

PIERRE LEGRAND\*

Jameses at Play:  
A Tractation on the Comparison of Laws†

*Withstanding trendyism and its abrupt brevities, shunning the contemporary's brisk cadences, this Article compares two salient comparativisms-at-law. While it argues that these models are epistemically irreconcilable in significant respects—and that one approach is emphatically more interpretively empowering than the other—it also claims that neither strategy is able to escape the play of the text. The inevitability of comparativism as play means that every enunciation of foreign law and every comparison-at-law must stand as the comparativist's invention, as an exercise in self-portraiture also, as an egotrope.*

“The world is utterly, thoroughly legal,  
as you may not know it.”  
—Thomas Bernhard<sup>1</sup>

“Let us grant the freedom to trace.”  
—Roland Barthes<sup>2</sup>

“And, no doubt, that is reading:  
to rewrite the text of the work  
directly from the text of our life.”  
—Roland Barthes<sup>3</sup>

Beyond the fact that it answers a desire for personal emancipation or *déniaissement*,<sup>4</sup> that it provides primordial terms “enabl[ing] [one] to ask vital questions,” and that, allowing for manifestations of insurmountable ethnocentrism, it “dislodge[s] and liberate[s] one from one’s

---

\* Professor of Law at the Sorbonne, Paris; Visiting Professor, Northwestern University Pritzker School of Law, Chicago; Distinguished Visiting Professor, University of San Diego School of Law.

† <http://dx.doi.org/10.1093/ajcl/avx018>

1. THOMAS BERNHARD, *Ist es eine Komödie? Ist es eine Tragödie?* (1967), reprinted in ERZÄHLUNGEN 74 (2001).

2. ROLAND BARTHES, LE BRUISSEMENT DE LA LANGUE 57 (1984).

3. 5 ROLAND BARTHES, *Noureev et la Berma* (1979), reprinted in ŒUVRES COMPLÈTES 628 (Eric Marty ed., 2d ed. 2002).

4. For a “classical” statement, see Peter Winch, *Understanding a Primitive Society*, 1 AM. PHIL. Q. 307, 317–18 (1964) (“Seriously to study another way of life is necessarily to seek to extend our own”).

self-centric and self-satisfied normality,”<sup>5</sup> comparative law, to uphold the disappointingly uncontested misnomer, is informed by an engagement with the world’s legal disparateness—which it regards in principle as beneficial and indeed as normatively *relevant*. Accepting that because one’s being exists in the world one is condemned to interpretation,<sup>6</sup> responding to the redoubtable summons of other laws—which are *there* and whose singular “thereness,” unbidden, intransigently and insatiably hails or interpellates one, making a claim on one, on one’s singularity, soliciting one’s recognition and one’s respect—the comparativist contests nationalizing and universalizing strategies alike. Indeed, while it obtains on the assumption that the legal cannot justifiably remain at home, in its abode, abidingly, comparativism also disputes the possibility and opportunity of one-law-for-all, alleged uniformity entailing the unwarrantable destruction of space’s spatiality and of time’s temporality. Ultimately, since there can be no comparison outside of the conditions of address of a self to an other, comparative law involves the appreciation, within one glance, of more than one law, one of the convoked laws having to be *foreign* to the other—the (legally) foreign consisting not in a fixed or absolute form, but in what is, in effect, not deemed to be (legally) binding on one.<sup>7</sup> Far from petrifying the comparativist into the speechlessness too readily associated with otherness’s estrangement or uncanniness, the fashioning of a legal heterotopia existing beyond commensuration serves to operate a felicitous shift away from the production, circulation, and analysis of legal knowledge of the autotelic and self-authenticating variety, of the kind that unabashedly blares “here is my only elsewhere.”<sup>8</sup>

As it appears in its contemporary “Western” guise, as it is currently deployed in Europe and North America for example, comparative law exists contrapuntally. Leaving aside Montaigne’s or Montesquieu’s comparativisms *avant la lettre*, the comparison of laws perceptibly emerged in its institutionalized guises in the 1820s in reaction to the European codification movement and in response to what were then perceived in some academic and professional circles as isolationist proclivities.<sup>9</sup> Following the usual patterns of

---

5. Ming Xie, *Towards a Critical Intercultural Hermeneutics*, in *THE AGON OF INTERPRETATIONS* 7, 14 (Ming Xie ed., 2014).

6. I adapt MAURICE MERLEAU-PONTY, *PHÉNOMÉNOLOGIE DE LA PERCEPTION* 20 (1945). Merleau-Ponty’s observation is that one’s being in the world condemns one to meaning. I am reminded of Taylor who, echoing Heidegger and Gadamer, asserts how “*Verstehen* is a *Seinsmodus*.” 1 CHARLES TAYLOR, *Self-Interpreting Animals*, in *PHILOSOPHICAL PAPERS* 72 (1985) (emphasis original).

7. Foreignness is contingent: it depends upon conjuncture and situation.

8. I draw on NATALIE MELAS, *ALL THE DIFFERENCE IN THE WORLD* 1–43 (2007). “Heterotopia” is indebted to Foucault. See 4 MICHEL FOUCAULT, *Des espaces autres* (1984), reprinted in *DITS ET ÉCRITS* 752–62 (Daniel Defert & François Ewald eds., 1994). The quotation is from SAMUEL BECKETT, *L’INNOMMABLE* 62 (1953) [hereinafter *INNOMMABLE*]. The English version of Beckett’s text is his own. SAMUEL BECKETT, *THE UNNAMABLE* 121 (Steven Connor ed., 2010 [1958]) [hereinafter *UNNAMABLE*].

9. Nietzsche refers to an “age of comparison” (“*Zeitalter der Vergleichung*”). 4/2 FRIEDRICH NIETZSCHE, *MENSCHLICHES, ALLZUMENSCHLICHES* (1878), reprinted in *NIETZSCHE WERKE* 40–41 (Giorgio Colli & Mazzino Montinari eds., 1967).

academic self-contrivance, comparison-at-law proceeded over time to carve a distinctive socio-intellectual and disciplinary arena featuring the usual sociological markers: learned societies, journals, chairs, conferences, research centers or institutes, courses, and postgraduate programmes. Nowadays, claiming to abnegate parochialism, an increasing quantity of individuals seek to enter the field of comparative law and to have their professional identity validated, at least in part, by their participation in it. In advance of empirical study, one can confidently assert that the number of legal academics purporting to style themselves as “comparativists” is in fact unprecedented. (In the same vein, one can identify many doctoral programmes in law—for instance, in Denmark and in the Netherlands—where comparativism has become an inavertible prerequisite to the ascription of intellectual credibility to one’s research.) Labels hardly being immune to vogue, words like “transnational” eventually made an appearance on the intellectual scene suggesting an alternative slant. Be that as it may, the array of scholarly enterprises that are pursued within the field of comparative law today remain infused with one steadfast concern, that is, a determination to extol the value of the foreign in terms of what is relevantly legal locally—a project that assumes an epistemic commitment to detotalization (national law simply cannot be all the law that matters) and to deterritorialization (the law that matters simply cannot stop at national borders). Irrespective of the troubling location of the foreign out of epistemic grasp (I mean the very foreign that makes the comparative discourse of interest) and, in the absence of calculable determinants, beyond the ability to recount *how it is*, the seriousness of the comparativist’s political commitment to other laws resists the angled precariousness of the solidus organizing the diremption between “here” and “there.”

Not unlike other fields, comparative law features an orthodoxy—and one orthodoxy only—whose strategic and generative power, whose hegemonic logic, commands consent on the part of comparativists jointly and severally. This *doxa* operates without any need for coercive action since, again, individuals covet entry into the field of comparative law and crave disciplinary acceptance as comparativists. Rather than exert itself from above and from without (on the model, say, of premodern sovereignty), the orthodoxy’s power circulates through the field and innervates it in capillary fashion, not least by virtue of a phenomenon of routinization, in a manner that entrenches the discourse it carries as obvious, as correct also, in fact as a form of seeming necessity devoid of any kernel of preferment. Rather than having arrived where it is after contesting alternative practices and excluding distinct frames of articulation, the orthodoxy would simply be “there,” *vor aller Theorie*. Through a bilateral chain of connectivity, individuals are “produced” as comparativists by virtue of their adoption of the dominant discourse, of its apparatus and equipment, while they themselves confirm the discursive power’s

authority by subscribing to it through *incorporation*. (I use this word advisedly bearing in mind its etymology. *In-corporare* is to embody, to absorb—it is also to ingest, to swallow—so as to make part of one’s body, thus, to encase meaning in the body in order to guard from self-forgetfulness and abstraction. *Comparativism is embodied*.)

Comparative law’s *doxa* has long been committed to an understanding of the legal that can fairly be termed “positivist-analytical” or “positivist” *tout court*.<sup>10</sup> Not least because of its volubility, the governing type will be immediately familiar to readers of specialized journals and expert books as it features comparativists steadfastly focussing on statutes or cases and propounding the juxtaposition of substantive and adjectival laws within formalized classificatory schemes. Predictably (and not unlike the doctrine of positivism itself), the field of comparative law harbors many positivist variations. One can therefore distinguish, if somewhat schematically, between the “porous” positivisms that are practiced in the United States and the “hermetic” applications to be found in continental Europe, where positivism continues to prevail as reverentially hypostasized dogma. (If it came to legal theorists, one would want to consider the declension of positivisms advocated by H.L.A. Hart and Joseph Raz or Hans Kelsen and Norberto Bobbio.) Yet, the diverse renditions of the positivist agenda share a certain number of basic characteristics. Thus, positivists of all hues are primarily concerned with analytics, that is, with legal technique and with the rationalization of legal technique. They foster “legal dogmatics,” to transpose a German phrase, in as much as they aim to arrange the law in the form of an orderly, coherent, and systematic representation of the different rules in force, largely applying at the behest of the state. Throughout, their investigations remain squarely set on rules—on what has been posited by authorized officials as “what the law is”—and on the formulation of accounts of these rules, whether judicial or academic, which are offered as veritistic. In Frederick Schauer’s

---

10. “[A]nalytical jurisprudence” and “positivism” are “interchangeable labels.” Brian Z. Tamanaha, *The Contemporary Relevance of Legal Positivism*, 32 *AUST. J. LEG. PHIL.* 1, 38 (2007). Given its currency, it is noteworthy that some leading positivists would rather abandon the term “positivism.” Schauer explains this (defensive) stance both on the ground that “attempts to characterize positivism often degenerate into caricature” and because of “excess dichotomization of perspectives into positivist and nonpositivist (or antipositivist).” FREDERICK SCHAUER, *THE FORCE OF LAW* 179 n.17 (2015). Now, ought one to jettison the word “democracy” because the Soviet regime distorted it for much of the twentieth century? And ought one to surrender oppositions as a matter of course given the risk of “excess dichotomization”? Along with Deleuze and Guattari, I hold that “all dualisms . . . are the enemy, but an enemy quite necessary.” GILLES DELEUZE & FÉLIX GUATTARI, *MILLE PLATEAUX* 31 (1980). *See also* CAROLINE LEVINE, *FORMS* 9 (2015): “[W]hile it may be possible to rid ourselves of particular unjust . . . binaries, it is impossible to imagine a society altogether free of organizing principles.” I nonetheless accept Schauer’s warning against the two pitfalls he identifies since a binary structural logic is particularly potent in its ability to exclude, hierarchize, and totalize.

terms, “the description of law” stands “at the heart of the positivist outlook.”<sup>11</sup>

According to positivist tenets, interpretation must optimally function as a kind of white writing. Ideally, it ought to act scrupulously exegetically or, if you will, as psittacistically as possible. From the standpoint of positivism, a commentary must require to manifest itself in what is ultimately a rigidly deciphering way, obeying as much as possible the dictates of (assertional) textual repetition. The investment of a statute, say, with any meaning that would appear visibly exterior to it would indeed involve a re-creation of the legislative text that would be deemed tantamount to a wreck-creation of it and, in any event, to an inadmissible recreation on the part of the judge or textbook writer meant to be acting as expositor. In other words, as they seek to promote an interpretive commentary on the legal provisions in force—which would be determinedly conceptual and rational, which would explain the law-texts’ reach and their potential, which would eliminate or reduce their apparent flaws, obscurities, hiatuses, or contradictions—positivists adhere to a brand of writing purporting to deploy itself in a largely unproblematic and unsituated mode so that, showing impermeability to the range of existential vagaries liable to afflict interpretation, it can be mobilized to foster exact (that is, non-perspectival or non-horizoned) statements about “what the law is.” It is a crucial assumption of positivism that political commitment or personal investment on the part of interpretive authorities should be minified so as not to contaminate the interpretive attitude and in order not to prevent it from supplying the *scientific* access to law-texts-as-they-are, which it is deemed able to achieve. Confident that any difficulty addressed scientifically can be resolved scientifically, positivists incessantly strive for the brand of fixity or invariance of meaning that is more readily associated with the Pythagorean theorem or with the laws on thermodynamics. Over time, deferential reprises of law-texts through judicial decisions or textbooks must operate the stabilization of the meaning of law as *the* meaning of law, thus supplying the kind of reassuring certitude that accompanies fundamental immobility.

