the mediation between the conditions in which a legal 'community' lives and the manner in which it tells itself and others about the way it lives. They capture the symbolic and symbolizing attributes with which a legal 'community' describes itself not to mention the prejudices — in the etymological (or Heideggerian, or Gadamerian, or Bultmannian) rather than the acquired, pejorative sense — that the members of the legal 'community' as culturally particularized beings bring to the law. Indeed, every event in the law — whether it be the reading of a legislative text or the interpretation of a textbook — is determined by a pre-understanding of what there is to be understood, which is itself framed by the particular legal culture within which an individual lives in the law.[137] Not only does the study of mythology enable the comparatist to acquaint himself with the imaginary of a 'community' for which its law is a sign, but it allows him to think what the legal 'community' under observation does not (or, more accurately, *cannot*) think. Through the particular itinerary of a legal 'community''s interaction with the world as allowed by the mental furniture of its interpreters, that which is unthought shapes the legal

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[132] *E.g.*: M.F. Belenky *et al.*, *Women's Way of Knowing*, 2d ed. (Basic Books, 1997), pp. 71-75.

[133] B. Parekh, 'Superior People: The Narrowness of Liberalism from Mill to Rawls', *The Times Literary Supplement*, 25 February 1994, p. 20.

[134] *Cf.* P. Legendre, *L'Empire de la vérité* (Fayard, 1983), p. 21: '[T]he unconscious, too, is a jurist' ['*(L)'inconscient lui aussi est juriste*'].

[135] See generally J.M. Balkin, *Cultural Software* (Yale, 1998), pp. 188-215.

[136] P. Bohannan, *How Culture Works* (Free Press, 1995), p. 151. *Cf.* J.N. Shklar, *Ordinary Vices* (Harvard, 1984), p. 230: 'The great intellectual advantage of telling stories is that it does not rationalize the irrationality of actual experience and of history. Indecision, incoherence, and inconsistency are not ironed out or put between brackets. All our conflicts are preserved in all their inconclusiveness'.

[137] See generally J. Lenoble & F. Ost, *Droit, mythe et raison* (Publications des Facultés universitaires Saint-Louis, 1980). See also *NCL*, *supra*, ch. VI, pp. 00-00.

'community' into what it is and constitutes its thought patterns. It could be said that myth bridges the gap between what is there and what is not there; it captures what is otherwise lost in the space between the signifier and the signified and, as such, emerges as a significant aspect of any thick or deep comparative analysis of law. In this respect, it is apposite to meditate Paul Ricœur's reflection to the effect that legal mythology is 'the most enticing, the most fallacious of mythologies, accordingly the most difficult to deconstruct, but especially the one that most energetically resists reinterpretation', notably on account of the intervention of legal rationality in the fabrication of myth.[138] (This adjunction of the rational and rationalizing — the clear, the rigorous, the continuous — to myth leads Paul Ricœur to refer to legal mythology as 'mytho-logical'.[139])

Because a 'community' uses stories to organize and store traditions and since these constitute a manifestation of power as they embody values and axiomatize cultural processes, comparative law needs to find ways to complement more conventional research by embracing the subtleties of narratives; it must allow them to 'emerg[e] from embeddedness'.[140] The point is that law is a matter of meaningful activity only very imperfectly studied through the objectifying methods of orthodox comparative analysis. In fact, responsible comparative work about law cannot be undertaken without addressing and overcoming the highly contestable character of any exclusion of meta-commentaries (such as myth) from the pertinent data. '[I]t would take a *Kulturphilistinismus* of a very high order to deny to [*muthos*] the status of genuine knowledge' that is readily granted to *logos*.[141] Even as myth lends its voice to the imaginary, it continues to refer to reality and provide useful knowledge about it (is this not, indeed, the value of all literary fiction?). Myth allows a legal culture, for example, to be defined in terms of its epistemic resistance to change or its desire to withstand the influence of alternative *Weltanschauungen* (and, possibly, of some *Weltanschauungen* in particular). The history of legal cultures as a history of refusals is significant because it authorizes an understanding of what there *is*, to be appreciated as a decision *not to be* otherwise; it captures 'the movement whereby a

[138] P. Ricœur, *Le Conflit des interprétations* (Editions du Seuil, 1969), pp. 364-65 ['*la plus captative, la plus fallacieuse des mythologies, la plus difficile par conséquent à déconstruire, mais surtout celle qui résiste le plus énergiquement à la réinterprétation*'].

[139] *Ibid.* ['*mytho-logique*'].

[140] R. Sennett, *Authority* (Norton, 1980), p. 141.

[141] H. White, *The Content of the Form* (Johns Hopkins, 1987), p. 45.

culture comes to express itself affirmatively through the phenomena that it rejects'.[142] (To quote Kierkegaard, 'a person's true being comes through an opposition'.[143]) In this way, a legal culture can be approached by way of the delineation of differences with its oppositional forms — as a *complexio oppositorum*, so to speak. Avoiding the fall into the structuralist trap that consists in bringing social behaviour into line with theoretical patterns of symbolism (say, through an anticipation of rule-following not allowing for the emergence of a fluid discrepancy between expectations and experience), the comparatist must further distinguish between the re-presentations that a 'community' forms and projects of its operating mechanisms and the effective operation of these mechanisms themselves. He must compare narratives within one legal culture, and the views held of these narratives within that culture, to narratives within another legal culture and to the views held of those narratives within that other culture. It is sensible to assume that a fantasy sustained by a culture is a valuable clue for coming to know that culture: the energies directed towards imagination, projection, and a sense of idealized 'community' also tell a story.[144]

A responsiveness to the limitations of perceptual ability appears vital for anyone aiming to develop what can only be a constructed understanding of a legal culture's construction of a world. With pardonable exaggeration, Paul Bohannan thus argues that '[t]he proper subject for study — indeed the only possible subject for study — is [...] perception'.[145] Clearly, the comparatist must learn to live within his cognitive means. Whereas first-legal-culture acquisition seems spontaneous, second-legal-culture acquisition is a complex process that invites complex speculation and requires complex understanding because although second-culture-learning takes the first culture as its referent, the enhancement of competence in a second legal culture is

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[142] M. Foucault, *Maladie mentale et psychologie* (Presses universitaires de France, 1962 [1954]), p. 95 ['*le mouvement (...) par lequel une culture vient à s'exprimer, positivement, dans les phénomènes qu'elle rejette*'].

[143] S. Kierkegaard, 'Johannes Climacus', in *Philosophical Fragments; Johannes Climacus* (H.V. Hong & E.H. Hong, transl. from Latin) (Princeton, 1985 [1842-43), p. 253. Recall Fernand Braudel's apophthegm to the effect that 'a civilization is characterized much more by what it disdains, by what it does not want, than by what it accepts': P. Daix, *Braudel* (Flammarion, 1995), p. 279 ['*(u)ne civilisation se caractérise beaucoup plus par ce qu'elle dédaigne, par ce dont elle ne veut pas, que par ce qu'elle accepte*']. The text transcribes an interview with Jean-Claude Bringuier broadcast in August 1994.

[144] For a general reflection on the necessary and constitutive role of the unconscious in the fashioning of political identity and destiny, see J. Rose, *States of Fantasy* (Oxford, 1996).

[145] P. Bohannan, *Social Anthropology* (Holt, Rinehart & Winston, 1963), p. 46. *Cf.* M.E. Spiro, 'Collective Representations and Mental Representations in Religious Symbol Systems', in *Culture and Human Nature: Theoretical Papers of Melford E. Spiro* (B. Kilborne & L.L. Langness, eds) (Chicago, 1987 [1982]), pp. 161-62: '[T]o attempt to understand culture by ignoring the human mind is like attempting to understand *Hamlet* by ignoring the Prince of Denmark'.

clearly more intricate than simply substituting structures from one culture for those of another, not least because the comparatist always-already inhabits a legal culture and because cognitive and affective frameworks within legal cultures, especially across legal traditions,[146] do not coincide. The comparative mind must somehow develop an organization that clearly discriminates between the different legal cultures while simultaneously permitting ample interaction between them. Does the comparatist's legal/cultural credo change by virtue of his acquaintance with another legal culture? Can he even learn another legal culture that, being located in a different legal tradition, makes conceptual distinctions at variance with the ones that he already understands? If his first culture is influenced by the new information that he re-presents in his mind, possibly the acquisition of a second legal culture situated outside his legal tradition becomes an event of considerable cognitive import. Indeed, it may be that the learning of a second legal culture may require a substantial re-organization of the comparatist's associative network. Or it may be that second-culture learners do not need to restructure the basic categories of their conceptual knowledge, but only to adjust them so as to accommodate the labels dictated by the new culture.[147] Arguably, though, a different legal culture from his own remains

[146] Three general observations concerning the meaning of 'legal tradition' are apposite at this stage. First, the concept of 'tradition' — in the sense of 'an argument extended through time in which certain fundamental agreements are defined and redefined in terms of [...] conflict[s] [...] with critics and enemies external to the tradition [...] and [...] internal debates' — is explored with particular reference to its pastness, its authoritative presence, and its transmittance in M. Krygier, 'Law As Tradition', (1986) 5 *L. & Philosophy* 237; M. Krygier, 'The Traditionality of Statutes', (1988) 1 *Ratio Juris* 20. For the understanding of 'tradition' as a prolonged argument, see A. MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, 1988), p. 12. Observe, however, the aporetic dimension inherent to the idea of 'tradition'. In effect, what is transmitted is not the 'tradition' as such because the 'tradition' is the always-already pre-given framework in which a 'community' finds itself and which finds itself in a 'community'. The constructed character of 'tradition' is considered in E. Hobsbawn & T. Ranger (eds), *The Invention of Tradition* (Cambridge, 1983); B. Anderson, *Imagined Communities*, 2d ed. (Verso, 1991). An influential deployment of 'tradition' with specific reference to comparative law is in Merryman, *supra*, note 93, pp. 1-5. For discussion, see D.S. Clark, 'The Idea of the Civil Law Tradition', in D.S. Clark (ed.), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (Duncker & Humblot, 1990), pp. 11-23. See also Glenn, *supra*, note 79. For a critique of Glenn's characterizations, see W. Twining, 'Glenn on Tradition: An Overview', (2006) 1/1 *J. Comp. L.* 107; A. Halpin, 'Glenn's Legal Traditions of the World: Some Broader Philosophical Issues', (2006) 1/1 *J. Comp. L.* 116. Secondly, the concept of legal 'system' refers to subsets of rules, procedures, and institutions *within* legal traditions. In the apt words of John Merryman, 'there is no such thing as *the* civil law system, *the* common law system [...]. Rather, there are many different legal systems within each [legal tradition]': Merryman, *supra*, note 93, p. 2. Thirdly, I regard the Scandinavian 'systems' as belonging to the civil-law tradition, if only as peripheral constituents. *E.g.*: J.W.F. Sundberg, 'Civil Law, Common Law and the Scandinavians', (1969) 13 *Scandinavian Studies L.* 179; F.H. Lawson, 'The Field of Comparative Law', [1949] *Juridical R.* 16, pp. 32-33. For a narrower definition of 'civilianity', see A. Watson, *The Making of the Civil Law* (Harvard, 1981), p. 4.