For positivism, then, law must be independently identifiable and knowable *as such*. Moreover, it must be properly expressed in terms that would be strictly confined to a sheer description of it. In the end, though, positivism probably most famously stands for the succinct proposition that *what counts as law is only what is binding as law*.<sup>12</sup> Indeed, Schauer insists on “analytic jurisprudence’s concern for legal

---

11. SCHAUER, *supra* note 10, at 12.

12. “[T]he core of legal positivism is the view that the validity of any law can be traced to an objectively verifiable source.” RAYMOND WACKS, *PHILOSOPHY OF LAW* 25 (2d ed. 2014).

validity.”<sup>13</sup> “[H]av[ing] invested hard, painful labor into the mastery of dry, obscure, and maddeningly intricate grids,” not to mention “the construction of endless legal mazes, the piling on of endless legal distinctions, the excruciating refinement of ever more precise doctrinal taxonomies,” which they then relentlessly proceed “to integrate . . . into extremely massive and intricate, but ephemeral and unenlightening, compendiums and commentaries,”<sup>14</sup> positivists rigorously abide by the normative position that “law is only that which is binding.”<sup>15</sup>

Positivism’s insistence on bindingness had traditionally meant that for positivists, law—whether national, regional, or international—was to be strictly equated with the law in force *within a given jurisdiction*. And it is one of comparative law’s convulsive epistemic postulates since its institutional emergence in the first part of the nineteenth century to have extended the range of positivist pertinence so as to include within the legitimate province of law as a focus of study *foreign* positivisms, mostly manifesting themselves at the national level, despite the obvious fact that foreign law does not enjoy any binding character locally. It is precisely this approach that accounts for the U.S. Supreme Court taking an interest in European law and indeed valuing European law as a (nebulous) source of relevant normative information within U.S. legal adjudication in decisions like *Lawrence v. Texas* (2003) or *Roper v. Simmons* (2005) and even *Lozano v. Montoya Alvarez* (2014).<sup>16</sup> (But there is reticence or recalcitrance, and Swiss or Brazilian law faculties still regard

---

13. SCHAUER, *supra* note 10, at 157.

14. PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 11, 144, 144 (1998).

15. Christian von Bar & Ole Lando, *Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code*, 10 EUR. REV. PRIV. L. 183, 232 (2002). Lando and von Bar assumed temporary visibility in Europe on account of their self-appointment at the helm of hand-picked task forces erstwhile loquaciously devoted to the drafting of Principles of European Contract Law or of a European Civil Code, which would apply across Member States within the European Union.

16. 539 U.S. 558 (2003); 543 U.S. 551 (2005); 572 U.S. \_\_\_ (2014). In *Roper*, Justice Anthony Kennedy, writing for a majority of the Supreme Court, held that foreign law, “while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” *Roper*, *supra*, at 554. In dissent, Justice Sandra O’Connor replied thus: “Because I do not believe that a genuine *national* consensus . . . has yet developed, . . . I can assign no such *confirmatory* role to the international consensus described by the Court.” *Id.* at 604 (emphasis original). While both Justices appeared willing to grant a measure of “normative purchase” to foreign law, the extent of the persuasiveness of this allegedly persuasive authority remains unspecified. The Kennedy opinion refers to a “significant” confirmation, which means that the foreign input would be meaningful, that it would bring to bear an important measure of legitimation. But why is there a need for the Supreme Court to have its opinions validated at all? Is the Supreme Court not, well, *supreme*? In point of constitutional theory, how can foreign law, issuing from a normative source located beyond national borders and not institutionally rooted in the national constitutional order, contribute to the ascertainment of the command of the U.S. sovereign and thus supply a ratification making the U.S. judicial decision normatively weightier?

references to foreign law as decorative self-indulgence and refuse to teach comparative law.)

In the main, the decentering I discuss has remained confined to the geographical sense of the term and has failed to embrace the kind of decentering of the mind, so to speak, that would have led comparativists to develop a primary understanding of law more adequate to the task of cross-border studies. Instead, comparativists, unable to escape the epistemic “system” into which they have been institutionalized “at home,” have found themselves projecting onto the international scene the positivism that they had been used to practice locally. Nowadays, while comparativists are indeed occupying the supranational stage, they thus remain for the most part unrepentant positivists committed as ever to a conception of the law separated from, say, cultural justification. The vaunted deterritorialization of the law having largely confined itself to a physical instead of a cerebral reterritorialization (although committed to peripateticism, one mostly continues to think *habitually*), the comparative foray in the direction of a practice acting as an antidote to a strictly local understanding of law is arguably but a “false exit,” thus revealing the strong gravitational attraction of the positivist structuring structure and demonstrating how “the force and the efficacy of the system . . . transform . . . [the comparativist’s] transgressions.”<sup>17</sup>

While positivism is eager to suggest tranquillized obviousness, the trajectory that it has chosen to champion must arguably contend with radical contingency. For instance, the strongest intentionality notwithstanding, positivism does not provide elemental access to the world (how could any doctrine? How could language? How could the word “pot,” Watt’s utterance, *name* Mr Knott’s “pot”?). Rather than presuppositionless observation, positivism offers a necessarily situated translation/transformation (a *dislocation*) of the world that is predicated upon an anterior practical view of it as instrument. This apprehension itself is indissociable from an ideology (which I understand here, reductively, as a dynamic psychological operation) and is accordingly a function of a strategic composition of the legal information at hand. Because of the positivist’s concern, certain knowledge is banished from the sphere of significance, and some issues are made never to arise, therefore allowing for what would be an ultimately immaculate conceptual prising over the lifeworld and also an ultimately immaculate development of internal heuristic processes generating ultimately immaculate *legal* results. In effect, then, positivism is a self-referential epistemic regime implementing a specific proneness of the legal mind. Irrespective of how its adherents would want to dispute this assertion, the fact is that given the way in which it deliberately structures

---

17. JACQUES DERRIDA, *MARGES* 162 (1972) [hereinafter *MARGES*].

information or seeks to work itself pure—because of the manner in which it purports to naturalize itself—*positivism assumes a position that is, perforce, political*. For example, the positivist mind channels the energies of law schools and of law teachers into the career preparation of students in a manner that ensures the solidification and the perpetuation of the existing institutional order through the annual “delivery” of sets of mentally homogeneous and socially receptive individuals pliantly disposed to apprehend the law as consisting in a set of textual commands requiring but (sophisticated?) technical mastery. And it is therefore a certain sensibility, the product of set conditionings and the source of ascertainable limitations, which finds itself being glorified by positivists, that is, by the group or caste sharing in a specific temperament. As they assert their predilection, positivists promote a sense of the sole “reality” of their point of view and of its endurance. They also assume progress toward the perfectibility of law through the self-regulatory and teleologically ordained use of the posited.

Along the way, in their quest for the reification of apodictic knowledge through the (would-be) evacuation of all markers of ambivalence, positivists censor the world of culture, that is, they subtract from the law cues that, as they approach the matter, would interfere with law as law and would detract from its conceptual merit and practical worthiness as law. Positivism is (and wants to be) radically bereft of all forms of cultural edification. The detachment of law from its cultural encumbrances through the edification of disciplinary palisades—this exercise in *striation*—reminds one in some ways of a medieval church: the “outside” world must not come in. It is not, then, that culture has been forgotten. It is that it has persistently been ignored on the ground that, being too *liquid*, culture fails the (narrow) analytic or empirical test pertaining to the question of legal epistemic legitimacy. Culture’s existence is known, yet culture is treated as “[u]nknowledge exceeding science itself,” as what “[does] not have scientific qualification,”<sup>18</sup> as the draff of non-law. For positivists, culture is “not of good birth, of legitimate birth.”<sup>19</sup> (Needless to insist, such epistemic restriction is hardly *wertfrei* in as much as it epitomizes the insistent imperialistic dissemination and infiltration of instrumental or technological rationality within the everyday life of the legal mind.)

Since it claims to delineate a complete system within, the authority of the orthodox interpretive frame within comparative law assumes places or spaces, which carry a discernibly cartographical connotation (say, France, Germany, or Oregon) and which are organizable as being discontinuous from other cartographical places (France is not Finland, Germany is not Greece, and Oregon is not

---

18. JACQUES DERRIDA, *L'ÉCRITURE ET LA DIFFÉRENCE* 394 (1967) [hereinafter *ÉCRITURE*].

19. JACQUES DERRIDA, *LA DISSÉMINATION* 171 (1972) [hereinafter *DISSÉMINATION*].

Ontario). And such categorical thinking extends to non-cartographical configurations also (law is not value, social import, or political consequence—nor is it linguistics or anthropology). Thus, positivism is intimately correlatable with the arrangement of an ever-clarifying textual zone to the point where even the presence of an interpreter's body would ideally seem superfluous or appear like an intrusion. Indeed, since he is meant to say "what the law is" and no more, the interpreter is there without ultimately being wanted there—which entails that he must be eliminated or at least synthesized into a coefficient of order whose programmed motion is in consonance with the rhythms enclosing him, which implies, in other terms, that he must be *institutionalized*.

From the perspective of the attenuated, bleached life of the "lawyer-as-such" (*der Jurist als solcher*) who ignores "ethical, political, [or] economic considerations,"<sup>20</sup> who acquiesces not to see beyond the law ("to be really good at 'doing law,' one has to have . . . a stunningly selective sense of curiosity"),<sup>21</sup> for whom culture is but a contravention of rational logic, law must be unshadowed, clean, pristine. It has to be conceived as bare, pure, essential even. As naked presence, it can only be confined to its own-nature and indulge its relentless habit of self-definition (the commentator says the law after the judge saying the law after the statute saying the law after the constitution saying the law) with a view to controlling the past, the present, and the future by effectively evoking a transcendental power. In the process, the jettisoned cultural apparatus is left devoid of any intellectual significance and reduced, whether purposefully or not, to the expression of "atavistic 'tribal' instincts."<sup>22</sup> Because positivism is in search of knowledge that is technically utilizable, culture (as understood) simply does not register on the professional scale. For the positivist, positivism and culturalism, if I may be allowed these cursory labels, are unredeemably incompatible. Positivism posits the deposition and the disposition of culture. And closure is the condition of positivism. Without such fixation of boundaries, there could be no positivism. But what is necessary for the system to behold is also fictitious: the discarded alternative continues to work at the margins and re-emerges with the inevitability characteristic of the return of the repressed.

In line with the situation that can be ascertained in other fields, the orthodoxy within comparative law is largely promoted by

---

20. BERNHARD WINDSCHEID, *Die Aufgaben der Rechtswissenschaft* (1884), reprinted in *GESAMMELTE REDEN UND ABHANDLUNGEN* 111–12 (1904).

21. SCHLAG, *supra* note 14, at 140. In a review of Schlag's book, Goodrich castigates "legal non-knowledge" and observes how "both structurally and sociologically law does not know the objects of its regulation." Peter Goodrich, *Law-Induced Anxiety: Legists, Anti-Lawyers and the Boredom of Legality*, 9 *SOC. & LEG. STUD.* 143, 147 (2000).