[147] I paraphrase E. Bialystok & K. Hakuta, *In Other Words: The Science and Psychology of Second-Language Acquisition* (Basic Books, 1994), pp. 103-04.

foreign to a comparatist even at the post-interpretive stage, albeit not in the sense in which it was before interpretation when it was a complete enigma to him, but in that he has now uncovered practices that he can identify as lying beyond the province of his understanding. What was seemingly an unfathomable mystery now appears more along the lines of an intractable problem. Since he can only become aware through empirical study that he cannot understand another experience of law, the local lawyer's confrontation with the foreign not unreasonably closes with the foreign remaining equivocal to him on account of the fact that he now appreciates more of its foreignness. (Of course, the self is still enriched by this experience since even the comparatist's realization of otherness takes the form of an *acquis* that is incorporated into his self-understanding, within which it now means something to him as a limitation on his understanding of the other's law-world.)

I argue that comparatists need to take more seriously the psychological and sociological constraints on human rationality that make the production of information by observers an unavoidably imperfect enterprise. There are important cognitive liabilities inherent to the human organism over which the mind has little direct control that necessarily colour the plausibility of any comparative understanding. Consider the following excerpt:

> *[Conscious mental life] is selective, attentive, and interested; it is excited by some features of the world, not by others*. [...] Given the interested nature of [conscious mental life], it follows that it is a mistake to think that stimuli can be identified independently of an interpretive human response, for example, in the language physicists use to describe physical objects and events. [...] [A]ny model that depicts the typical psychological causal chain as proceeding unidirectionally from sense impression to cognition to volition must be rejected. The objection to such a model is simply that it fails to take into account how interested and how selective mental life is. Our mental life is such that volitional and cognitional acts are already taking place at the receiving stage. We never [...] experience the world as such, and then think about it, and then act toward it. We experience a world as we, in some sense, choose to experience it, one that we have already constituted in accordance with our personal aims, interests, and expectations. [...] [B]ecause each person's mental life is uniquely constituted by the particular experiences he or she has, and the particular constellation of interests and expectations he or she brings to those experiences, it follows that the universe of human thought and

action is a pluralistic one.[148]

Acquired knowledge, then, is always derivative or contingent, which is why linguistics teaches that 'the phonetic boundaries of bilingual speakers are never exactly the same as those for corresponding monolinguals'; in other words, the bilingual individual 'never reaches the ideal goal of a new phonological norm'.[149] Ellen Bialystok and Kenji Hakuta thus report on two studies, one concerning 'the structure of address terms in English and Farsi by Iranian learners of English' and the other focussing on 'the structure of English spatial terms for speakers of German and Urdu': 'In both cases, the native language differs from English in its assumptions about what things belong in the same category, so words appear to label different categories. In both cases, the language learners transferred the conceptual organization from their first language to organize the corresponding domain in English, even though it led to subtly incorrect uses of English words. The words were transferred across languages, even though the categories in each case were different'.[150] Accordingly, to what extent is there a basic ability for a national lawyer turned comparatist to deviate from an ingrained cognitive pattern in ways that are creative? Does the fact that 'individual expression takes place within a general idiom' nonetheless allow for a cultural theory that, although robustly determinist in a number of ways, also conceives of agents as active, transformative figures and refutes the total appropriation of human beings by ideology?[151] How realistically can a national lawyer who has assimilated the epistemological assumptions of a legal culture as actively forged and consistently reinforced through an educational system within which he has immersed himself over a number of years come to edge understanding — in the strong sense of the term — closer to the experience of another legal culture?[152] Such is Dan Sperber's argument: '[Y]our understanding of what I am saying is not a reproduction in your mind of my thoughts, but the construction of thoughts of your own which are more or less closely

[148] O. Flanagan, *The Science of the Mind*, 2d ed. (MIT, 1991), pp. 33-35.

[149] Bialystok & Hakuta, *supra*, note 147, p. 16. See also A.L. Becker, *Beyond Translation* (Michigan, 1995), *passim*. For an 'All-American' illustration, see D.R. Hofstadter, *Le Ton beau de Marot* (Bloomsbury, 1997), p. 290: '*Fromage* [...] is irrevocably contaminated by the annoying image of pre-sliced plastic-wrapped orange squares, like it or not'. See generally R. Ellis, *The Study of Second Language Acquisition* (Oxford, 1994), pp. 299-345.

[150] Bialystok & Hakuta, *supra*, note 147, p. 109.

[151] The quotation is from R. Darnton, *The Great Cat Massacre and Other Episodes in French Cultural History* (Allen Lane, 1984), p. 6. *Cf*. H. Miyazaki, 'Insistence and Response', (2014) 20 *Common Knowledge* 518, p. 520: '[A]gency never goes into abeyance'.

[152] I address this issue in P. Legrand, 'Legal Systems in Western Europe: The Limits of Commonality', in R. Jagtenberg, E. Örücü & A. de Roo (eds), *Transfrontier Mobility of Law* (Kluwer, 1995), pp. 75-82.

related to mine'.[153] As Laurence Thomas observes, '[n]o amount of imagination in the world can make it the case that one has the subjective imprimatur of the experiences and memories of another'.[154] In effect, 'there is [...] *always* a remainder, much that I do not understand about the other person's experience and perspective'.[155] Clearly, idealizing descriptions of extensive commonalities and co-operative mutualities supposedly presupposed by human communication obscure epistemological differences amongst verbal agents, not least as regards the significant operation of asymmetrical dynamics between comparatists-as-participant-observers and their interlocutors-as-observed.

I have just deployed the word 'participant'. Since to observe an 'object' (such as a legal culture) is to constitute that 'object' through an infinity of conscious (and not-so-conscious) decisions, a comparatist intervenes in another legal culture as a participant observer. This fact entails that there is always-already a measure of suggestibility in the act of comparison: the comparative enterprise cannot be value-free. For this reason, objectivity — in the sense of what is incontrovertible (and incontrovertibly authoritative) — must stand as a decidedly pernicious epistemology. In brief, 'no one has the epistemological privilege of somehow judging, evaluating, and interpreting the world free from the encumbering interests and engagements of the ongoing relationships themselves'.[156] To suggest otherwise is to divest the observer of his agency, not least all qualitative (including sensuous) features, and to endorse the repudiation of individuality, uniqueness, and passion by positing an abstract equivalence or perfect substitutability amongst diverse consciousnesses.

First, one can never be an observer of oneself as observed. It is impossible to see oneself as other from the perspective of another. The self cannot exist apart from its

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[153] D. Sperber, *Explaining Culture* (Blackwell, 1996), p. 58. For an analogous insight in Pirandello's most famous play, see L. Pirandello, *Sei personaggi in cerca d'autore* (G.D. Bonino, ed.) (Einaudi, 1993 [1921]), p. 110: 'And how can we understand one another, sir, if in the words I speak I put the meaning and the value of things as they are within me, while the one who listens inevitably takes them with the meaning and with the value that he has in himself, the world as he has it inside him. We believe we understand each other; we never understand one another' ['*E come possiamo intenderci, signore, se nelle parole ch'io dico metto il senso e il valore delle cose come sono dentro di me; mentre, chi le ascolta, inevitabilmente le assume col senso e col valore che hanno per sé, del mondo com'egli l'ha dentro? Crediamo d'intenderci; non c'intendiamo mai!*'].

[154] L. Thomas, 'Moral Deference', (1992) 24 *Philosophical Forum* 233, p. 235.

[155] I.M. Young, 'Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought', (1997) 3 *Constellations* 340, pp. 354-55 [my emphasis].

[156] E.W. Said, *Culture and Imperialism* (Knopf, 1993), p. 55. See also I.M. Young, *Justice and the Politics of Difference* (Princeton, 1990), p. 114. The idea of the 'embedded self' is in M.J. Sandel, *Liberalism and the Limits of Justice*, 2d ed. (Cambridge, 1998). See also, *e.g.*, C. Taylor, *Sources of the Self* (Harvard, 1989); A. MacIntyre, *After Virtue*, 3d ed. (Notre Dame, 2007).

forms of understanding, for one always-already understands oneself using the forms of thought that one currently possesses.[157] Secondly, the comparatist's 'own' legal culture is necessarily projected onto another legal configuration: '[A]ny vision of the foreign laws is derived from and shaped by domestic assumptions and bias'.[158] Knowingly or unwittingly, '[t]he foreign law is conceived of as like or unlike, derivative or opposite'.[159] (For example, even allowing for processes of co-operation or imitation, the meaning of the common-law tradition is to be located not only in itself but also in its contrastive disrelations with its oppositional form, the civil law.) In the words of Douglas Hofstadter, 'though you may imagine that you have jumped out of yourself, you never can actually do so'.[160] As a foreigner, one's knowledge of another legal culture is always-already mediated through the meanings constructed in one's own language and legal language. Such mediation can never be effaced, for it must remain one's initial point of contact with another legal culture: the fact that one approaches the foreign culture in a mediated way can *never* be undone or eradicated, no matter how long one eventually lives within the new culture. The comparatist-at-law is simply not endowed with the superhuman ability to dismiss his cultural background at will. Although, in the flux of the instantaneous, this circumstance is likely to elude him, the comparatist is doomed never to escape his past and never to understand another legal reality as it is understood by native members of the legal 'community' under observation, as it is approached by those individuals who were socialized and institutionalized into the law within that legal 'community'. (Observe that I am emphatically not saying that the comparatist can never understand another legal culture, only that his understanding will necessarily differ from that of the native or socialized/institutionalized interpretive 'community', because no understanding of something is identical to the thing of which it purports to be the understanding.) If you will, the 'objectivity' of the comparatist always remains the 'objectivity' of an interpreter — a necessarily situated interpreter — which means, perforce, that it is no objectivity at all. This fact also means that the comparatist-at-law's observations are simply not replicable irrespective of his idiosyncrasies (or, in other words, that comparatists are not freely interchangeable in a way that would not have any impact on the 'object' of study). Thirdly, one is confronted by the fact that there is an aspect of the other, a dimension of otherness, that will always remain impenetrable, a secret,

[157] For an influential discussion of limitations upon critical self-consciousness, see S. Fish, *Doing What Comes Naturally* (Duke, 1989), pp. 436-67.

[158] Frankenberg, *supra*, note 99, p. 443.

[159] *Id*., p. 423.

[160] D.R. Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid* (Basic Books, 1989), p. 698.

from the standpoint of the comparatist.[161] The observer, no matter how much of a participant in the act of observation, is fated ultimately to remain a stranger to the observed: he does not understand the local legal culture as does the observed, he simply cannot replicate these terms of understanding. If you will, the otherness of foreign legal cultures thus remains elusive to him. The comparatist-at-law trying to enter otherness *inside* of thought can only do so as a fictional project: I can only imagine *me* being my friend, and I cannot be my friend.[162] Now, it is precisely because the other is *entitled* to preserve its singularity against appropriation by the self that Edouard Glissant boldly calls for the recognition of a 'right to opacity'.[163]

If the self cannot be suppressed, if it remains, encumbered, and if the other cannot be accessed, if it remains, encrypted, must it not follow that the comparatist can never tell about 'that thing' (that foreign law), but must always have to tell about *his encultured response* to 'that thing' (that foreign law)?[164] Is the comparatist not

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[161] *Cf*. J. Derrida, *Schibboleth* (Galilée, 1986), p. 50: '[T]here is there some secret, in the background, forever shielded from hermeneutic exhaustion' ['*(l)l y a là du secret, en retrait, à jamais soustrait à l'exhaustion herméneutique*'].

[162] *E.g.*: T. Nagel, *Mortal Questions* (Cambridge, 1979), p. 169, where the author distinguishes between 'what it would be like for *me* to behave as a bat behaves' and 'what it is like for a *bat* to be a bat'. *Cf*. Sandel, *supra*, note 156, p. 52: '[N]otwithstanding even the closest similarity of situation, no two persons could ever be said to be identically situated, nor could it be that any two persons had identical aims and interests in every respect, for if they did, it would no longer be clear how we could identify them as two distinguishable persons'.

[163] E. Glissant, *Poétique de la relation* (Gallimard, 1990), p. 204 ['*droit à l'opacité*']. See generally *Id*., pp. 203-09.

[164] R. D'Andrade, 'Moral Models in Anthropology', (1995) 36 *Current Anthropology* 399, p. 399. The situation does not differ in the sciences where, notably after Heisenberg (whose uncertainty principle is said to embody 'a fundamental, *inescapable* property of the world'), the idea that science benefits from an absolutely observational base is no longer tenable. The quotation is from S. Hawking, *A Brief History of Time* (Bantam, 1988), p. 61 [my emphasis]. For a celebrated statement by Erwin Schrödinger regarding science-as-culture, see [E.] Schrödinger, 'Are There Quantum Jumps?', (1952) 3 *British J. Philosophy Science* 109, p. 109: '[T]here is a tendency to forget that all science is bound up with human culture in general, and that scientific findings, even those which at the moment appear the most advanced and esoteric and difficult to grasp, are meaningless outside their cultural contex'. See generally I. Prigogine & I. Stengers, *La Nouvelle alliance* (Gallimard, 1979). For a stimulating exposition of the role of individuality in the process of scientific discovery, see A. Pickering, *The Mangle of Practice* (Chicago, 1995). See also, *e.g*., M. Polanyi, *Personal Knowledge* (Chicago, 1962); Latour & Woolgar, *supra*, note 115; T. Lenoir, *Instituting Science: The Cultural Production of Scientific Disciplines* (Stanford, 1997); J. Golinski, *Making Natural Knowledge* (Cambridge, 1998); S. Harding, *Is Science Multicultural?* (Indiana, 1998). The corpus of literature is enormous. For an excellent summary, see, *e.g*., K. Chemla & E. Fox Keller (eds), *Cultures Without Culturalism: The Making of Scientific Knowledge* (Duke, 2017). The argument for science-as-interpretation is well summarized and cogently illustrated in A. Pickering, 'Science Warriors and Enemies of Reason', *The Times Literary Supplement*, 1 August 1997, pp. 8-9. For a familiar thematization of the cultural pre-understanding informing scientific experimentation with specific reference to the work of the geneticist Samuel G. Morton, see S.J. Gould, *The Mismeasure of Man* (Penguin, 1992), pp. 50-69. Investigations along the lines of science-as-culture have been

confronted with an epistemological *summa differentia*, that is, an irreducible cognitive incommensurability or non-homology across legal cultures envisaged as paradigms or world-views — an interpretive hurdle that, if it does not disable the comparative project, must lead at the very least to comparative legal research being pursued with less jaunty self-assurance (if not, perhaps, with some outright anxiety)? I argue that the common-law *mentalité* is *irreducibly* different from the civil-law *mentalité* as actually found in the diverse states of equilibrium (or different stable solutions) that have developed as instantiations of the all-embracing theme of the Gaian institutional system,[165] so that there is no way to adjudicate amongst the two traditions to establish the correctness of just one of them, for instance, by exposing what would be the flaws at the heart of the other.[166] The two legal traditions are, thus, *incommensurable*. Note that the idea of 'incommensurability' remains compatible with the existence of an overlapping otherness — a fact that rescues comparative law from the closure of the mind that essentialism would otherwise engender. The simple point is that the experience of the strangeness and difference of otherness presupposes its intelligibility. And, in effect, despite the disrelational, or the 'not-relational', interplay of attractions and aversions, legal cultures are never fully individuated. Indeed, 'total unintelligibility of another culture is not an option'.[167]

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extended with a view to supplanting the Cartesian dualism between mind and body. For an analysis of the dynamics linking ideas, on one hand, and the physical characteristics and private habits of the individuals having produced these ideas, on the other, see C. Lawrence & S. Shapin (eds), *Science Incarnate* (Chicago, 1998), who show how dedication to knowledge is inscribed in the body with consequences for personal authority and the creditability of one's scientific work. The basic connection between 'culture' and the human body had previously been noted by anthropologist Bronislaw Malinowski: B. Malinowski, *A Scientific Theory of Culture* (University of North Carolina, 1944), p. 171: '[E]very culture must satisfy the biological system of needs'.

[165] See *The Institutes of Gaius* (W.M. Gordon & O.F. Robinson, transl. from Latin) (Duckworth, 1988). For a well-known overview of the impact of Gaius's systematics, see D.R. Kelley, 'Gaius Noster: Substructures of Western Social Thought', (1979) 84 *Am. Historical R.* 619. See also P. Stein, 'The Development of the Institutional System', in P.G. Stein & A.D.E. Lewis (eds), *Studies in Justinian's Institutes in Memory of J.A.C. Thomas* (Sweet & Maxwell, 1983), pp. 151-63; K. Luig, 'The Institutes of National Law in the Seventeenth and Eighteenth Centuries', [1972] *Juridical R.* 193; A. Watson, 'The Importance of "Nutshells"', (1994) 42 *Am. J. Comp. L.* 1. The epistemological predilections traceable to Gaius transcend the fact that the civil-law world can largely be organized into two sub-groups depending on whether codification (where it has obtained) was perceived 'as the taming of the power of the jurists by democracy' or envisaged 'as the convenient summation of the jurists' doctrines': Unger, *supra*, note 110, p. 39. For treatments of systemics in Roman law, see generally F. Schulz, *Prinzipien des römischen Rechts* (Duncker & Humblot, 1934), pp. 27-56; F. Wieacker, *Römische Rechtsgeschichte*, vol. I (Beck, 1988), pp. 618-39; W. Wolodkiewicz, *Les Origines romaines de la systématique du droit civil contemporain* (Ossolineum, 1978). *Cf*. H. Goudy, *Trichotomy in Roman Law* (Oxford, 1910).

[166] In Jean-François Lyotard's language, there is a 'differend' across legal traditions: J.-F. Lyotard, *Le Différend* (Editions de Minuit, 1984).

[167] C. Taylor, 'A Gadamerian View on Conceptual Schemes', in S. Glanert & F. Girard (eds), *Law's Hermeneutics: Other Investigations* (Routledge, 2017), p. 43.

Incommensurability thus accords with valid and insightful external perspectives upon the foreign including moral judgments to the effect that particular cultural traits are either praiseworthy or deserving of reproach. Indeed, it is not the case that understanding from within (or immanent intelligibility) is necessarily superior to a perspective come from elsewhere, or that the intelligibility of something in and through itself inevitably proves 'better than' the intelligibility of something through something else. (*Quaere*: Can the local account be regarded as 'privileged' vis-à-vis an exotopic understanding on the part of the observer, which would mean that it would not simply be an account amongst many?) In fact, both perspectives are partial and, to this extent, defective — if inevitably so. Arguably, though, external perspectives will find it easier to give a voice to minority discourses operating at the margins of the experience of law being studied, that is, they will prove readier to assume a critical stance vis-à-vis the law under examination.[168]

I maintain, therefore, that a German professor of constitutional law — say, Professor Dr Schmidt — cannot understand the U.S. constitutional experience in an identical way as a colleague born and raised in the United States — say, Professor Smith — who was made to pledge allegiance to the flag in primary school and at summer camp, who majored in history and political science at an East Coast, and who then attended law school in the Mid-West. In my view, Professor Smith's U.S. upbringing — his socialization — and his law studies — his institutionalization — play an important role in the appreciation that he will have of U.S. constitutional law as a U.S. professor of constitutional law. So do other rituals such as the singing of the national anthem through countless iterations over the years, for instance.[169] These events, and many

[168] But see E.J. Weinrib, *The Idea of Private Law* (Harvard, 1995), pp. 22-55. There is a range of rewarding reflections, some of them sceptical, on the theme of incommensurability. *E.g.*: I. Berlin, '"From Hope and Fear Set Free"', in *The Proper Study of Mankind* (H. Hardy & R. Hausheer, eds) (Chatto & Windus, 1997 [1964]), pp. 91-118; C. Taylor, 'The Diversity of Goods', in *Philosophy and the Human Sciences*, vol. II (Cambridge, 1985 [1982]), pp. 230-47; R.J. Bernstein, *The New Constellation* (Polity, 1991), pp. 65-66; B. Williams, *Moral Luck* (Cambridge, 1981), pp. 71-82; J. Raz, *The Morality of Freedom* (Oxford, 1986), pp. 321-66; J. Kekes, *The Morality of Pluralism* (Princeton, 1993), pp. 53-75; J. Griffin, *Well-Being* (Oxford, 1986), pp. 75-92; D. Davidson, *Inquiries into Truth and Interpretation* (Oxford, 1984), pp. 183-98. *Cf*. R. Chang (ed.), *Incommensurability, Incomparability, and Practical Reason* (Harvard, 1997). Chang's book, however, explicitly excludes the matter of incommensurability across cultures from its purview. See *Id*., p. 1.