22. HOMI K. BHABHA, *THE LOCATION OF CULTURE* 250 (1994).

established academics (which is not to say that all established academics belong to the orthodoxy nor, for that matter, that all orthodox comparativists are established academics). I have in mind individuals like those who edit the principal journals, who are invited by leading academic publishers to assess book proposals, who secure large budgets to launch major research projects or fund new post-graduate programmes, who direct centers or institutes, who (eagerly) preside over learned societies (and, I am minded to add, who reward each other with honorary doctorates and other derisory prizes, medals, ribbons, or parchments). All these “gatekeepers,” whose continuing institutional overdetermination structures any measure of epistemic idiosyncrasy they may harbor,<sup>23</sup> intervene in a structuring capacity. They sustain an identifiable regime of legitimization of knowledge whose everydayness cannot hide the *prejudices* that inform it (I refer to anterior judgments, in the sense of predispositions and inclinations, of propensities and tendencies, of *encumbrances*—some known to one, others not).<sup>24</sup>

By virtue of the institutional posts they occupy, established comparativists are able to defend what they regard as good academic practice, that is, good comparative manners—or, which is another way of conveying the same idea, they are in a position to promote *themselves* as good academics or as good comparativists. Insightfully, Jacques Derrida underlines that what is deemed to be “good writing has . . . always been *comprised*,” “enveloped,” or contained;<sup>25</sup> it has already been *circumscribed*. Wanting to preserve the capital of epistemic authority they have accumulated over the years, wishing to protect the intellectual credit they have built for themselves, now wanting time to stand still, orthodox comparativists are given to conduct a subjugation of the psychic terrain within the field of comparative law and to censor opponents, those whose work they see to be wavering and yet, paradoxically, whose scholarship they fear to be competing with their own research for the assumption of institutional dominance, those whose brand of comparativism would accelerate the passage of time so that there would (ultimately) occur, at their established expense, a displacement of the locus of institutional exemplarity. Within comparative law, positivism has thus come to promote a regularized practice and an embedded ethos, which pertinently serve to frame investigative agendas deemed pertinent

---

23. Cf. JACQUES DERRIDA, *LE MONOLINGUISME DE L'AUTRE* 15 (1996) (“Yes, I have but one language, yet it is not mine”) (emphasis omitted) [hereinafter *MONOLINGUISME*]. See also BECKETT, *INNOMMABLE*, *supra* note 8, at 78 (“I’m of words, made of words, others’ words”). The English version of Beckett’s text is his own. BECKETT, *UNNAMABLE*, *supra* note 8, at 38.

24. My use of “prejudice” broadly agrees with Gadamer’s (who refers to “*Vorurteil*”). HANS-GEORG GADAMER, *WAHRHEIT UND METHODE* 275–76 (6th ed. 1990).

25. JACQUES DERRIDA, *DE LA GRAMMATOLOGIE* 30 (1967) (emphasis original) [hereinafter *GRAMMATOLOGIE*].

through (self-interested) criteria of academic appositeness. Its force has become so great that, as “the default theory of the legal world,”<sup>26</sup> as the law of the law, positivism radiates an unmistakable air of *entitlement*.<sup>27</sup>

I entertain no doubt that, if surveyed at this historical juncture, comparativists-at-law would express a variety of opinions regarding the orthodox company governing their field. But I am convinced that a very large majority of these individuals would readily agree that James Gordley, a learned and prolific scholar, an erudite (in the honest old sense of the term) and influential comparativist-at-law of uncontested intellectual integrity, belongs firmly within comparative law’s orthodoxy, perhaps on account of the fact that he is a former co-editor-in-chief of the *American Journal of Comparative Law*, one of the field’s flagship journals, or since he has long acted as a Fellow of the American Academy of Arts and Sciences and as Corresponding Fellow of the British Academy, but presumably given many other preponderant reasons also—for instance, because he is perpetuating “a discourse that emerged in early modern Europe . . . [i]n the eighteenth and nineteenth centuries [featuring] more or less utopian visions of a future world society built upon rationalism, reasonable social contracts, and common goals,”<sup>28</sup> optimistically seeking a “lost” unity, which would have been blemished by difference, and purporting to blur foreignness beneath an ethos of general humanity, not to mention the fact that his work is consonant with the prevailing neo-liberal logic of the commodity form, a popular and politically conservative agenda predicated on the reassuring management of difference and on the no less comforting possibility of perfect understanding and communication through the analytical refinements of language. An examination of these justifications would explain how Gordley has increasingly come to be perceived as a source of authoritative statements about comparative law within the field.

An inquiry into the development of Gordley’s comparativism would assess the overall credentialed character of his published research, which has long been unproblematically accepted as paradigmatic *for* comparative law and *as* comparative law. Specifically,

---

26. ALLAN C. HUTCHINSON, *THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED* 5 (2009).

27. The leading U.S. casebook on comparative law offers one compelling illustration of how the dogmatic architectonics within the field can take the form of a fully-fledged process of closure—while allowing retrenchment occasionally to recede just long enough to permit the perfunctory nod to inclusivism. See SCHLESINGER’S *COMPARATIVE LAW* (7th ed. 2009). I specifically exclude the volume’s Asian materials from my critique. Likewise, texts such as *THE OXFORD HANDBOOK OF COMPARATIVE LAW* (2006) or *THE CAMBRIDGE COMPANION TO COMPARATIVE LAW* (2012) reveal, as I read them, reservoirs of sources so extraordinarily biased and lists of contributors so spectacularly clannish that one has to wonder whether even commissioning editors should not have realized that something was most seriously amiss (I graciously leave to one side the matter of the amiable referees—or did they not get names?).

28. Hans-Georg Moeller, *Universal Values or Cultural Relativity: A Pointless Question*, in *THE AGON OF INTERPRETATIONS* 163 (Ming Xie ed., 2014).

such investigation would relate Gordley's determinative power to his emphases and delimitations, to what he has chosen to accentuate as deserving focusses of his attention while distinguishing these from those targets he has deemed to be unworthy of his scholarly interest—in sum, to his selected programmes and preferred *problématiques*. An exploration of Gordley's comparative scholarship would evaluate his arguments. It would review his procedures of intervention—what many would call his “method,” hopefully bearing in mind the fact that “[t]here is no empirical methodology for learning how to disclose a world,” no regular, systematic, given, scientific path allowing to make the other othery in the way the artist seeks “to make the stone *stony*.”<sup>29</sup> Note that far from being scientific, from amounting to a specific procedure purporting to lead to certain intended results, any comparative-law method acts as a vehicle for an identifiable ethical or political agenda. A method is always some comparativist-at-law's method and therefore inevitably reveals a committed perspective as regards the investigation of the matter under scrutiny. Indeed, a method gives effect to a particular world-view, which is why I claim that ultimately, the only approach to the event of the foreign law-text is one based on experience and experimentation (interestingly, the French language has a single word, “*expérience*,” to embrace both terms), one thus featuring nomadic errancy.<sup>30</sup> Such

29. The first quotation is from NIKOLAS KOMPRIDIS, *CRITIQUE AND DISCLOSURE* 108 (2006), who adds that “disclosure is not *learnable* in the relevant sense.” *Id.* at 109 (emphasis original). The second excerpt is from Viktor Shklovsky, “Art as Technique” (1917), *reprinted in* RUSSIAN FORMALIST CRITICISM 12 (Lee T. Lemon & Marion J. Reis eds. & trans., 2d ed. 2012) (emphasis original).

30. An “experience” is anything but banal, as Heidegger reminds us: “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.” MARTIN HEIDEGGER, *UNTERWEGS ZUR SPRACHE* 159 (1959). Evoking the Heideggerian *Denkweg*, Derrida equates experience with “the trajectory, the way, the crossing.” JACQUES DERRIDA, *PAPIER MACHINE* 368 (1990) [hereinafter *PAPIER*]. Indeed, Derrida expressly distinguishes the “way” (“*chemin*”) from method. See Jacques Derrida, “Et cetera . . . (and so on, und so weiter, and so forth, et ainsi de suite, und so überall, etc.),” in JACQUES DERRIDA 24 (Marie-Louise Mallet & Ginette Michaud eds., 2004 [2000]). Crucially, a way neither begins nor leads anywhere in particular. It has no origin and it has no point of arrival in as much as thought, which must be incessant questioning, eschews firm solutions. The insistence on the way as a mode of thinking expresses “the fact that thinking is thoroughly and essentially questioning, a questioning not to be stilled or ‘solved’ by any answer.” Joan Stambaugh, “Heidegger, Taoism, and the Question of Metaphysics,” in HEIDEGGER AND ASIAN THOUGHT 80 (Graham Parkes ed., 1987). See generally OTTO PÖGGELER, *DER DENKWEIG MARTIN HEIDEGGERS* (1968). Heidegger holds that “[method] abides by the extreme perversion and degeneration of what is a way.” HEIDEGGER, *supra*, at 197. On the theme of method's deceptiveness, an influential connection has been drawn with “an actual deformation of knowledge.” GADAMER, *supra* note 24, at 306. Lucidly locating comparative-law method within the realm of the scientific, perspicuously ascribing to it the fixed criterion of judgment that it entails, and effectively rejecting this “false comfort,” Glanert resists enticement. Simone Glanert, *Method?*, in *METHODS OF COMPARATIVE LAW* 61–81 (Pier Giuseppe Monateri ed., 2012). The quotation critical of method is from PAUL RABINOW & ANTHONY STAVRIANAKIS, *DEMANDS OF THE DAY* 110 (2013). See also Günter Frankenberg, *The Innocence of Method—Unveiled: Comparison*

an examination of Gordley's comparativism, then, would address his modes of enunciation, that is, it would envisage how he has said what he has been saying, and it would consider the resonance of the rhetorical strategies he has marshalled in order to seduce his lawyerly readership into acknowledging the narrative affability of his claims. And it would contemplate the institutional *loci* whence he has addressed the issues that have detained him and that he has subsequently made pre-eminently visible within comparative law.

As I interpret Gordley, I find him staunchly committed to the promotion of a positivist understanding of law, and I observe that he is steadfastly devoted to implementing the doctrine of positivism with specific reference to law and to comparative law. As a positivist—and therefore as a comparativist who, in my view, would largely reject the constitutive (or fabricative) view of language, that is, who would hold that law-texts can exist externally to any interpretive framework and who would contest the claim that such writings cannot be constituted as “object” outside discursive conditions of interpretive emergence—Gordley is actively working toward the preservation of the established epistemic order. Defending the position that he can do more than contribute yet another perspective on the law, holding that he can actually encounter law-texts explicitly and grasp them in the one way they *really* are, maintaining that he is able to offer an understanding of the law (of *the* law) that will survive any shifts in contexts of concern, Gordley aims for the *certum*, indeed for the *verum*, and for the production of an interpretive text as *speculum sine macula*. No other, lesser regime of veridiction will satisfy him, every other discourse belonging ultimately to *oratio* instead of *ratio*. Thus, Gordley eschews the kind of reflexive meta-discourse that would address his own political input into the constitution (or fabrication) of his declared targets of study and that would affirm the cultural mediation of his own activity through institutionally-induced interpretive practices bringing to bear, in particular, epistemic impositions not readily appreciated as such.<sup>31</sup> Positivism features a dearth of positionality: Gordley is not an observer of Gordley (and even less an observer of Gordley observing Gordley).

---

as an *Ethical and Political Act*, 9/2 J. COMP. L. 222 (2014). Cf. Benedict Anderson, *Frameworks of Comparison*, LONDON REV. BOOKS, Jan. 21, 2016, at 18 (“It is important to recognise that comparison is not a method or even an academic technique; rather, it is a discursive strategy”). *Adde*: Letter from Martin Heidegger to Julius Stenzel (Dec. 31, 1929), 16 HEIDEGGER STUD. 11, 19 (2000): “I would actually be in the greatest embarrassment if I ought to describe my method or even to release a methodology. And I am happy that I am thus far not feeling the fetters of a technique, but rather the coercion of a predicament.” The comparativist-at-law’s “predicament” is to make sense of foreign law and to do so comparatively.

31. Let us recall that “[a]n institution is not only the walls and exterior structures that surround, protect, guarantee, or constrain the freedom of our work; it is also and already the structure of our interpretation.” JACQUES DERRIDA, *DU DROIT À LA PHILOSOPHIE* 424 (1990).

He is not on the alert against himself. In particular, he assumes his manner of encountering law-texts to be *the* manner of encountering law-texts. Not only would Gordley “know something better about law, but [he would] know something better about knowing,” so that, as he postulates “an a-historical, a-traditional, a-political mode of inquiry,” it hardly occurs to him that his analytical monism is overlooking the contingency of his approach, even less that he is cancelling or neglecting other legitimate and arguably more interpretively rewarding epistemic routes.<sup>32</sup> Against the background of his existential engagement with law and with the comparison of laws, I am persuaded that Gordley fits harmoniously indeed within comparative law’s orthodoxy.

Contrariwise, on the basis of my understanding of his scholarship, I regard James Whitman as an academic who, while on board the ship (Whitman uncontrovertibly qualifies as a comparativist-at-law), wishes to go in the opposite direction from the one the ship has been travelling. Despite indicators readily evocative of orthodoxy (a named chair at Yale Law School comes to mind, to mention one prominent instance of institutional capital), there is compelling evidence that Whitman has elected to occupy a specifically dissentaneous or aversive intellectual position vis-à-vis some at least of the field’s governing epistemic doctrines. If it were a question of one discursive occurrence to identify, I would argue that his highly critical appraisal of Patrick Glenn’s *Legal Traditions of the World*—an author and a volume I locate within comparative law’s orthodoxy if only on account of the age-old “Cook’s-tour” approach to foreign law on display over hundreds of pages—inscribes Whitman’s resistance to the paradigmatic ideological, axiological, and normative views purporting to encase the theory and practice of comparative law.<sup>33</sup> While the back cover of Glenn’s treatise, through a collection of meticulously selected excerpts from carefully chosen journals, proudly introduces the text as “the book that needed to be written,” an analysis “firmly based in social theory,” “superb,” “illuminating,” a work of “sheer academic brilliance” offering “another vision of the legal world,” in sum an “opus *extra ordinem*” and a “ground breaking” scholarly contribution,<sup>34</sup>

32. The first quotation is from HUTCHINSON, *supra* note 26, at 12. The second excerpt is from David Dyzenhaus, *The Genealogy of Legal Positivism*, 24 OXFORD J. LEG. STUD. 39, 40 (2004). I address Gordley’s historical work *infra* at note 221.

33. See James Q. Whitman, *A Simple Story*, 2006/4 RECHTSGESCHICHTE 206 (reviewing H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (2000)). All quotations *infra* are from *id.* at 206–08.

34. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (5th ed. 2014) (emphasis original). Until the fourth edition (2010), the back cover of the book displayed an even larger number of snippets deemed suitably laudatory. It remains unclear why this list has now been abbreviated. Still as far as the fourth edition, the back cover also advertised the fact that the typescript for the first edition had won the Grand Prize of the International Academy of Comparative Law in 1998. In the fifth edition, the

Whitman's retort is that "[l]overs of serious scholarship are sure to dislike this book," that this is "a poorly executed, self-indulgent piece of work," its "scheme . . . obviously too rickety a structure for a serious exploration of its subject." He adds that Glenn's text is "poorly worked out" and "rambling," that it features "hopeless anachronism[s]" and "breezy pomposity," and that it is "dotted with self-confident verdicts that display indifference to all . . . methodological dangers." Whitman also observes how "[i]nfelicities and errors abound" while considering that the text features "embarrassing misconceptions" and "[m]any solecisms," not to mention "the inanity of . . . parenthetical lecture-hall remark[s]." Dismissing Glenn's heuristic conveniences, Whitman uncompromisingly concludes his traversal critique by remarking that while Glenn's book "might make a good text for weak students who need a few lessons in the love of their fellow man," "[e]ven those students . . . should not be asked to wade through the garrulous first two chapters." (Note that the manifestation of authoritative critique within a field does not entail the supplantation of its orthodoxy. Notwithstanding Whitman's demurrer—and despite many more strongly-worded

---

information regarding the conferment of this award has been displaced and appears inside the book on the page facing the table of contents. Perhaps such re-arrangement reveals a deeper appreciation for an implausible decoration that has seen fit on more than one occasion to recompense books so obviously *undeserving* of recognition beyond the confines of the author's local circle of colleagues. Not at all coincidentally, these rewarded texts had been written in French, a fact attesting at once to the stranglehold a cluster of French academics long exercised over the Academy and to the woeful poverty of French comparative practice. The paucity and epistemic obsolescence of French comparative law is attributable in important ways to French jurists' lack of attraction for foreign laws (and for foreign languages), to French legal scholarship's devalorization of interdisciplinary work (it cannot have helped that in 2006 the then Secretary-General of the French *Société de législation comparée* complained in print that interdisciplinarity within comparative law is "too demanding"), and to French institutions' unwillingness to honor academic forays beyond national or disciplinary borders. Even more primordially, perhaps, French legal culture cannot sustain itself without indulging the idea of (its) empire. Foucault's observation regarding "the French's monoglot narcissism" emphatically holds. 1 MICHEL FOUCAULT, *Entretien avec Madeleine Chapsal* (1966), reprinted in *DITS ET ÉCRITS* 517 (Daniel Defert & François Ewald eds., 1994). As a result, the local significance of "*droit comparé*" in Paris ranks on a par with what I imagine to be the relevance of "The Thought of Marie de Gournay" in Khartoum or of "Oceanography" in La Paz. I am unaccountably reminded of Sloterdijk's quip that "France has become the most hermetic country in the world, [so that] even Tibet is totally transparent in relation to [France]." Peter Sloterdijk, *La France est une exception psycho-politique, une bulle préservée*, *LIBÉRATION*, Aug. 5–6, 2006, at 31. Sloterdijk states further that "France has generated a kind of psycho-political exception by trying to create a protected space . . . a kind of unique micro-climate, a preserved bubble." *Id.* To return to Glenn's text, I feel bound to record that in June 1997, having been invited to assess this submission, I wrote to Christopher Rycroft, commissioning editor at Oxford University Press (letter on file), that "the design of [Glenn's] project is fundamentally misguided and epistemologically flawed." I added that "[t]his book was doomed to be derivative and superficial." Moreover, I commented that "even if one was to accept the merits of [this] brand of comparative scholarship, it remains that this *particular* book is poorly structured, poorly written, and poorly researched" (emphasis original). Specifically, I pronounced that "[b]y and large, the text is convoluted and rambling."

objections in the 2006 inaugural issue of the London-based *Journal of Comparative Law*—Glenn, his publishers, and his *Preisschrift* have subsequently continued their career practically as if *nothing* had happened.)

In the way I envisage the question, it is not that Whitman acting as Glenn's contemner claims dissident scholarship or peripheral academic status as a mode of self-identification or as a self-referring narration, but that he practices an ascertainable form of distanciation from the prevailing model of epistemic governance within the field of comparative law. Rather than emphasize self-proclaimed and systemic opposition to orthodox scholarship, Whitman displays disagreement in knowledge production; he deploys a *performative* protest. At this stage, I find it important to remark that, as Whitman's professional circumstances ought to make clear, epistemic dissension, irrespective of the disapproval it may generate among comparativists, hardly correlates with lack of scholarly precedence within comparative law and certainly does not lead to automatic marginalization as an excluded outsider.

Although I appreciate that Whitman might well resist my qualification of his work, I regard his comparative scholarship as a variant of "culturalism." It is important to observe at the outset that within comparative scholarship, culturalist work—the analysis of jurisculture, of law-as-culture—does not propose to dispense with the usual legal artifacts such as statutes and judicial decisions. Indeed, culture is to be found operating, so to speak, *as* statutes and *as* judicial decisions, which therefore understandably remain one of the principal focusses of study for comparativists intervening as culturalists. But these comparativists realize how the posited law, while it can operate as a scholarly point of departure, cannot stand as comparative research's point of arrival. Indeed, they argue that comparative work must regard posited law as a prompt advantageously raising the question "why?" and provoking insightful elucidation (or "deep appreciation," to refer to Gary Watt's thoughtful reflection).<sup>35</sup> In other words, for culturalists there can be no question of abandoning the examination of the law's technicalities. It is rather that the posited law cannot be where comparison stops. Instead, it must be the springboard allowing the comparison to begin its *presencing*.

According to my interpretive grid, for a comparativist-at-law like Whitman to turn to culture is for him to perform an exercise in negative dialectics (in the sense at least of an anti-Hegelian or anti-*Aufhebung* dialectics) since it is to develop a cultural argument meant to negate clearly and emphatically the positivist and scientificist enterprise that (establishment-minded) comparative legal studies has insistently wanted to be. Far from suggesting a Trophonian "mood" (one need not be a negative person in order to foster negative

---

35. Gary Watt, *Comparative Law as Deep Appreciation*, in *METHODS OF COMPARATIVE LAW* 82–103 (Pier Giuseppe Monateri ed., 2012).

dialectics) or evoking some sort of incapacity, well away from any endorsement of pejorism or nihilistic destruction, negativity intervenes as a strategy of release. It expresses a distrust in positing and in positivity and in positivists and in the positivist *Zeitgeist*, which it *ex-poses* as the most determining factor suppressing the phenomenological dimension of meaningful experience within comparative analysis. In the sense in which it expropriates positivism (at least in its monopolistic guise), negativity epitomizes the transformative role of theory as counterdiscourse or countersignature. It effectuates a politics of resistance. It wishes to be resolutely refractory (not strictly in a cathartic sense, although it would be unwise to obfuscate the constructive value that the purgative dimension may hold, but in an ecstatic mode); in other terms, it makes itself disobedient in the way it is “critically promot[ing] progressive social transformation.”<sup>36</sup> As the condition for articulating an agential thinking (over against such agency-attenuating shibboleths as method, objectivity, and truth),<sup>37</sup> negativity here stands, literally, as an *undisciplined* gesture. Not at all purporting to underwrite quixotic or capricious interventions, it is, aptly, *contrarian*, which is precisely how, in Derrida’s words, “negativity is a *resource*,” how it supplies traction.<sup>38</sup> Having in mind not the bad, sterile negativity of the impasse, but the good negativity that strategically allows for an *opening*,<sup>39</sup> Samuel Beckett, in characteristically pithy fashion, captured the rehabilitative dynamics I am attempting to formulate: “The artist is active, but negatively.”<sup>40</sup>

Whitman’s comparative scholarship makes a case for an encultured conception of law. As I see the matter, he aims to free law from the kind of metaphysical or theological assumptions that would have the legal bask in some transcendental purity. His organizing trope is “meddling.” He proposes to interfere with the positivist understanding of law. As he interrupts positivism, he embraces something like “*Gelassenheit*,” what Martin Heidegger defines as “the self-withdrawal from transcendental imagination.”<sup>41</sup> But since law-texts like statutes and judicial decisions very much continue

36. PATRICIA J. HUNTINGTON, ECSTATIC SUBJECTS, UTOPIA, AND RECOGNITION 10–11 & *passim* (1998). “Negative dialectics,” in the expression made famous by Adorno, can refer to a critical mode of reflection which at crucial moments—these stages in the identification, aggregation, and dissemination of knowledge urging one to determine how one gets from one step to the next, from one statement to the next, from one sentence to the next—negates what a discipline affirms. See THEODOR W. ADORNO, NEGATIVE DIALEKTIK (1966).

37. For a detailed critique of these weasel words, see Pierre Legrand, *Foreign Law: Understanding Understanding*, 6/2 J. COMP. L. 67 (2011). See also Glanert, *supra* note 30. For a precursive challenge, see Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L. L.J. 411 (1985) [hereinafter “Comparisons”]. See also GÜNTER FRANKENBERG, COMPARATIVE LAW AS CRITIQUE (2016).

38. DERRIDA, *ECRIURE*, *supra* note 18, at 381 (emphasis original).

39. I draw closely on JACQUES DERRIDA, *APORIES* 65 (1996).

40. 4 SAMUEL BECKETT, PROUST (1931), reprinted in THE GROVE CENTENARY EDITION 539 (Paul Auster & J.M. Coetzee eds., 2006).