[169] For innovative reflections by U.S. scholars around the idea of constitution-worship (broadly understood) in the United States, see, *e.g*., T.C. Grey, 'The Constitution As Scripture', (1984) 37 *Stanford L.R.* 1; M. Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (Knopf, 1987); S. Levinson, *Constitutional Faith* (Princeton, 1988); A.R. Amar, *America's Constitution: A Biography* (Random House, 2006); J.M. Balkin, *Constitutional Redemption* (Harvard, 2011); M.A. Franks, *The Cult of the Constitution* (Stanford, 2019). In the words of Henry Monaghan, writing as a U.S. law professor with specific reference to the United States, '[t]he practice of "constitution worship" has

others like them, simply cannot be internalized from outside of the U.S. configuration. Either one has lived them — and, for this to have happened, one needs to have been an individual embedded in the U.S. experience in the United States — or one has not. The fact that the German constitutional law professor may have been visiting for thirty years at a U.S. law school can never be enough to recapture the episodes that I have in mind — such as one's summer-camp, college, or law-school years — which inevitably and indelibly anchor a wide range of affective and cognitive attitudes that determine later exercises in ascription of meaning. Because these experiences cannot be had by the German professor and since they necessarily influence an apprehension of the significance of the U.S. constitution in U.S. society, Professor Dr Schmidt's understanding of U.S. constitutional law is bound to differ from Professor Smith's. (Of course, in order to accept this contention one must be prepared to acknowledge the threshold assumption that there is a connection between the practices of the law and cultural practices in general — which, frankly, it would be somewhat implausible to deny.[170]) By way of illustration, let me quote Andrew Koppelman's pithy observations

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been quite solidly ingrained in our political culture from the beginning of our constitutional history': H.P. Monaghan, 'Our Perfect Constitution', (1981) 56 *New York U. L.R*. 353, p. 356.

[170] *E.g*.: R.W. Gordon, 'Critical Legal Histories', (1984) 36 *Stanford L.R.* 57, p. 90: 'I find it very hard to believe that autonomous legal forms are best understood as the product of a culturally isolated tribe of beings. Would any society tolerate lawyers as mediators of disputes, practical problem-solvers, or instruments of legitimate rule if the lawyers' practices didn't resonate *at all* with anyone else's? It seems much more probable that the specific legal practices of a culture are simply dialects of a parent social speech and that studying the speech helps you understand the dialect and vice-versa. Even a legal system clotted with arcane technicalities is unlikely to depart drastically from the common stock of understanding in the surrounding culture' [emphasis original]. Peculiar as his views may appear, the late Alan Watson long maintained that 'legal change […] is independent of a particular time and place' (A. Watson, *The Evolution of Law* [Johns Hopkins, 1985], p. ix); that 'to a considerable extent law in most places at most times does not progress in a […] responsive way' (A. Watson, *Society and Legal Change*, 2d ed. [Temple, 2001], p. 5) [hereinafter *Society*]; and, specifically, that 'in the West rules of private law have been and are in large measure out of step with the needs and desires of society' (*Id*., p. [xviii]). In sum, 'law is out of step with the society in which it operates': A. Watson, *Law Out of Context* (Georgia, 2000), p. 167. In an unduly charitable assessment of Watson's work, William Ewald remarks that 'in attempting to limit the link between law and society, one must consider how laws originate, how they evolve, and how they differ from society to society; and this can only be done by detailed comparative studies' (Ewald, *supra*, note 14, p. 510) — none of which Watson has attempted. For compelling critiques of Watson with specific reference to the dynamics between law and society, see O. Kahn-Freund, 'On Uses and Misuses of Comparative Law', (1972) 37 *Modern L.R.* 1; R.L. Abel, 'Law As Lag: Inertia As a Social Theory of Law', (1982) 80 *Michigan L.R.* 785. Endorsing Otto Kahn-Freund's argument, Eric Stein points to the significance of 'how […] rules operate as "living law"': E. Stein, 'Uses, Misuses — and Nonuses of Comparative Law', (1977) 72 *Northwestern U. L.R*. 198, p. 209. I have staked my own, strongly 'anti-Watson' position in P. Legrand, 'The Impossibility of "Legal Transplants"', (1997) 4 *Maastricht J. Euro & Comp. L.* 111. Note that Gordon, Kahn-Freund, and Abel (and I) do not maintain that law mirrors or reflects society, which is a claim as problematic as Watson's superficial argument. Unaccountably, Watson himself occasionally embraces the 'reflection' line of reasoning. *E.g*.: Watson, *Society*, *supra*, pp. 4 & 131. Watson's incoherence is the leitmotiv in Ewald, *supra*, note 14. Meanwhile, those who happen to be interested in hagiography — or, rather, Hagiography — can safely turn to John

regarding originalism, a leading U.S. doctrine of constitutional interpretation: 'Originalism is a manifestation of American exceptionalism. […] Many originalists claim that interpretation just *is* recovery of original meaning, that nothing else could count as interpretation. They think that because they are Americans'.[171] Koppelman proceeds to address 'America's tendency to lionize its founders, [the] Constitution's revolutionary origins, […] assimilationist tendencies in American identity, and the fundamentalist elements of American religion'.[172]

In my example, Professor Dr Schmidt can never be other than a German man who was born and raised in Germany, who received his legal education in Germany, who assimilated the narrative and mythology (including the epistemological assumptions) of the civil-law tradition as mediated by the German legal/cultural model of education. Although one must admit that there is a basic ability to deviate from an ingrained cognitive pattern in ways that are creative,[173] Herr Schmidt can never fully un-learn the totality of his German upbringing and of his German legal education. He can never do away with the entirety of his cultural impedimenta. Herr Schmidt can, therefore, never become a U.S. law professor who was born and raised in the United States and went to a U.S. law school to become equipped with the cultural inventory of a U.S. lawyer, that is, to assimilate the narrative and mythology of the common-law tradition as relayed by the U.S. legal/cultural education system. Herr Schmidt's knowledge of U.S. law is mediated: it is superimposed upon a cultural background that is not of the United States. As a result, his outlook is ascertainably different from a local U.S. outlook. He will always perceive U.S. law as a German who was socialized and institutionalized into the law in Germany. Professor Dr Schmidt simply cannot extirpate those empirical facts and their consequences from his legal/cultural

Cairns's 'Ode to Alan' in J.W. Cairns, 'Watson, Walton, and the History of Legal Transplants', (2013) 41 *Georgia J. Int'l & Comp. L.* 637.

[171] A. Koppelman, 'Originalism, Abortion, and the Thirteenth Amendment', (2012) 112 *Columbia L.R.* 1917, p. 1920.

[172] *Ibid*. This enumeration expressly draws on J. Greene, 'On the Origins of Originalism', (2009) 88 *Texas L.R.* 1. *Cf*. Franks, *supra*, note 169, who investigates what she styles 'constitutional fundamentalism': *Id*., *passim*.

[173] *Cf.* W.R. Everdell, *The First Moderns* (Chicago, 1997), where the author, focusing on the period from 1899 to 1913, illustrates the emergence of ideas like 'recursion', 'radical subjectivity', 'multi-perspectivism', 'stochasticism', and 'ontological discontinuity' through narratives devoted to individuals who, although raised and accultured within a particular constellation of ideas, became able to think in a different way than the one that had been presented to them and into which they had been socialized. Examples of persons offering what William Everdell regards as disjunctive thought include Freud, Husserl, Strindberg, Kandinsky, Bohr, and a few other such luminaries.

persona: he cannot step outside of himself.[174]

Although a German jurist hailing from the German legal/cultural system cannot have an unmediated experience of U.S. law, I accept the practical point, lest I be held in contempt of common sense, that it is nonetheless possible for a 'concordance' of views to arise between a German and a U.S. lawyer — for their positions to be, if you will, 'common enough'. Herr Schmidt can have an appreciation — possibly, a rich appreciation if he has been in the United States for many years, has worked hard to consolidate his knowledge of U.S. legal culture, has shown sensitivity to the U.S. experience of law, and has steadfastly strived to master the U.S. legal/cultural complex and a wide range of the many nuances that inevitably characterize it. Assuming basic erudition, Herr Schmidt and his U.S. counterpart can evidently come not-together and claim that they have reached a not-strictly-common appreciation with respect to something that is the focus of their joint appreciation.[175] (Likewise, if I say: 'This table is red', and you reply: 'Indeed, this table is red', we 'understand' each other. However, because intelligibility is but translatability into one's own language, you do not know what I mean by 'red', and I do not know what you mean by 'red'. And it is easy to imagine situations where our interpretations of 'red' would differ so that I would feel bound to refute your assertion.) Jacques Derrida's sophisticated insight is apt: '[W]e know in common that we have nothing in common'.[176] Even if I agreed, *concessio* firmly *non dato*, on the possibility of an authentic common denominator (that is, an element with respect to which appreciation could be discernibly identical between Herr Schmidt and his U.S. colleague), the fact that Herr Schmidt had pierced the veil in one place would leave him with nothing less than an infinity of rules, concepts, doctrines, categories, precedents, and institutions to probe. In other words, an extraordinarily (indeed, impossibly) extensive and intricate web of narrative and mythology would yet have to be conquered. And my point is that there will be, irreducibly, a remainder, that the U.S. model will obstinately keep a secret, if

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[174] A U.S. lawyer trying to ascribe meaning to Japanese law makes this claim at once succinctly and vividly: 'I realized very quickly that understanding the Japanese legal system from outside of Japanese traditions and culture was nearly impossible': F.S. Ravitch, 'The Continued Relevance of Philosophical Hermeneutics in Legal Thought', in B.G. Slocum (ed.), *The Nature of Legal Interpretation* (Chicago, 2017), pp. 94-95. Presumably, any number of jurists finding themselves in the midst of a foreign law would readily concur with Frank Ravitch (or with me!). And then, there is the champion of the three-month rule! See *NCL*, *supra*, ch. XVI, p. 00.

[175] Otherwise, 'we should scarcely be able to understand Homer or Herodotus as, at least to some extent, we claim to be able to do, in spite of the fact that they wrote about societies widely different from our own': I. Berlin, 'Is a Philosophy of History Possible?', in Y. Yovel (ed.), *Philosophy of History and Action* (Reidel, 1978), p. 222.

[176] J. Derrida & M. Ferraris, *Le Goût du secret* (A. Bellantone & A. Cohen, eds) (Hermann, 2018† [1994]), p. 71 ['*(N)ous savons en commun que nous n'avons rien en commun*']. The words are Derrida's.

only one secret, from Professor Dr Schmidt. To be sure, these conclusions do not detract from the empirical fact that communication across legal cultures can be pragmatically sufficient without meanings being identical — and that it is shown to be, every day.

I am not contesting the existence of important legal/cultural differences between jurisdictions within the civil-law tradition itself, say, between France and Germany or between countries belonging to the common-law tradition, such as New Zealand and England. Of course, it is also the case that there can be found potentially important legal/cultural differences within a single country, for example, between Northern and Southern Italy or between California and Connecticut — not to mention the differences between family-law and criminal-law lawyers in Marseille. Yet, ultimately all jurisdictions within a legal tradition abide by one basic narrative, mythology, and rationality. The epistemological distinctions arising within legal traditions are therefore not cardinal in the sense in which there can be found a primordial difference between the civil-law and common-law worlds, which exist *contrapuntally* to each other.[177] As the common law promotes an idiographic trajectory to legal knowledge, the civil-law advocates a nomothetic configuration of the legal — an ontological difference that effectuates two thoroughly conflicting visions or two irresolutely rival constructions of life-in-the-law.[178]

Notwithstanding the intersections that have punctuated the incessant negotiations between these two legal traditions, they are immediately recognizable as discrete and

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[177] *E.g.*: O. Kahn-Freund, 'Common Law and Civil Law — Imaginary and Real Obstacles to Assimilation', in M. Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (Sijthoff, 1978), p. 138: 'There is [...] as between common and civil law countries, a difference [...] which has no equivalent in the differences between any common or civil law countries *inter se*'. See also H. Lévy-Ullmann, *Comment un Français d'aujourd'hui peut-il aborder utilement l'étude du droit anglais et du droit anglo-américain* (L.G.D.J., 1919), p. 11: 'Within English law, [we, French jurists,] we are not at home; *we do not feel at home* as we always feel a little at home in all laws, even though foreign, that have been subjected to the discipline of Roman law' ['*Dans le droit anglais, (...) nous ne sommes pas chez nous,* nous ne nous sentons pas chez nous*, comme nous nous sentons toujours un peu chez nous dans tous les droits, même étrangers, qui ont subi la discipline du droit romain*']. *Adde*: V. Arangio-Ruiz, *Istituzioni di diritto romano*, 14th ed. (Jovene, repr. 1980 [1960]), pp. 4-5.

[178] See generally P. Legrand, 'European Legal Systems Are Not Converging', (1996) 45 *Int'l & Comp. L. Q.* 52; P. Legrand, 'Are Civilians Educable?', (1998) 18 *Legal Studies* 216; P. Legrand, 'Uniformity, Legal Traditions, and Law's Limits', [1996] *Juridisk Tidskrift* 306. See also P. Legrand, *Pour la relevance des droits étrangers* (I.R.J. Sorbonne Editions, 2014), pp. 169-240. For illuminating contrasts between the two traditions, some of them 'classic', see, *e.g.*, M. Weber, *Wirtschaft und Gesellschaft*, 5th ed. (J. Winckelmann, ed.), vol. II (Mohr Siebeck, 1976 [1922†]), pp. 456-67; Merryman, *supra*, note 93; O. Kahn-Freund, 'Introduction', in *The Institutions of Private Law by Karl Renner* (O. Kahn-Freund, ed.; A. Schwarzschild, transl.) (Routledge & Kegan Paul, 1949 [1929]), pp. 8-16; A.A. Ehrenzweig, *Psychoanalytic Jurisprudence* (Sijthoff, 1971), pp. 109-41; G. Samuel, *Epistemology and Method in Law* (Ashgate, 2003).

stable discursive formations inviting meaningful reference to them as distinctive epistemological clusters and permitting the comparatist-at-law to dismiss the charge that he is fabricating a reductionist differentiation. Perhaps an analogy can assist the refutation of the view that the identification of two legal traditions is but the outcome of a theoretical construction. Suppose that I have in front of me this morning's editions of *The Guardian* and of the *Frankfurter Allgemeine Zeitung*. Assume, further, that I choose to focus on the main article on page three in each newspaper, and that I decide to consider every fifth sentence within that article. I will soon be identifying what I will regard as regularities or patterns with respect, for instance, to the capitalization of nouns and the location of verbs within sentences. I will also conclude that, as far as these two grammatical features are concerned, the two newspapers (or, rather, the languages they use) differ. In a sense, of course, I am constructing these differences, for they are based on my understanding of what a capital letter, a noun, and a verb are. Yet, these differences must also be acknowledged to exist before I ever come to them and pretend to elucidate them. In other words, the differences must be assumed to be there even before my perceptual or interpretive apparatus is engaged. (Thus, Columbus 'discovers' America, which is already there.) Specifically, words in the English and German languages are arranged in a certain order in advance of when I come to them with my view of what 'order' is, that is, even before I purport to incorporate them into my cognitive world. While the differences may need me to come to interpretive light and to come to light as part of a particular interpretation, they do not require me to exist. *Is there not noise when a tree falls in the forest without anyone there to hear it?* The analogy holds as regards the differences between the civil-law and common-law traditions. Before the comparatist ever comes to the study of legal traditions, there are centuries of history that have, independently from his construction, produced epistemological differences between the civil-law and common-law traditions that are as recognizable as those between the German and English grammars. *One easily knows that one is teaching law in Paris rather than in London*.

While the common law's approach to inclusiveness is to add the new item to an aggregation, the civil law subsumes it under a higher level of abstraction — two processes that exemplify the distinction between ratiocination and rationalization.[179] In the absence of shared epistemological premisses linked to the lack of common foundational texts,[180] the two forms of moral inquiry characteristic of the civil-law and

[179] R. Stone, 'Ratiocination Not Rationalisation', (1965) 74 *Mind* 463.

[180] For a thoughtful argument to the effect that commonalities across traditions (and languages) depend upon the existence of 'an aggregate of remembered and half-remembered prior texts', see Becker, *supra*, note 149, p. 286.

common-law worlds — understood here as inherently defensible ways of organizing one's place in the moral universe through commitments to standards of reference and reasoning, to sets of coherences and correspondences affording at once defensive and aggressive strategies, to structures of intelligibility, and to mythological concatenations — cannot engage in an exchange that would lead one to a thick or deep understanding of the other in the other's terms.[181]

The absence of cognitive commensurability is not modified by the fact that judicial decisions have assumed greater prominence in civil-law jurisdictions or that legislative texts have multiplied in the common-law world. Even leaving to one side the obvious (and most significant) fact that there is always a strong sense in which the civil-law judge remains *external* to the law, a 'case' will never carry a common cognitive meaning for a German or Spanish jurist as it does, say, for an English lawyer (of course, it does not carry a common meaning for German and Spanish jurists either...). A judicial decision in England textualizes aspects of Englishness, which themselves partake of an intricate construct involving a sense of national, religious, linguistic, and geographic identity. Only if one refuses to see a case as a quasi-encyclopaedic cultural formation transporting cultural accretions (not least epistemological traces), and only if one adopts a desultory instrumental view of the law leading one to draw nice clear lines between 'purely legal' questions and, say, political, religious, or social issues, can one find evidence of a trend towards convergence of legal traditions on the ground, say, of the institutional role of judicial decisions. (Thus, Tim Murphy perspicaciously observes that even the Constitution of the United States and its Amendments — the so-called 'Bill of Rights', for example — are 'essentially written in the common law style' in the sense that 'they take the form of particularistic provisions aimed less at giving fixed and unalterable textual expression to the dictates of a general reason and more at defining a set of limitations, rather like those of a property settlement. [...] Neither in textual form nor in its modes of genesis [a]re these documents which should necessarily derail the tradition'.[182])

In the way in which the civil-law and common-law minds capture two modes of experiencing or living in the world, even the most sophisticated comparative analysis will fail to cross epistemological boundaries between the two traditions. Rather, the

[181] For an introduction to the civil-law and common-law traditions as *moralités*, see P. Legrand, 'Against a European Civil Code', (1997) 60 *Modern L.R.* 44, pp. 47-48, where the argument builds on the work of Michael Oakeshott as this philosopher explores what he regards as the two forms of moral life that constitute the occidental world. *Cf.* Ewald, *supra*, note 15, p. 1949, who offers a conception of legal thought as 'applied moral philosophy'.