41. MARTIN HEIDEGGER, *GELASSENHEIT* 57 (1959).

to hold significance for Whitman as comparativist, except that he denies them the exclusive role they occupy within positivism, his comparative work can be said to be suggesting a *re-signification* of law and of comparative research about law. Whitman is maintaining that law can signify otherwise (differently) or, more accurately, *other-wise* (that is, in a manner that can show enhanced attunement to foreignness, to otherness, to the other law's singular complexity). Whitman's interpretive trouble-making is arguing for an *heterodidactic* approach to comparative law.

For Whitman to configure law as also culture (in addition to everything else that law exists as) is effectively to refute any stringent distinction between law and non-law (the kind of dualism that Derrida, for example, consistently derided as "metaphysical" throughout his decades of writing). It is to enounce culture as not being exterior to law, to recognize it to be existing as law (in addition to everything else that it exists as). And, pursuant to the same idea of unstriatability, it is to accept law as culture or, better still, *law-as-culture*. It is to mobilize culture and to make a place for it as a constitutive component of law even though positivism would not have it there. It is, *vis-à-vis* positivism, to assert culture's subversive or rebellious quality. Indeed, culture's exuberance stands as an emancipatory act of remonstrance against the positivist momentum of normalization or regulation (and, arguably, manipulation). Culture provides a way to check the rule of the police—of the policing of the legal. It speaks in the name of an acute sense of letting-be, of letting law exist as other-than-rules, as other than what is positivistically or officially enclosed as "what the law is." It imparts the allowance of contingent interpretive expressions of the legal on account of a decentering away from the posited as nodal point. In the process, as it leverages foreign law's possibility of meaning, culture possibilitates comparative practice. It makes it feasible for comparativism to suscite a heightened ascriptive and disclosive signification, to enhance the law-texts' interpretive *yield*.<sup>42</sup> It empowers comparativism.

Because it actively seeks to impede positivism's deliberate dismissal of culture from the comparative narrative (the expunging of the cultural dimension from the rule would help to make rulelessness *legal*), Whitman's work raises the matter of violence. Indeed, as I understand it, Whitman's stance is that it cannot be enough for culture to occupy the institutional space simply as some sort of nuisance, which could then be tamed or subdued. In order to make

---

42. Alternatively, a text's yield is its "affordance," a term Gibson introduced in perceptual psychology. See J.J. Gibson, *The Theory of Affordances*, in PERCEIVING, ACTING, AND KNOWING 67–82 (Robert Shaw & John Bransford eds., 1977). The term has become widely used in design theory owing to DONALD A. NORMAN, *THE DESIGN OF EVERYDAY THINGS* (1988). See generally HARRY COLLINS, *TACIT AND EXPLICIT KNOWLEDGE* 34–39 (2010).

its mark, culture must exert a certain violence on positivism and on the positivist understanding of law (and of comparative law). Otherwise, it would be saying nothing and achieving nothing. But, unlike the violence that positivism has sought to implement by discrediting culture and dismissing the argument for law-as-culture, Whitman's culturalist claim asserts itself with a view to imputing a meaning to law-texts that attempts to bear witness to their existential complexity, that seeks to do justice to their fabric, that would therefore be conducive to *justice* toward them. (While he is destined to fall short of attaining anything like justice "as such"—although irresistibly commanding, justice cannot be reached—the comparativist-at-law can at least attenuate injustice.) As Whitman purports to surmount the gap that positivism has artificially created and maintained between law and culture by violently expelling culture from the ambit of scholarly relevance (positivism being inherently *eliminative* or *purgative*—a smothering), "[his] *vigilance* is a violence chosen as the least violence."<sup>43</sup> Whitman's defense of culture asserts itself as the acknowledgment of an indebtedness to the law, to the multidimensional character of a law-text (as a matter of justice, or of a lesser injustice, there are the comparativist's interpretive dues vis-à-vis the law and toward the law's extant compositions). Through an intensified attunement to the law, Whitman seeks, if I may forge a word of Heideggerian inspiration, to recover its *ownmostness*. Of course, a key question holds: *how to show culture's relevance to foreign law in a way that will make a strong case for law-as-culture and therefore for the legal having to be envisaged as cultural by interpreters such as comparativists who are themselves unavoidably intervening as encultured readers (which is emphatically not to say that law exists only as culture and that it must therefore only ever be understood as culture)?*

As I prepare to move beyond my prefatory words, I do not deny that as regards the strategico-discursive fabrication and dissemination of comparative legal knowledge, both orthodoxy and dissidence within the field of comparative law, or positivism and culturalism, are constructed categories, which would both be unalloyed imaginarily only. Whatever designation one gives them, the two standpoints must therefore be approached un-categorically in as much as they require to be understood as assuredly relative, inevitably flexible, and inextricably intertwined with situatedness (the situation very much including the categorist's own). Moreover, any such polarized construction is bound to feature divisions at once too narrow and too broad, to display fuzzy borderlines, and to harbor overlaps or interstices. It remains that the kind of delineation I suggest helpfully allows for the depiction of two exemplary and contrastive approaches to comparative scholarship in law. And it

---

43. DERRIDA, *ECRIURE*, *supra* note 18, at 172 (emphasis original).

offers an opportunity better to apply oneself to the singularity of each model (this is Gilles Deleuze and Félix Guattari's claim about dualisms being "quite necessary"). Indeed, the conflictuality I want to evince is particularly striking given that in the 2000s Whitman and Gordley entered into a negotiation over the manufacturing of a valid comparative argument concerning the laws of privacy. Specifically, Whitman released a culturalist text on privacy, which through the usual process of rhizomatic diffusion attracted Gordley's hostile positivist takeover bid a few years later. I now turn to a *re*-presentation—*my* *re*-presentation—of this remarkable debate for comparative law, a disputation registering high on the field's epistemograph, a galvanizing encounter between leading comparativists featuring two paradigms as regards the extension of legitimate and usable knowledge for comparative legal research.<sup>44</sup> I emphasize that I am not suggesting a theory-neutral recital—which I do not think there is any prospect of supplying in any case, even if I were minded to do so. I wish to add by way of further preliminary reflexion that I have long felt profound intellectual discomfort and frustration that my professional existence should have been unfolding within a field that, in the main, has tended somewhat blatantly to keep even the most basic epistemic interrogations very safely out of the ambit of scholarly investigation. My disquisition thus wishes to contribute to the redemption of epistemology within comparative law.

At the outset, let me say that I am not trying to describe the actual biochemical economy at work in the human beings James Whitman and James Gordley. I leave aside therefore the biological capacities of Whitman's or Gordley's organism for empathy and creativity or for intuition and introspection—the state of dopamine-sensitive neurons in the brain's frontal lobe or the condition of other neurotransmitters such as serotonin and norepinephrine. Now, the transaction I discuss between two outstanding

---

44. Throughout, I am concerned with the texts that appeared in print. The fact that either author should subsequently want to qualify his published text, perhaps to contradict its literality, cannot have any bearing on my interpretation and certainly cannot disqualify it. Neither what the author "genuinely" or "really" intended is relevant to me. *Language* speaks, and I work from *texts*. Cf. HEIDEGGER, *supra* note 30, at 254 ("*L*anguage speaks") (emphasis original). The German language allows Heidegger to write "*die* Sprache *spricht*" (emphasis original). See DERRIDA, GRAMMATOLOGIE, *supra* note 25, at 107 n.38. As he explained that he was preparing to publish anonymously, Mallarmé referred to "the Text there speaking by itself and without an author's voice." STÉPHANE MALLARMÉ, AUTOBIOGRAPHIE 17 (1991 [1885]). See also Letter from Samuel Beckett to Alan Schneider (Oct. 16, 1972), in NO AUTHOR BETTER SERVED: THE CORRESPONDANCE OF SAMUEL BECKETT AND ALAN SCHNEIDER 283 (Maurice Harmon ed., 1998) ("All I know is in the text"). *Adde*: SAMUEL BECKETT, *Se voir*, in POUR FINIR ENCORE ET AUTRES FOIRADES 57 (1976 [1968]) ("There is nothing but what is said. Beyond what is said there is nothing"). The English version of Beckett's text is his own. SAMUEL BECKETT, *Closed Place* (1974), reprinted in TEXTS FOR NOTHING AND OTHER SHORT PROSE, 1950–1976 147 (Mark Nixon ed., 2010).

U.S. comparativists reveals two incompatible theoretical motifs regarding what warrants to be researched, organized, and written as comparison-at-law—one contesting the orthodox epistemic system and its existence, rejecting the system’s exclusion of the surplus of meaning inherent to it and subversive of it, and acknowledging the primordially speculative character of the interpreter’s reading; the other, in orthodox fashion, fetishizing an “object” that would be “real” law on which one would be reporting on the assumption that settled meaning and perfect referentiality lie within methodological reach. As they unfurl themselves, these discrepant comparativisms (“these two interpretations of interpretation”) prove “absolutely irreconcilable,” “even though we live them simultaneously.”<sup>45</sup> I insist that I regard the discordance separating Whitman’s and Gordley’s avowed scholarly projects as irresolvable: *a comparativist reading foreign law culturally cannot not affirm otherness, while a comparativist reading foreign law positivistically cannot not deny it*. But, if only because pure exteriority must be impossible, the matter is in fact more complicated—hence my reference to the idea of avowance. Accordingly, I shall argue presently that, while he would earnestly beg to differ, Gordley, like Whitman, effectively engages in the *making* of foreign law although claiming to be writing in strictly documentary fashion with a view to reporting exclusively on “what the law is.” In other words, Gordley, too, must fall short of anything such as pure opticality. And there is another reason also why Whitman’s and Gordley’s magisterial assemblages of comparative knowledge cannot be totally external to each other. Not unlike fellow comparativists whose gazes purport to decipher the legally foreign and who move to name the legal uncanny, Whitman and Gordley, as they compare, as they stake their being in their work, in their comparison, in their foreign law, are both seriously *at play*. After considering the protagonists in my story with specific reference to their basic disagreement on the writing of privacy laws, and on the inscription of foreign law more generally, I shall address lusive comparativism. Again, I want to underscore the fact that beyond any close examination of Whitman’s and Gordley’s work, my exposition defends the enduring need for comparative law to be reflexively and critically attentive to its epistemic commitments, to the question of knowledge in comparative discourse, to what must be valued as a matter of comparative knowledge, and to the discursive forms comparative knowledge can adopt. Suffice it to observe at this stage that as the assumption of voice with a view to narrating foreign laws—other laws, the other’s laws—must entail epistemic response and responsibility, it also raises important ethical and political considerations.

---

45. DERRIDA, *ECRITURE*, *supra* note 18, at 427.

Armed with a title explicitly announcing his unabashed focus on “cultures,” a remarkable caption without either the word “law” or the term “legal,” Whitman published his argument on the French, German, and U.S. laws of privacy in the 2004 edition of the *Yale Law Journal* against the background of extensive research in France and Germany and on the strength of his fluency in both countries’ languages and ways of life in the law.<sup>46</sup> In the light of Whitman’s emphasis, an appreciation of his text must begin with a cursory exploration of the idea of culture on the understanding that any apprehension of culture is itself cultural in the sense at least that whoever comes to the reading and interpretation of culture is himself situated in place and time.

Famously said to be “one of the two or three most complicated words in the English language,” “culture” helps the realization that individuals are part of a community—let us say, an *interpretive* community—if this problematic instantiation of commonality be allowed.<sup>47</sup> At the minimum, the term forces the escape from the dichotomy whereby behavior is seen either as idiosyncratic—mostly when one faces someone with a different world-view—or as universal—especially when one underscores one’s own comportment. “Culture” imparts the notion of shared mental programmes that have formed neither because of one’s uniqueness nor on account of the fact that one lives on this planet, but as a function of the community of which one is a part. Indeed, one can hardly reduce the world to countless individuals and assume that collective gatherings

---

46. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L.J.* 1151 (2004).