[182] T. Murphy, *The Oldest Social Science?* (Oxford, 1997), p. 98.

more the responsible comparatist, himself situated within a legal tradition, understands about another legal culture in another legal tradition, the more he will understand that there is much that he does not and *cannot* understand about that legal tradition, that is, the more he will be responsive to the *illusion* of understanding (and, one fervently hopes, to the dangers attendant upon imagined understanding).[183] Ultimately, what a rich comparative analysis can yield is more understanding than the average study will allow of the other's traditionary singularity. In Samuel Beckett's words, it can '[f]ail better'.[184] (*Quaere*: Is there not a direct correlation between comparative refinement and epistemic modesty?) Synchronic limitations on meaning thus appear as inevitable as diachronic limitations on understanding. While Isaiah Berlin is right to remind us that insights remain possible,[185] '[t]here is a sense in which *The Merchant of Venice* is for us unreadable, so different is the meaning of "Jew" to Shakespeare and to us'.[186]

There is more. Whatever the barriers to the validity of direct 'knowledge' of the other's law and of the other-in-the-law, they are less than the difficulties engendered by indirect, or derivative, perception. Has the earnest comparatist defined concrete ways in which he will privilege involvement and enmeshment within a legal 'community' rather than apartness and withdrawal from it? Only through a prolonged and versatile experiential presence — *not* captured by even repeated and extended visits to the local law library — can one meaningfully develop the type of significant 'knowledge' about a legal culture that will confer creditability to the comparative enterprise and to the subsequent re-presentation of it arising, in all likelihood in writing, from that venture.[187] The relevance of fieldwork is not in doubt for

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[183] *Supra*, text at note 153. *Cf.* J. Piaget, *Le Langage et la pensée chez l'enfant*, 10th ed. (Delachaux & Niestlé, 1997 [1923]), p. 113: 'If children understand one another badly, it is that they believe to be understanding one another' ['*Si les enfants se comprennent mal entre eux, c'est qu'ils croient se comprendre*'].

[184] S. Beckett, *Worstward Ho*, in *Company/Ill Seen Ill Said/Worstward Ho/Stirrings Still* (D. Van Hulle, ed.) (Faber, 2009 [1983]), p. 81.

[185] *Supra*, note 175.

[186] J.B. White, 'Law As Language: Reading Law and Reading Literature', (1982) 60 *Texas L.R.* 415, p. 427. *Cf*. J.D. Wilson, *What Happens in* Hamlet, 3d ed. (Cambridge, 1951), pp. 26-27: 'A hundred years hence [...] readers or spectators of Edwardian plays like *Major Barbara* and *The Voysey Inheritance* will unconsciously miss a great deal through their inability to understand, or even to realise their failure to understand, the economic facts which Bernard Shaw and Granville-Barker assumed but never spoke of because they knew their audience would assume them likewise'.

[187] I regard as seriously misleading the suggestion that '[f]or the small investment of three or four evenings spent reading [two books, the first on ancient Chinese law and the second on Tibetan law], one will painlessly achieve expertise in the emergence of Chinese written law and the final flourishing of Buddhist law at state level': A. Huxley, 'Golden Yoke, Silken Text', (1997) 106 *Yale L.J.* 1885, p. 1951. I find it difficult to reconcile this superficial and disheartening comment — which strikes me as being

anthropologists: '[T]o find out about man, you must go among men. There is no other way. It is perhaps the most important contribution anthropology has made to science, this simple idea'.[188] In this regard, comparative law needs to acknowledge that to characterize direct experience as the source of the comparatist's factual 'knowledge' does not eliminate the ineradicable role of reliance upon testimony, no matter how invisible the phenomenon. The empirical fact of the matter is that the comparatist can only have access to the *correlation* between his mind and foreign law — which means that he cannot access his mind, but also that he is unable to access foreign law in itself. In other words, the foreign cannot be thought without an interpreter, and no comparatist is able to conceive of a foreign law that is separable from a comparatist's apprehension of it. Even though the prevailing understanding of fieldwork is hardly static, and technological advances have had a considerable impact on 'how we research, write, disseminate, and receive our work',[189] the basic cognitive limitations that I indicate stand.

These observations raise another concern in their turn, which is that the making of much of a comparatist's factical 'knowledge' about foreign legal culture readily depends on his appreciation of the views of individuals whom he is willing to regard as local experts — although it is often not clear how he judges a local author to be a reliable source of knowledge in an area in which he himself, being from elsewhere, cannot act as an authoritative source of knowledge in his own right. It is rare indeed that the comparatist will pursue the chain of authority very far. In his urge to use information rather than verify it, he will usually fail to seek a 'first knower', that is, he

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even worse than the 'three-month rule' (see *NCL*, *supra*, ch. XVI, pp. 00) — with a number of insightful theoretical observations made by the author earlier in his essay (see, *e.g.*, *Id.*, pp. 1923-37).

[188] J.F. Downs, *Human Nature: An Introduction to Cultural Anthropology* (Glencoe, 1973), p. 322. For a useful description of the contemporary relevance of fieldwork within anthropological studies, see R.A. Barrett, *Culture and Conduct,* 2d ed. (Wadsworth, 1991), p. 3: 'Those who intend to become members of the profession are expected to live for a year or more with some people until they have a satisfactory understanding of their society and culture, or at least of the facets of their way of life that they deem worthy of detailed investigation. This is what anthropologists term *fieldwork*, and it is without doubt the outstanding characteristic of the discipline; much that is valuable and distinctive in anthropology derives from the tradition of original fieldwork. When anthropologists write about a people, it is with the assuredness that comes from intimate association. They have learned their language, participated in the humdrum daily round, eaten their food, observed their ceremonies, and, normally, established lifelong friendships. They are not merely outside observers of a foreign way of life. They have made an effort, albeit temporary, to accommodate themselves to that way of life and to gain understanding from the experience. […] [G]raduate departments of anthropology typically make fieldwork a condition for granting the doctoral degree. Only under special circumstances are Ph.D. candidates allowed to write "library" dissertations, that is, those based on information collected by others. But perhaps the principal reason that there are so few who have not undertaken fieldwork is that they bear a stigma within the discipline'.

[189] C. Kelty *et al*., 'Collaboration, Coordination, and Composition: Fieldwork After the Internet', in J.D. Faubion & G.E. Marcus (eds), *Fieldwork Is Not What It Used To Be* (Cornell, 2009), p. 185.

will *satisfice*. However, if the comparatist's 'knowledge' of a given legal 'community' is therefore a function of a prior allocation of trust on his part — the fiduciary element being itself the result of a general creditability assessment — and, consequently, of an assumption regarding the reliability of an entire reservoir of background knowledge about the legal culture under observation issuing from a narrator whose competence is presumed, the conservatism that appears integral to a process of 'knowledge'-making that relies in large part on loyal derivation from communications by others must call for close examination by comparative law. What circumstances attest to the accreditation of a given individual acting as a source of information in the eyes of a given comparatist? Do these circumstances involve the membership of the individual in a certain collectivity? Do they include the enjoyment by that individual of a certain status within his 'community'? Is the individual regarded as representative of a certain type of jurist (the leading textbook-writer, the subversive voice)? What are the probable outcomes of expressions of assent to 'knowledge'-claims by certain individuals rather than others (say, to the leading textbook-writer instead of to the subversive voice)?[190] More generally, what are the dangers associated with the development of the comparatist's own warrant through the screen of received ideas such as are found in doxological statements — treatises, hornbooks, and the like — offering themselves as attested pronouncements while inevitably engaging in denial, exclusion, and distortion of real experiences of law (safely) relegated to the periphery of the legal 'community' (and, indeed, locked away from its core)?[191] I argue that the comparatist must be more forthcoming with respect to the dynamics of authority and knowledge that are concealed in information that he readily re-presents as dependable, often by way of simplification — not least through the elimination of any reference to the particular circumstances of its provenance, consolidation, and reiteration. The fact that so much information is personally uninvestigated indeed compels one to ask whether one ought not to be talking about the comparatist holding *beliefs* with respect to the information that he has come to value as regards a foreign legal culture. At any rate, it should be obvious that the comparatist acquires information about foreignness in an adventitious and messy agglomeration of ways.

Such remarks call to mind a passage from Harriet Martineau's *How to Observe*

[190] I draw on S. Schapin, *A Social History of Truth* (Chicago, 1994), pp. 3-41.

[191] In this respect, it must be borne in mind that a 'treatise' does not carry the same implications across legal 'communities'. For example, it would be a mistake to understand U.S. treatises to signify the same thing as European books bearing analogous titles. In fact, U.S. authors themselves do not mean their treatises to be complete and authoritative in the way that European authors do. *E.g.*: M.A. Glendon, *Rights Talk* (Free Press, 1991), p. 169.

Manners and Morals, acknowledged as a pioneering investigation of sociological strategy. Martineau holds that decisions regarding the articulation of the materials demand to be gained and deployed 'before the student possesses the requisites for understanding what he contemplates'.[192] For instance, how does the comparatist define the relevant epistemological units with reference to the focus of his research in advance of ascertaining the 'object' of research itself? Indeed, how can one engage in one's research without knowing what one is striving to elucidate, that is, without an understanding of the relevant epistemological units? And how can the comparatist surmount the limitations arising from the prevalence of certain epistemological units in his own law? (Consider the case of the comparatist issuing from a 'community' where 'old' judicial decisions carry little or no value and wishing to study a foreign legal culture where such decisions play an important role.) Yet, the authors of the dominant text within the field of comparative law proclaim, with questionable peremptoriness, that functionalism is '[t]he basic methodological principle of all comparative law'.[193] Curiously, various academics in various jurisdictions have given their seemingly unqualified adhesion to this act of faith, their allegiance however taking the form of an affirmation devoid of the rigorous argumentation that one might expect.[194] Now, it can only be described as simplistic to regard configurations from different legal cultures as being common merely on account of the fact that they perform a similar (subjectively ascribed) function.

Functional analysis has undoubtedly become unduly attractive as a variance reducer: it 'has no eye and no sensitivity for what is not formalized and not regulated under a given legal regime'.[195] Crucially, it lacks a critical vocation because it betrays a fundamentally technical perspective accounting for a view of comparative law as

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[192] H. Martineau, *How to Observe Morals and* Manners (M.R. Hill, ed.) (Transaction, repr. 1989 [1838]), p. 13.

[193] Zweigert & Kötz, *supra*, note 81, p. 33 ['*(d)as methodologische Grundprinzip der gesamten Rechtsvergleichung*'].

[194] *E.g.*: M.A. Glendon, P.G. Carozza & C.B. Picker, *Comparative Legal Traditions*, 4th ed. (West, 2014), pp. 17-18; L.M. Friedman & G. Teubner, 'Legal Education and Legal Integration: European Hopes and American Experience', in M. Cappelletti, M. Seccombe & J. Weiler (eds), *Integration Through Law*, vol. I/3 (De Gruyter, 1986), pp. 370-80; M. Ancel, *Utilité et méthodes du droit comparé* (Ides & Calendes, 1971), pp. 101-03; F.J.M. Feldbrugge, 'Sociological Research Methods and Comparative Law', in M. Rotondi (ed.), *Inchieste di diritto comparato*, vol. II (Cedam, 1973), pp. 211-24; M. Bogdan, *Comparative Law* (Kluwer, 1994), p. 60. Vicki Jackson calls functionalism 'appealing and seductive': V.C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford, 2010), p. 182. For earlier advocacy, see, *e.g.*, M. Rheinstein, 'Teaching Comparative Law', (1937-38) 5 *U. Chicago L.R*. 615, pp. 617-19; J. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (Mohr, 1956), *passim*. For general discussion, see, *e.g.*, M. Graziadei, 'The Functionalist Heritage', in P. Legrand & R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge, 2003), pp. 100-27.