47. RAYMOND WILLIAMS, *KEYWORDS* 49 (2d ed. 2015 [1983]). The notion of community demands in-depth theoretical investigation bearing in mind that many express the word to address constraints from which they want to be freed. Cf. Letter from Samuel Beckett to Thomas McGreevy (Jun. 6, 1939), in 1 *THE LETTERS OF SAMUEL BECKETT, 1929–1940* 660 (Martha D. Fehsenfeld & Lois M. Overbeck eds., 2009) (“[A]ll groups are horrible”). The words are Beckett’s. In the shadow of Heidegger’s discussion of “*Mitsein*” (a philosopheme literally translatable as “being-with”) and under the influence of Georges Bataille, a French writer and literary critic, three texts in particular call for close reading: MAURICE BLANCHOT, *LA COMMUNAUTÉ INAVOUABLE* (1983); JEAN-LUC NANCY, *LA COMMUNAUTÉ DÉSGÉVRÉE* (1986); GIORGIO AGAMBEN, *LA COMUNITÀ CHE VIENE* (1990). Blanchot is responding to an article by Nancy who is addressing Blanchot’s retort in his book while Agamben is reacting to both Nancy and Blanchot. A second edition of Nancy’s essay appeared in 1990. See also JEAN-LUC NANCY, *LA COMMUNAUTÉ AFFRONTÉE* (2001); JEAN-LUC NANCY, *LA COMMUNAUTÉ DÉSAVOUÉE* (2014); MIRANDA JOSEPH, *AGAINST THE ROMANCE OF COMMUNITY* (2002); WILLIAM CORLETT, *COMMUNITY WITHOUT UNITY* (1993); ALPHONSO LINGIS, *THE COMMUNITY OF THOSE WHO HAVE NOTHING IN COMMON* (1994). See generally *RETURNING (TO) COMMUNITIES* (Stefan Herbrechter & Michael Higgins eds., 2006); ROBERTO ESPOSITO, *COMMUNITAS* (1998). In an influential text, Anderson argued that communities are imagined. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (2d ed. 2006). The writing of “community” under erasure (as “community”) would underline the inherent and unsurpassable referential inadequacy of the word, such inscription being readily associated with the work of Heidegger and Derrida. Indeed, “[w]ho can ever dare an ‘us’ without trembling?”. JACQUES DERRIDA, *CHAQUE FOIS UNIQUE, LA FIN DU MONDE* 259 (Pascale-Anne Brault & Michael Naas eds., 2003).

of these individuals would be mere creations of the mind. To be sure, there are names that refer to no genuine “unit,” to no collective “reality,” such as “the Orient,” “natural law,” or “European private law.” But it cannot follow that only individuals are real: “French law professors,” “French jurists,” and arguably “French legal culture” are more than fuzzy linguistic labels having only a mental existence.<sup>48</sup> As regards law, then, I argue that “culture” can creditably assist in naming the legal’s singular formations.

To be sure, the contours of the “unit” will vary according to the comparative intervention at stake. In other terms, the location of culture will depend on the specific question of concern to the comparativist-at-law. For example, the legal culture at issue might be that of Corsica, of commercial courts in France, or of labor lawyers in Marseille. In each case, the scales of the comparison will influence what will count as data or hold as interpretive material. The “unit” could also be—and indeed will often be—coterminous with French lawyers as a whole, that is, with the group of legal agents who, let us say, are French citizens (in other words, to write rapidly, who are “French”) or who practice law in France—although even notions like “citizenship” or “practice” can hardly claim impermeable intellectual borders and are not to be envisaged as totalizing structural formations. (There is more, for facts are vertiginous. The “legal” is evidently not the only feature of one’s identity. Any individual embodies a seemingly infinite declension of ascertainable cultural formations, each allegiance engaging only a part of one’s energies and concerns. Thus, one can be a labor lawyer in Marseille while also being a feminist, a native of Alberta, a fluent speaker of Hungarian, a militant of Amnesty International, a breeder of siamese cats regularly entering international competitions, and a lifelong member of the *Parti socialiste*. The decision by a comparativist-at-law to emphasize one specific manifestation of culture only cannot be taken as denying the legitimacy of cultural analysis. Any research endeavor must ultimately contend, no matter how sorrowfully, with the matter of boundedness: there will be *tears* in the web of knowledge.<sup>49</sup> Nor can the determination to map one particular feature of the discursive sprawl that is culture be seen to suggest a lack of awareness of the composite character of cultural identity.)

---

48. I draw closely on Graham Harman, *Objects and Orientalism*, in *THE AGON OF INTERPRETATIONS* 128–29 (Ming Xie ed., 2014).

49. Otherwise, one finds oneself having to contend with the predicament of inutility, which Borges strikingly illustrates through the briefest of stories. There was an empire where the art of cartography had been developed to such perfection that the map of a single province occupied a whole town, and the map of the empire occupied a whole province. In time, these enormous maps no longer satisfied, and the college of cartographers established a map of the empire the size of the empire, which coincided with it point for point. Subsequent generations reflected that this inflated map was useless, and they abandoned it. JORGE LUIS BORGES, *Del rigor en la ciencia* (1946), reprinted in *EL HACEDOR* 119 (2009 [1960]).

The idea cannot be to anthropomorphize culture and make it into some superior being that would somehow have come into existence out of successive interactions within a community and would at last be ruling it. Culture is a tool to enhance description, not an object that is being described. The notion of culture gestures toward frameworks of intangibles within which ascertainable communities operate and that have normative force for these communities, even though not coherently and completely instantiated. For example, “culture” is a word allowing comparativists-at-law to convey a phenomenon of aggregation or cohesion, which is stabilized by imitation and standardized through habituation. With respect to the legal, culture is at once historical, political, social, philosophical, linguistic, economic, epistemic, and indeed comprises whatever other aspect of facticity significantly inscribing the law’s *emplacement*. Culture is what allows one to tell the story of the law’s situation—for the law is ultimately always domestic or local. (On circumspect analysis, even so-called “globalized” law exists as “glocalized” law.<sup>50</sup>) Crucially, through its valorization of law as law-in-situation, cultural analysis attests to a strong commitment to legal inquiries that no longer regard the technical aspects of the posited law as governing interpretive action.

But whence culture? To frame the matter succinctly, enculturation operates along the following lines. As he is taught to engage in social forms of activity, the individual learns to ascribe significance and value to his environment. For instance, he endows objects with social meaning beyond their materiality or their strictly physical nature. This assignment of meaning relates to the purposes for which the object was created and to the uses to which it is put. When “that thing” is called a “pen,” it acquires an additional form of existence at the level of meaning that was never part of its physical nature as such. It is through this ascriptive process that the world becomes an object of significance beyond its raw materiality, and that it can therefore exist as an object of thought. This is to say that thought can only emerge in an environment of socially-constituted meanings, or that thought is only possible for an individual once he has been socialized into the practices of a community (for instance,

---

50. For the notion of “glocalization,” see Roland Robertson, *Glocalization: Time-Space and Homogeneity-Heterogeneity*, in GLOBAL MODERNITIES 25–44 (Mike Featherstone, Scott Lash & Roland Robertson eds., 1995). According to Robertson, the English word is a transliteration from the Japanese: ROLAND ROBERTSON, GLOBALIZATION 173 (1992). Robertson’s “glocalization” can perhaps be connected to Mignolo’s “diversality,” this author’s counterpoint to “universality.” See Walter Mignolo, *The Geopolitics of Knowledge and the Colonial Difference*, 101 SOUTH ATLANTIC Q. 57, 88–91 (2002). The term is from JEAN BERNABÉ, PATRICK CHAMOISEAU, and RAPHAËL CONFIAINT, *ELOGE DE LA CRÉOLITÉ* 54 (1989) (“*diversalité*”) (capitals omitted). In the final analysis, “[t]here exists no place that can be said to be ‘non-local.’” BRUNO LATOUR, REASSEMBLING THE SOCIAL 179 (2005). For an argument defending the place of law’s singularity as a core theoretical motif within comparative law, see Pierre Legrand, *On the Singularity of Law*, 47 HARV. INT’L. L.J. 517 (2006).

within the family or at school). It is the appropriation or internalization of these practices that shapes the individual mind. Since the practices themselves express various collective allegiances such as national, geographical, ethnic, religious, or linguistic affiliation, the individual mind can reasonably be said to be formed as it is inaugurated into the thought processes or beliefs of communities.<sup>51</sup> In other words, “we experience the world collectively before we experience it individually,”<sup>52</sup> which is another way of saying that rather than stand in opposition to society, the individual is thus “one of its forms of existence.”<sup>53</sup> If you will, to write like Heidegger, “being” is “being-in-the-world.”

To get a sense of how a focus on legal culture changes the parameters governing comparative research—to appreciate that the argument in favor of a culturalist approach is not merely theoretical, but carries the most practical ramifications in as much as it leads to the construction of a different knowledge about foreign law and, ultimately, conduces to the formulation of a different foreign law—consider article 1184 (3) of the 1804 French civil code. Before it was redrafted and renumbered pursuant to the 2016 comprehensive legislative reform, this provision featured an injunction to the effect that “termination,” or “*résolution*,” of contract must be requested in a court of law. I claim that positivists would reflexively confine their examination of this article to its exegetical features and strive to ascertain how the courts (and, possibly, the leading writers of textbooks or law-review articles) have interpreted the relevant keywords. Arguably, this exercise into identification of meaning would find itself trapped within a circular and superficial understanding of the provision’s significance. It would embrace the view that the law (the civil code) means this or that because the law (the judge) says that it means this or that, and it would seek the views of academics on what they think the legislator or the judge meant and, no doubt, ought to have meant.

For a culturalist, however, the law-text, much more rewardingly, is seen to conceal constitutive ideas that inform it and have indeed generated it—all of them manifestations of long-standing ways of living and working together, which one can helpfully style as “French

---

51. I follow David Bakhurst, *Activity, Consciousness, and Communication*, in *MIND, CULTURE, AND ACTIVITY* 147–63 (Michael Cole, Yrjö Engeström & Olga Vasquez eds., 1997).

52. D.N. RODOWICK, *PHILOSOPHY’S ARTFUL CONVERSATION* 79 (2015). Cf. RUDOLF A. MAKKREEL, *ORIENTATION AND JUDGMENT IN HERMENEUTICS* 123 (2015) (“Elementary understanding is oriented by the normative authority of a local commonality”). Makkreel indeed specifies that “[f]or elementary understanding, *everything* is from the we-perspective of commonality.” *Id.* at 196 (emphasis added). For his part, Fish refers to the self as “a moving extension” of culture: STANLEY FISH, *DOING WHAT COMES NATURALLY* 13 (1989).

53. PIERRE BOURDIEU, *QUESTIONS DE SOCIOLOGIE* 29 (1984). Cf. BECKETT, *INNOMMABLE*, *supra* note 8, at 167 (“I’m of words, made of words, others’ words”). The English version of Beckett’s text is his own. BECKETT, *UNNAMABLE*, *supra* note 8, at 104.

culture” and specifically as “French legal culture.” For example, article 1184 (3) of the 1804 French civil code concealed at least a commitment to the deep distrust into which the individual is readily held in France; a time-honored aversion for the unfettered play of the market; a well-honed social demand for state interventionism; an assumption that only the state can optimally bring to bear the appropriate dose of *solidarité* that must feature within a French contractual relationship; and the deployment of a strongly assertive state. I claim that a view of law-as-culture indicates these various dimensions of the law-text as being key elaborative features of the rule compelling the principled requirement for judicial authorization before a contract can be “terminated,” and I maintain that it is such ideas that explain why the French law-text long refused to allow a party unilaterally to declare the contract at an end subject to the payment of damages in case of subsequent retaliatory litigation—which is, in a nutshell, the position obtaining in the common-law tradition (not to mention Germany). Note that, in the wake of a 1998 decision of the *Cour de cassation*, French courts have occasionally appeared willing to ignore the civil code’s demand for a judicial pronouncement and showed themselves prepared to validate a unilateral “termination” of contract although within strict limits involving an assessment of the “seriousness” of the misbehavior of the party allegedly in breach (the relevant French word, arguably setting a higher threshold, is “*gravité*”). The presence of dissenters, a feature of every legal culture, can assist, as is the case here, in confirming the strength of the governing pattern. In this instance, it also accounts for the relaxation of the rule, again within a stringent framework, under the 2016 reform.

In order to generate the sort of interpretive *yield* (or affordance) that, alone, can permit a deep understanding of the law-text, a comparativist must be prepared to approach law *as culture* (that is, to treat law as law-as-culture) and to ascribe epistemic relevance to the law-text’s constitutive features in appreciation of the fact that these form an integral part of the law-text, that these exist *as* the law-text that therefore exists *as* culture. In other terms, the comparativist writing on article 1184 (3) of the 1804 French civil code must be disposed to be *writing culture*. For positivists, the ideas of “suspicion of the individual,” “market-aversion,” “*solidarité*,” “state activism,” and so forth ought perhaps to concern political theorists or sociologists or economists, but certainly not lawyers—a disciplinary reaction which resolutely and disappointingly rides roughshod over the question “why” (as in “Why was the French provision formulated as it was?” “Why the prolonged legislated demand for judicial intervention to the exclusion of any other process?”). From the perspective of the interpreter of a legal culture such as a comparativist who is willing to offer an overture *to* the language of the law-text, which is also an overture *of* the language of the law-text, there can be nothing that is

quintessentially “legal” or automatically outside the “legal.” Because there is no algorithm to determine the vectors of cultural extension, the quality of “legality” (if this be the apt word) is thus conferred to heterogeneous elements—the beliefs, the desires, the commitments—which the comparativist connects or assembles, which he collocates, which he understands or interprets as pertaining to the “legal,” and which he names “the French law of ‘termination’ of contract” (I leave to one side the not insignificant fact that the French themselves would refer to “*résolution*”). Again, note that what positivism has deemed superfluous can be said to matter, interpretively speaking, even more than what it has held to count: the ideas permeating the words of the law-text can be understood as telling us more about the law than a “legal” exegesis of these words themselves can ever do, irrespective of how much “legal” analyticity one brings to their reading. To those who (still) do not like the notion of legal culture and would leave unnamed and untheorised the scheme of legal-identity formation that article 1184 (3) of the 1804 French civil code instantiated for over two centuries, I ask: What is your competing model of epistemic cohesion in law? Or do you not like the idea of epistemic cohesion either?

It ought to be obvious—*mais cela va peut-être mieux en le disant*—that legal culture, as a form of governance, is not to be reduced to a static, linear, totalizing, permanent, and idealized configuration. To speak of legal culture does not automatically aggravate uniformity, imply reification, entail essentialism, exaggerate distinctness, preclude temporal change, efface individual variations or contestations (which can take the form of participation or non-participation in a range of sub-cultures), fetishize identity so that it would lay beyond critique, trivialize agency or individual reasoning, and cast its advocates as blinkered conservatives. Again, to argue the case for culture is hardly to fathom some tyrannical force ossifying a community along stereotypical lines and disabling any individual from harboring idiosyncratic behavior vis-à-vis the group. Only culture’s detractors ascribe such simplistic implications to culture—the extent of their attempt to disqualify the notion through caricature possibly being a measure of the significance of the threat that culture is seen to pose on the road to the universalism to which such critics remain largely devoted. While on the subject of culture’s depreciators, I find it useful to add that even though the notion of culture can be exploited by those who wish to unfurl it in an anti-cosmopolitan sense, such a strategy of embezzlement cannot offer a reason to jettison law-as-culture. After all, the fact that a progressive idea can be appropriated to foster a reactionary political project is hardly a difficulty specific to culture. Importantly, therefore, resort to legal culture does not imply acquiescence to oppressive exigencies for conformity or to repressive practices castigating difference and certainly does not require anyone to adhere to fundamentalist

regimes—or to rain dances, for that matter. Also, a legal culture is not monolithic. Individuals do not act within precisely the same cognitive framework in response to typical objects and events (nor, incidentally, are individual world-views internally consistent). Moreover, legal culture need not be subordinated to the idea of nativism. A legal culture is not a windowless monad allowing neither for cross-cultural interaction nor for cultural overlap. It is permeable and features neither firm edges nor limits: *the framework is not framed*. Indeed, “what is peculiar to a culture is not to be identical to itself.”<sup>54</sup>

Culture is thus ever-becoming—and the comparativist-at-law’s formulations of it, although always already situated, are ever-mobile. Accordingly, the idea of legal culture cannot be understood to assume a number of discrete heritages organically tied to specific homelands and considered best kept separate (like the laboratory specimens in petri dishes that one also calls “cultures”). Yet, a legal culture’s porosity is restricted, which means that its elasticity is limited. Because culture functions as an ongoing integrative process, what one encounters by way of alternative experience tends to be intelligibilized against the background of existing patterns within which it is ultimately absorbed even at the cost of a measure of dissonance reduction. (If psychoanalysis is to be credited with any insights, a key advance is surely that one’s psychological state, one’s past experience, and one’s memories curtail one’s field of action so that one enjoys but interstitial freedom to think away from oneself.) The matter of transformation typically involves the contrivance of epistemic safeguards whereby external perturbations are coded as information in the culture’s pre-defined terms, which explains how change tends to be marginal and incremental. While there can be no question of “cultural imprisonment,” like other organisms a legal culture strives to maintain a homeostatic equilibrium in relation to its environment and to perpetuate itself through duplication: in the pursuit of its project, it aims to overcome transgressions.

In his *Yale* article, Whitman mobilizes culture as an omnibus category allowing him in his quality as comparativist-at-law to point to the posited law not only in terms of its materiality (the rules), but, more significantly in my view, to address it at the level of its deep meaning, which alone can reveal why the posited law was articulated how it was (and not otherwise) and can disclose the goals sought by a community as it invested itself into its posited law. For Whitman, no formulation of the posited law can safely escape a cultural

---

54. JACQUES DERRIDA, *L'AUTRE CAP* 16 (1991) (emphasis omitted) [hereinafter *AUTRE CAP*]. However, as Kompridis perceptively observes, “[a] culture that is strictly non-identical with itself would be a culture without a past.” In other words, if a culture is to remain a culture, if it is to continue to be identifiable as this culture rather than that other, it cannot be “deeply discontinuous with itself”: NIKOLAS KOMPRIDIS, *Normativizing Hybridity/Neutralizing Culture*, 33 *POL. THEORY* 318, 340 (2005) (emphasis omitted).

interpretation, and all enunciations of the posited law can therefore be profitably envisaged as cultural expressions. In the end, while he is certainly not defending the view that the old dichotomy between structure and agency should be resolved in favor of a complete incapacitation of the power of choice, of a de-identification of the self, Whitman maintains that there is an important sense in which individual identity is supervenient upon unchosen participation in cultural forms of life, that the way of a culture determines the resources of perception (or, rather, of analogical appresentation), that there exists at the very least something like cultural suggestibility. In the process, Whitman discards the notion of an unencumbered legal self, that is, he rejects the idea of a self being fashioned through acts of will unmediated by any constitutive cultural inheritance. As regards “legal language, legal reasoning, legal argument and legal justification,” not to mention other forms of cultural ostension,<sup>55</sup> one’s self-in-the-law is seen to belong to culture more than culture belongs to it.<sup>56</sup>

To return to Whitman’s text, it makes the relevant hierarchization emphatically clear: “What we must acknowledge . . . is that there are, on the two sides of the Atlantic, two different cultures of privacy, which are homes to different intuitive sensibilities, and which have produced two significantly different laws of privacy.”<sup>57</sup> Having thus underlined the primordially of culture over law and its seminal character (*culture “produce[s]” law*),<sup>58</sup> Whitman does not hesitate, resorting to different language, to renew his claim regarding the subordination of the legal—a measure, I assume, of the significance he attaches to the appreciation of law as a thoroughly encultured construct and of law-texts as cultural entities. For example, Whitman declares that “[l]aw is about what works, what seems appealing and appropriate in a given society”; he adds that “[t]he law will not work *as law* unless it seems to people to embody the basic commitments of their society.”<sup>59</sup> Specifically, “the [continental] conception of privacy . . . has succeeded [in continental Europe] because it fits into

---

55. Geoffrey Wilson, *English Legal Scholarship*, 50 *MODERN L. REV.* 818, 845 (1987).

56. I am reminded of GADAMER, *supra* note 24, at 281 (“In fact history does not belong to us; we belong to it”). This claim can easily be extended to language—or to law. For a famous assertion of the precedence of language, see 2 ANDRÉ BRETON, *Introduction au discours sur le peu de réalité* (1925), reprinted in *ŒUVRES COMPLÈTES* 276 (Marguerite Bonnet ed., 1992): “After you, my fair language” (“Après toi, mon beau langage”). I find significance in the fact that a writer and a poet—indeed, a major Surrealist figure—should acknowledge the leading role of language over individual autonomy.

57. Whitman, *supra* note 46, at 1160.

58. *Id.* (emphasis added). See also *id.* at 1211 (“After many generations of experience, Europeans have come to value a certain kind of personhood . . . . This is a *concept of personhood that has been formed by the peculiarities of continental culture and continental history*, and it has produced a *law of privacy that has been formed by the same culture and history*”) (emphasis added).

59. *Id.* at 1168, 1220 (emphasis original).

continental social traditions, and into a quotidian continental culture of respect.”<sup>60</sup> Otherwise said, “[c]ontinental privacy is ‘continental’ in much the way that continental hate speech law is ‘continental,’ and in much the way that continental prison law is ‘continental.’ For that matter, it is ‘continental’ in much the way that continental etiquette is ‘continental.’”<sup>61</sup>

Whitman’s prioritization of culture over law is further captured toward the end of his study as he summarizes his painstaking findings.<sup>62</sup> The discrepancy he has been tracking throughout his research, he writes, “has always been one between the values of Jefferson and the values of Goethe.”<sup>63</sup> As far as Whitman is concerned, the question at issue—the laws of privacy—has effectively never moved to a place that would be situated beyond culture. Still in Whitman’s words, “[t]he comparative law of privacy is . . . about contrasting political and social ideals.”<sup>64</sup> A fair reformulation of this excerpt would accentuate the fact that for Whitman the matter of law cannot usefully be isolated from politics or divorced from ideology: “Differences in cultural tradition, in short, *have made for* palpable differences in law.”<sup>65</sup> It is culture that possibilitates law. Positivism’s claim notwithstanding, law-as-rules is simply not the controlling center of the legal action.

Along with the encultured character of law, Whitman’s article underscores a second leitmotiv in terms of its insistence on the existence and on the valorization of difference across laws, on what one may call the “differential co-presence” of laws. Indeed, the co-presence of more than one law—which means, as befits the comparative enterprise, that there is not one law only anymore—must assume

---

60. *Id.* at 1168.

61. *Id.*

62. No matter how detailed one’s inquiry, one never reaches interpretive satiety—which implies that there always remains more of foreign law’s singularity to be brought to significance. I have little doubt that Whitman would concur that the totality of signifiability is elusive, that there is always additional meaning that could be ascribed to a foreign law-text so that access to the full singularity of it is inevitably deferred, that it is always to come. Meanwhile, “[a] good [account] should trigger in a good reader this reaction: ‘Please, more details, I want more detail[s].’” LATOUR, *supra* note 50, at 137. It is noteworthy that Nabokov, a foremost comparatist in the field of literary studies, was a tireless advocate of the relevance of details. *See, e.g.*, Pierre Dommergues, *Entretien avec Vladimir Nabokov*, 62/1 LES LANGUES MODERNES 92, 97 (1968) (“[E]verything is in the detail”) (“[L]e détail, tout est là”). The words are Nabokov’s. *See also* VLADIMIR NABOKOV, STRONG OPINIONS 168 (1990) (“[D]etail is everything”); BRIAN BOYD, VLADIMIR NABOKOV: THE AMERICAN YEARS 133 (1991) (“I am not concerned with generalities . . . I am concerned with the specific text”). The words are Nabokov’s, which he wrote in 1948. The interpretive challenge remains to do justice to the other law keeping in mind that absent enough details, there is a risk of injustice. In Taylor’s terms, “[n]onrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.” Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM 25 (Amy Gutmann ed., 1994).

63. Whitman, *supra* note 46, at 1209. *See also id.* at 1197–98.

64. *Id.* at 1164.