[195] Frankenberg, *supra*, note 99, p. 438.

essentially utilitarian.[196] Functionalism offers a variation on the theme of formalization, which itself can only prevail if one is prepared to discard the concrete contents of experiences and values — if one is willing, that is, to disregard the fact that law, any law, exists of the world and in the world, that it is inherently *worldly*. In other terms, functionalism is a mechanistic theory that says nothing about understanding. Indeed, it appears as the perfect vindication of Hans-Georg Gadamer's claim to the effect that the use of a method entails a 'deformation' of knowledge.[197] Functionalism represents 'a scientific extrapolation and abstract accentuation of *one aspect* of a phenomenon, for the sole reason that it has been thought through *in this form*'.[198] Accordingly, 'the functionalist focus on the law's practical consequences neglects much of what might profitably be included as the object of comparative research'.[199] Alan Hunt's conclusion follows: '[T]he universalism claimed by functionalism is an unsupported assertion which carries the dangerous implication of being likely to result in the misleading imposition of uniformity upon the diversity of social reality'.[200] In sum, comparatists-at-law must break from the 'charmed circle' of functional inquiry.[201] Let me take this exhortation one important step further and repeat that comparatists must emancipate oneself from the hold of method altogether.[202] It may be that Paul Feyerabend's anarchistic methodological agenda is not seductive political philosophy — a point that the philosopher of science actually concedes — but it is 'certainly excellent medicine for epistemology'.[203]

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[196] See Hill, *supra*, note 89, pp. 106-07.

[197] H.-G. Gadamer, *Wahrheit und Methode*, 5th ed. (Mohr Siebeck, 1986), p. 306 ['*Deformation*'].

[198] K. Mannheim, *Ideology and Utopia* (L. Wirth & E. Shils, transl.) (Harcourt Brace Jovanovich, 1936), p. 19 [my emphasis]. The English text that Mannheim released after he had settled in England upon fleeing Nazi Germany varies substantially from the 1929 German version. See also M.B. Hooker, *Legal Pluralism* (Oxford, 1975), p. 42: '[A] demonstration in similarity in function [...] does not necessarily imply the same supporting epistemology'.

[199] R. Hyland, 'Comparative Law', in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 1996), p. 188. For a general critique of functionalism, see R. Hyland, *Gifts* (Oxford, 2009), pp. 63-104. Indeed, Richard Hyland roundly pronounces functionalism to be 'incompatible' with comparison: *Id*., p. 101.

[200] A. Hunt, *The Sociological Movement in Law* (Macmillan, 1978), p. 53. See also G.P. Fletcher, 'The Universal and the Particular in Legal Discourse', [1987] *Brigham Young U. L.R.* 335, p. 350: 'There are differences among the legal systems of the industrial world which are greater than they appear to the functionalist eye. [...] If everyone is inclined to protect tort plaintiffs, or impose pollution controls, we are inclined to believe that we are all doing the right thing. But this functional resemblance [...] remains superficial unless we know the doctrinal depths from which the instances of convergence emanate'.

[201] W. Goldschmidt, *Comparative Functionalism* (California, 1966), p. 14.

[202] In this regard, Simone Glanert's important argument deserves serious consideration. See S. Glanert, 'Method?', in P.G. Monateri, *Methods of Comparative Law* (Elgar, 2012), pp. 61-81. See also *NCL*, *supra*, ch. IV, pp. 00-00.

[203] P. Feyerabend, *Against Method* (Verso, 1975), p. 17.

A related point concerns the comparatist who, within the comparison, undertakes to research his own legal culture, who becomes the anthropologist of his own jurisdiction. What are the implications for the comparatist of operating 'at home' in terms of ethnographic data-generation, descriptive re-presentation, and interpretive understanding? Is it the case, as seems to be consistently assumed, that there is no need for an articulation of strategies of reflexivity? And what are the consequences for the act of comparison as the comparatist contrasts immanent knowledge (one's knowledge of one's own law) and external 'knowledge' (one's knowledge of another law), those knowledge/'knowledge' being obtained through radically different modes of apprehension of information? After all, the dynamics that comparative law configurates regularly involves the staging of an engagement between one's 'own' law and a foreign law. Is there not a meaningful sense, however, in which the epistemological congruence of the two legal/cultural regimes being deployed is far too readily assumed?

Epistemological issues — arguably insuperable ones, in fact — also arise as regards translation. While Schopenhauer's astringent aphorism is to the effect that '[a] library of translations resembles a gallery of reproductions',[204] I claim that translation — a motion crucial to comparative work — is a pivotal act of non-mimesis effectively purporting to resolve a tension, in a manner necessarily unsatisfactory, between two contrary allegiances: loyalty to the language of the text being translated, on one hand, and fidelity to the language of the text in translation, on the other. For reasons that remain unclear, orthodox comparatists typically refuse to take cognizance of the entanglements of law and language and of the attendant problems of legal translation that any comparative study must necessarily be required to address, even if it 'is only a somewhat provisional way of engaging itself with the foreignness of languages'.[205] In this regard, the persistent silence of the prevalent text in the field speaks loudly as

[204] A. Schopenhauer, 'Über Sprache und Worte', in *Sämtliche Werke*, 3d ed. (W. von Löhneysen, ed.), vol. V (Suhrkamp, 1994 [1851]), ch. 25, §299, p. 667 ['*(e)ine Bibliothek von Übersetzungen gleicht einer Gemäldegalerie von Kopien*'].

[205] W. Benjamin, 'Die Aufgabe des Übersetzers', in *Illuminationen* (S. Unseld, ed.) (Surhkamp, 1977 [1923]), p. 55 ['*nur eine irgendwie vorläufige Art ist, sich mit der Fremdheit der Sprachen auseinanderzusetzen*']. For useful overviews of salient issues arising within the field of translation studies, see, *e.g.*, L. Venuti, *Translation Changes Everything* (Routledge, 2013); A. Berman, *La Traduction et la lettre ou l'auberge du lointain* (Editions du Seuil, 1999); N. Sakai, *Translation and Subjectivity* (Minnesota, 1997); D. Robinson, *Critical Translation Studies* (Routledge, 2017); S. Bermann & M. Wood (eds), *Nation, Language, and the Ethics of Translation* (Princeton, 2005).

does the curt dismissal of the issue in another influential book,[206] the two attitudes betraying a refusal to discern the interested or political connotation inherent to every translative act,[207] and therefore to appreciate the ethical implications attendant upon every translation. Given that no word can be so precisely and unambiguously attached to one referent in a way that would allow it to be devoid of any and all connotative meaning, how does the comparatist-at-law cope with the 'vicissitudes of the movement of the signifier',[208] that is, how does one translate a signifier without further concealing or distorting the signified? In other words (!), how does one ensure that the signifier-in-translation retains 'the radiating haze of connotation', that it 'evoke[s]' in a way that can reasonably be said to be non-distorting or not-so-distorting?[209] At the very least, the comparatist must learn to work '*à l'enseigne de Saint-Jérôme*', which according to the late George Steiner is to know that 'there are no exact equivalences between languages, only betrayals, but that the attempt to translate is a constant need if the [text] is to achieve its full life'?[210] Unless, of course, the comparatist — even without proceeding from the perspective of an extreme linguistic instability that undermines the coherence of any statement — should heed Rodolfo Sacco's admonition to learn *not* to translate?[211] Is 'contract' obstinately to be rendered by '*contrat*' even as one appreciates that '*contrat*' will never *translate* 'contract', if only because the idea of 'meeting of minds' can never *translate* that of 'exchange of promises'?[212] Is it not the case that 'contract' can only be conveyed

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[206] See Zweigert & Kötz, *supra*, note 81. The rebuff is in Glenn, *supra*, note 79, pp. 48-49: '[T]he untranslatability argument exaggerates the difficulties in human communication. It also exaggerates the importance of the text. […] The translation industry in the world stands as testimony to this'.

[207] *E.g.*: A. Vitez, 'Le devoir de traduire', in L. Muhleisen (ed.), *Antoine Vitez, le devoir de traduire*, 2d ed. (Actes Sud, 2017 [1982]), p. 23: 'Translation […] is always situated in the field of political forces, it is the object of a political and moral stake' ['*La traduction (…) est toujours située dans le champ des forces politiques, elle est l'objet d'un enjeu politique et moral*']. In a broader sense, literature and politics are inextricably linked. For a prominent statement regarding this connection, see S. Rushdie, 'Outside the Whale', in *Imaginary Homelands* (Penguin, 1992 [1984]), pp. 87-101.

[208] H.K. Bhabha, *The Location of Culture* (Routledge, 1994), p. 24.

[209] Hoffman, *supra*, note 95, p. 106.

[210] G. Steiner, *Language and Silence* (Faber, 1967), p. 27. I disagree with the use of the term 'betrayal' for there is no treachery or breach of trust. But my concern is not central to the claim that I am making here, which has to do with the impossibility of isomorphy across languages. The *locus classicus* on the indeterminacy of translation remains W.V.O. Quine, *Word and Object* (MIT, 1960). For an exploration of Quine's thought and an application to comparative law, see S. Glanert & P. Legrand, 'Foreign Law in Translation: If Truth Be Told…', in M. Freeman & F. Smith (eds), *Law and Language* (Oxford, 2013), pp. 513-32.

[211] See R. Sacco, *Introduzione al diritto comparato*, 5th ed. (UTET, 1992), pp. 40-41.

[212] See *NCL*, *supra*, ch. III, pp. 00-00, note 00. *Cf.* [A.] Esmein, 'Le droit comparé et l'enseignement du droit', in Congrès international de droit comparé, *Procès-verbaux des séances et documents*, vol. I (L.G.D.J., 1905), p. 452: 'We have taken to the habit, [in France], of translating in the language of French

meaningfully *in English*? And does the matter depend on the languages at issue?[213] Also, to what extent is (legal) language a reflection of the organization of indigenous thought?[214] How much of the 'silences of language' can translation ever capture?[215] Why should the English sentence 'the cat is on the mat' not be translatable into French as '*la grenouille est sur la quenouille*'? Or does the power of the interpreter in the production of meaning here become exacerbated or extravagant so that, as the new image is introduced, one is no longer discussing the matter of translation but rather that of 'transformation'? Now, does 'transformation' ultimately differ from translation? Is translation not an instantiation of *transformation*? Derrida makes

law and of cloaking in French forms the data supplied by English law. [...] Comparative law, thus practiced, distorts institutions rather than show their genuine character' ['*On a pris l'habitude, chez nous, de traduire dans le language du droit français et de revêtir des formes françaises les données fournies par le droit anglais. (...) Le Droit comparé, ainsi pratiqué, dénature les institutions au lieu d'en faire apparaître le véritable caractère*']. For those who would be interested, I can confirm on the basis of twenty years of law teaching at the Sorbonne that Esmein's critique remains as current as it appears to have been more than a century ago. But see, for an early (and famous) plea in favour of the development of the French language through accretion and acculturation, J. du Bellay, *La deffence et illustration de la langue françoyse* (H. Chamard, ed.) (Société des textes français modernes, 1997 [1549]), pp. 42-48 & 137-43.

[213] Douglas Hofstadter shows that, as they interact with foreign words, languages attest to different absorption patterns. Thus, 'Johann Sebastian Bach' is 'Johann Sebastian Bach' in English and '*Jean-Sébastien Bach*' in French. Likewise, 'Galileo' and 'Julius Caesar' are 'Galileo' and 'Julius Caesar' for anglophones and '*Galilée*' and '*Jules César*' for francophones. See Hofstadter, *supra*, note 149, pp. 320-23.

[214] This issue is central to the Gluckman-Bohannan exchange. Max Gluckmann argues that occidental legal terms can be used to re-present non-occidental legal 'systems' while Paul Bohannan disagrees. See M. Gluckman, 'Concepts in the Comparative Study of Tribal Law', in L. Nader (ed.), *Law in Culture and Society*, 2d ed. (California, 1997), pp. 349-73; P. Bohannan, 'Ethnography and Comparison in Legal Anthropology', in L. Nader (ed.), *Law in Culture and Society*, 2d ed. (California, 1997), pp. 401-18. For an interesting contribution to the debate, see J.E. Ainsworth, 'Categories and Culture: On the "Rectification of Names" in Comparative Law', (1996) 82 *Cornell L.R.* 19. See also Fletcher, *supra*, note 200. The controversy between Gluckmann and Bohannan is reprised in the acerbic debate between sinologists Jean-François Billeter and François Jullien. To summarize the argument most economically, Billeter defends the translatability of Chinese into French, thus resisting the confinement of Chinese culture to otherness, a claim that Jullien regards as not doing justice to the singularity of the Chinese language. *E.g.*: J.-F. Billeter, *Contre François Jullien*, 2d ed. (Allia, 2018); F. Jullien, *Chemin faisant* (Editions du Seuil, 2007); P. Fava, 'A propos de *Contre François Jullien*', (2006) 25/1 *Etudes chinoises* 173; J.-F. Billeter, 'Réponse', (2006) 25 *Etudes chinoises* 187; J.-F. Billeter, 'François Jullien, sur le fond', (2007/11) *Monde chinois* 67. *Adde*: P. Chartier (ed.), *Oser construire: pour François Jullien* (Les Empêcheurs de penser en rond, 2007) ; N. Martin & A. Spire, *Chine, la dissidence de François Jullien* (Editions du Seuil, 2011). For discussion, see, *e.g.*, T. Botz-Bornstein, 'The Heated French Debate on Comparative Philosophy Continues: Philosophy vs. Philology', (2014) 64 *Philosophy East and West* 218; R. Weber, 'What About the Billeter-Jullien Debate? And What Was It About? A Response to Thorsten Botz-Bornstein', (2014) 64 *Philosophy East and West* 228. For an expression of agreement with Jullien, see L. Vandermeersch, *Ce que la Chine nous apprend* (Gallimard, 2019), p. 9.

[215] Becker, *supra*, note 149, pp. 283-94 & *passim*.

precisely this argument.[216] Closer to disciplinary home, so does Simone Glanert. Over a period of approximately ten years, this German comparatist — trained in Germany, France, and the United States, and having long taught in England — has written or directed various books, special issues, and articles, whether in law or translation studies, regarding the intersection between translation and comparative law.[217] In these numerous publications, she advocates the deployment of an enhanced epistemological sensibility on the part of comparatists who are invited to acknowledge that as much as law must be translated, law is structurally untranslatable.

The inability — also the unwillingness — to contemplate all these primordial interrogations regarding the practice of comparison, and no doubt a few others, too, confirms the absence of that theoretical *tension* that befits an assumption of responsibility to *invent* the legal other (in the sense of finding/constructing) — an intervention that not only must have an impact on how the legal culture under observation will be understood abroad, but also on how that legal culture will come to regard itself at home. Indeed, it is possible that the narrative told by the observer becomes assimilated as fact by the observed culture's interpretive 'community' so as eventually to become part of that legal culture itself — an instance of the *enfranchisement* of comparative law and, more generally, an illustration of discourse making happen what it says is the case, of narrative structures shaping the world through their own, inherently distorted lens.[218] (Note that, unbeknowst to the self, the invention of the other is also a re-invention of the self through the other. Indeed, the 'act of making the strange familiar always makes the familiar a little bit

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[216] *E.g.*: J. Derrida, *Positions* (Editions de Minuit, 1972), p. 31: '[F]or the notion of translation, one will have to substitute a notion of *transformation*: the regulated transformation of a language by another, of a text by another' ['*(A) la notion de traduction, il faudra substituer une notion de* transformation*: transformation réglée d'une langue par une autre, d'un texte par un autre*'].

[217] *E.g.*: S. Glanert, *De la traductibilité du droit* (Dalloz, 2011); S. Glanert, 'Translation Matters', in S. Glanert (ed.), *Comparative Law — Engaging Translation* (Routledge, 2014), pp. 1-19; S. Glanert, 'Law-in-Translation: An Assemblage in Motion', (2014) 20 *The Translator* 255; S. Glanert, 'Zur Sprache gebracht: Rechtsvereinheitlichung in Europa', (2006) 14 *Euro. R. Private L.* 157; S. Glanert, 'La langue en héritage: réflexions sur l'uniformisation des droits en Europe', [2006] *Revue internationale de droit comparé* 1231; S. Glanert, 'Europe, Aporetically: A Common Law Without a Common Discourse', (2013) 5 *Erasmus L.R.* 135; S. Glanert, 'Speaking Language to Law: The Case of Europe', (2008) 28 *Legal Studies* 161; S. Glanert, 'The Interpretation of Foreign Law: How Germane Is Gadamer?', in S. Glanert & F. Girard (eds), *Law's Hermeneutics: Other Investigations* (Routledge, 2017), pp. 63-79.

[218] According to sociologist Harry Collins, for the comparatist to influence or change the local legal culture, he will have to show 'contributory expertise' rather than 'interactional expertise': H. Collins, *Forms of Life* (MIT, 2019), p. 60.

strange'.[219])

The indolence of orthodox comparative research at a time when Europe — to refer to the most spectacular case — is once again experiencing a 'comparative moment', what Galileo might have called 'a marvelous conjuncture',[220] demands a strong corrective, deconstructive programme projecting comparative work about law beyond the suffocating theoretical complacency to which it has been confining itself.[221] Even though the mainstream approach continues to derive much institutional support from the fantastic investment of effort, time, and money in the preservation of the *status quo* — whether through the editorial policies of publishers and law reviews, the dominant pedagogical practices, or the professional associations' scholarly programmes — and continues to benefit from the way in which a particular type of knowledge — the immediately serviceable for practical ends — is valued in society,[222] the habitual and largely unexamined epistemic ways simply cannot be permitted unopposed. Specifically, one must object to the seemingly relentless production of texts devoted to the doctrinal analysis of the posited law in the formalist mode or to the organization of legal 'systems' into evermore arcane diagramming conclusively setting the paradigmatic framework for future comparative research. Nor can it be allowed that the influence of the comparatist-at-law should depend upon how well his asseverative prose creates in the reader a sense of order and totality, an impression of objectivity and truth that would somehow *warrant* the authenticity and the veridiction of what is written about what is being recounted.

In sum, the *atheory* prevailing within the field of comparative law raises serious epistemological barriers to the practice of erudite as opposed to ingenuous comparisons — and shows how '*Das Zeitalter der Vergleichung*' continues to cast such

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[219] R. Wagner, *The Invention of Culture* (Chicago, 1981), p. 11.

[220] Galileo used the expression in writing in October 1623 just as a book of his destined to be controversial was in press and in the light of the fact that Maffeo Barberini, a patron whom he had been cultivating for many years, had acceded to the pontificate as Urban VIII two months earlier: M. Biagioli, *Galileo, Courtier* (Chicago, 1993), pp. 34-35 & 289-90 ['*una mirabil congiuntura*']. Although made famous in this context, the word 'conjuncture' was widely used in the seventeenth century. See J.A. Maravall, *La cultura del barroco*, 2d ed. (Ariel, 1980), p. 392.

[221] I borrow the theme (although not all the ramifications) of a 'strong programme' from D. Bloor, *Knowledge and Social Imagery*, 2d ed. (Chicago, 1991), pp. 2-5. For instance, while I argue that law, to refer to the case of particular interest to me within *NCL*, should be studied like other aspects of (human) culture and that a social component is always constitutive of knowledge, I would not ascribe a causal role to social interests.

[222] For a leading statement, see M. Foucault, *L'Ordre du discours* (Gallimard, 1971), pp. 19-20.

a long shadow over comparative law.[223] Now, Beckett exclaims: 'No. Shades cannot go'.[224] Is he being his usual percipient self?

[223] For the concept of 'epistemological barrier' (or '*obstacle épistémologique*'), see Bachelard, *supra,* note 97, *passim*. For a well-known application to law, see generally M. Miaille, *Une introduction critique au droit* (Maspero, 1976), pp. 37-68.

[224] Beckett, *supra*, note 184, p. 99.