65. *Id.* at 1196 (emphasis added).

difference between them. It is this differend that characterizes law-worlds in co-presence. It is *what there is*. This differend is the very “there-issness” of laws-in-co-presence. As such, it is “irreducible”<sup>66</sup>—an epistemic fact, and a well-known Leibnizian insight,<sup>67</sup> which Whitman accepts, if tacitly, throughout his text. “To exist is to differ” is how French sociologist and philosopher Gabriel Tarde put the matter as early as 1893.<sup>68</sup> Importantly, the site of the law’s immanence does not feature only within human awareness, so to speak, and it is therefore not to be reduced to the psychological texture of one’s experience as comparativist-at-law. Rather, the differend across laws acts as an interpellation in advance of any concern, appropriation, construction, and deployment by a comparativist-at-law as he decides at what level of differentiation he plans to conduct his archaeological probing or genealogical unconcealment of the laws he is bringing to hand and his interpretive ascription of meaning to these laws. It remains that the comparativist’s work of excavation and elicitation, his archival foray, not to mention his imputation of meaning, intervene *performatively*.

Whitman, as he marshalls his alertness to the differend, as he acts as discloser of meaning conveying the laws he is studying into interpretive existence, as he inscribes specific captures and framings of these laws, inevitably executes a re-presentation or a cascade of re-presentations of them, all presentations anew of the differend that there is, all *iterations*, all a process of *iterability*.<sup>69</sup> And these

66. JACQUES DERRIDA, LIMITED INC 253 (1990) [hereinafter LIMITED].

67. The gist of Leibniz’s argument (which he wrote in French) is as follows: “By virtue of imperceptible variations, two individual things cannot be perfectly similar.” 5 G.W. LEIBNIZ, NOUVEAUX ESSAIS SUR L’ENTENDEMENT (1765), reprinted in DIE PHILOSOPHISCHEN SCHRIFTEN VON GOTTFRIED WILHELM LEIBNIZ 49 (C.J. Gerhardt ed., 1960). Appearing some fifty years after his death, this text had been left incomplete by Leibniz in 1704. Often labelled “Leibniz’s Law,” the statement to which I refer stands for the proposition that only indiscernibles are identical or that the diverse is necessarily “other than” (or that distinct entities are never exact replicas of one another, that is: if there is X and Y, X is at least minimally something that exists as not-Y). Whitehead influentially extended Leibniz’s formulation to maintain that “[n]o two occasions can have identical actual worlds”—his claim being that no matter how faithfully situation B purports to mimic situation A the fact is that when B comes along, A has already taken place, which entails that event B features as one of its constitutive elements the pastness of event A and therefore, if on that ground alone, that event B differs from event A. ALFRED N. WHITEHEAD, PROCESS AND REALITY 210 (David R. Griffin & Donald W. Sherburne eds., 1978 [1893]). Cf. SAMUEL BECKETT, *Textes pour rien*, in NOUVELLES ET TEXTES POUR RIEN 191 (1958) (“[T]he same moment, there is no such thing”). The English version of Beckett’s text is his own. SAMUEL BECKETT, *Texts for Nothing* (1974), reprinted in TEXTS FOR NOTHING AND OTHER SHORT PROSE, 1950–1976 38 (Mark Nixon ed., 2010).

68. 1 GABRIEL TARDE, MONADOLOGIE ET SOCIOLOGIE (1893), reprinted in ŒUVRES 72 (Eric Alliez ed., 1999).

69. Using the lemma “iter,” which he claims to derive from the Sanskrit “itara” and to mean “other,” Derrida coins “iteration” and “iterability,” neologisms connoting at once recurrence and otherness or combining repeatability and differentiality. See DERRIDA, MARGES, *supra* note 17, at 375. Derrida insists that the idea of repetition *tout court* is “fantasmatic[ic],” “ideological[ic],” and “metaphysical[ic].” 2 JACQUES

re-presentations are “his”: indeed, they ultimately stand as a self-portrayal so that it would be artificial in the extreme to see Whitman elsewhere than being firmly ensconced within the comparison he has been designing: *the comparativist haunts the comparison*. The epistemic fact of the matter is thus that the foreign law and the foreign law’s otherness being disclosed in Whitman’s article very much bear Whitman’s “*absolutely singular signature*” and appear as nothing short of (displaced) “autobiographical inscription[s],”<sup>70</sup> an audacious concatenation of autobiographical fragments fashioned through the detour of the other’s laws. It is not, of course, that the comparativist ever finds himself being fully replicated beyond himself in the foreign law that he is addressing. Rather, it is that the foreign law one is shaping is to be understood as an extensibility of oneself in the sense that the comparison goes in a circle, which starts with the self and ends with the self.<sup>71</sup> In its turn, the inevitable complicity between foreign law and self-portraiture entails an ineliminable

---

DERRIDA, LA BÊTE ET LE SOUVERAIN 120 (Michel Lisse, Marie-Louise Mallet & Ginette Michaud eds., 2010 [2003]) [hereinafter BÊTE]. Again, Borges is helpful. Thus, Pierre Menard’s “admirable ambition was to produce a number of pages which coincided—word for word and line for line—with those of Miguel de Cervantes.” In the event, “[t]he Cervantes text and the Menard text are verbally identical, but the second is almost infinitely richer.” JORGE LUIS BORGES, *Pierre Menard, autor del Quijote* (1944), reprinted in FICCIONES 47, 52 (1999). Observe that the comparativist’s writing of foreign law is always subsequent to any encounter he will have had with the foreign. If only because this temporal gap hinders full restoration, writing is always “ruptured writing.” Letter from Samuel Beckett to Mary M. Howe (Jul. 11, 1937), in 1 THE LETTERS OF SAMUEL BECKETT, 1929–1940 521 n.8 (Martha D. Fehsenfeld & Lois M. Overbeck eds., 2009) Indeed, “[t]he simple act of recording anything on paper is already an immense transformation that requires as much skill and just as much artifice as painting a landscape or setting up some elaborate biochemical reaction.” LATOUR, *supra* note 50, at 136. The mnemonic challenge is liable to increase as more time passes between the comparativist’s experience and its inscription.

70. Jacques Derrida & Derek Attridge, “*Cette étrange institution qu’on appelle la littérature*,” in DERRIDA D’ICI, DERRIDA DE LÀ 262 (Thomas Dutoit & Philippe Romanski eds., 2009 [1989]) [hereinafter “Etrange institution”]. The words are Derrida’s. See GEORGE DEVEREUX, FROM ANXIETY TO METHOD 148 (1967) (“All research is . . . self-relevant and represents more or less indirect introspection”). And consider Borges’s striking metaphorical expression of the inescapable character of the self’s mark: “A man sets himself the task of drawing the world. As the years pass, he peoples a space with images of provinces, kingdoms, mountains, bays, ships, islands, fishes, rooms, instruments, stars, horses, and individuals. A short time before he dies, he discovers that that patient labyrinth of lines traces the image of his face.” JORGE LUIS BORGES, *Epilogo* (1960), reprinted in EL HACEDOR 128 (2009 [1960]). Cf. Letter from Samuel Beckett to Marthe Arnaud (Jun. 10, 1940), in 1 THE LETTERS OF SAMUEL BECKETT, 1929–1940 683 (Martha D. Fehsenfeld & Lois M. Overbeck eds., 2009) (“One believes to be choosing something, and it is always oneself that one chooses”).

71. “Everything given to me under the light appears as given to myself by myself.” DERRIDA, ECRITURE, *supra* note 18, at 136. Cf. BECKETT, INNOMMABLE, *supra* note 8, at 25 (“[M]y speech can only be of me and here”). The English version of Beckett’s text is his own. BECKETT, UNNAMABLE, *supra* note 8, at 12. For an exploration of the theme of recursiveness within comparative law, see Pierre Legrand, *Comparing in Circles*, in EXAMINING PRACTICE, INTERROGATING THEORY: COMPARATIVE LEGAL STUDIES IN ASIA 1–8 (Penelope Nicholson & Sarah Biddulph eds., 2008). Another investigation is in Pierre Legrand, *Law’s Translation, Imperial Predilections and the Endurance of the Self*, 20/3 THE TRANSLATOR 290 (2014).

admixture between foreign law and fiction, an inescapable ravel.<sup>72</sup> Although the edification of a self-portrait is unlikely to be perceived more clearly by a comparativist-at-law than, say, rules of grammar or rhetorical devices by a speaker, the fact remains that no ontological discontinuity between *interpretandum* and *interpreters* can safely be delineated.

As an authenticating motion, differential comparison allows each law-text under scrutiny to manifest itself as an inherently singular entity through the comparativist's act of *invention*, which is also a translation. The idea of invention is key. Its etymology readily evokes a contrivance (say, the invention of gunpowder or of the iPod). But, less intuitively perhaps, the Latin roots of the word "invention" also suggest a finding of what there is, there, *before* one (thus, the finder of a treasure trove is literally its "inventor," and one refers to the reputed finding of the Holy Cross by Helena, mother of Emperor Constantine, in 326 C.E. as the "Invention of the Cross"). "Invention" is therefore "suspend[ed] undecidably": "[I]t *hesitates perhaps . . .* between *creative* invention, the production of what is not—or was not earlier—and *revelatory* invention, the discovery or unveiling of what *already . . .* finds itself to be there."<sup>73</sup> Most significantly, "invention" can account for the fact that the comparativist simultaneously creates and finds foreign law, that he configures it even as he discovers it. The term thus captures the tension between *law-as-narrative* and *law-as-archive*, between the graphicacy and the graphical. The word "invention" carries the further *crucial* implication that the comparativist himself is not extraneous to the operation that consists in re-presenting foreign law. Indeed, no interpretation is simply a bringing-to-attention of a fully-present meaning, which would exist there, inertly awaiting decipherment. In other terms, no interpretation is ever only a finding. Rather, each single text requires an interpreter to bring forth one of its many latent or potential meanings. Not only is interpretation complementary to the text at hand, but it is a *necessary* complement for without interpretation no meaning could appear. Interpretation thus acts as a necessary placeholder of meaning, a fact entailing that interpretation cannot be regarded as being fully external to the text. Instead, interpretation, as it "*make[s] sense of the text*,"<sup>74</sup> pertains to the text. (Note how interpretation *makes sense* of the text: it fabricates the text's sense, it *invents* it.)

72. It is not that the comparativist's self-portrayal as foreign law is *only fiction*, but that it is *not only non-fiction*—a complication which cultural analysis helps to discern. See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* 139 (1999) ("A cultural approach sees that all of law's texts, including those of the legal scholar, are works of fiction").

73. Jacques Derrida, *Le parjure, peut-être*, 38/1–2 *ETUDES FRANÇAISES* 15, 23 (2002) (emphasis original).

74. Richard Shusterman & Wojciech Małecki, *Making Sense of Critical Hermeneutics: Critical Reflections*, in *THE AGON OF INTERPRETATIONS* 234 (Ming Xie ed., 2014) (emphasis original).

While the comparativist engages in a bringing-closer of what he ascertains to be significant within the foreign law-text, he is shown to occupy a station that cannot be fully independent of the comparison. And as he proceeds to elucidate the singularity of foreign law—to bring into relief, dauntlessly, the singularity within the law-texts that he is studying, to exhibit it, so to speak, on a stage which he will himself have set—he conveys the foreign’s textual complexity also. However, since the term “invention” includes reference to a finding, it aptly reminds one that the comparativist-at-law owes fidelity to the law-texts and cannot say whatever he wants about them. No matter how much open-texturedness and indetermination textuality beholds, the text ultimately sets boundary conditions on the activity of interpretation: there is *that* foreign law-text, there, and there are its lines of semantic resistance, its materiality; and then there is *this* foreign law-text, here, and its linguistic ramparts, too. If you will, textuality offers no limitless terrain for unconstrained semiosis. There is an extent to which texts thus exist as interpreter-independent entities so that, for instance, a judicial decision on minority shareholders’ rights just cannot be said to be about the land claims of indigenous peoples—indeed, even arguments that law is profoundly political allow that law-texts constrain legal reasoning.<sup>75</sup> It follows that the comparativist is *of* the law-text (in the sense that he is tied to it *and depends on it*), not unlike the way in which the law-text is *of* the comparativist (in the sense that it is tied to him *and depends on him*): the graphical prescribes the graphicacy even as the graphicacy prescribes the graphical.

On the question of the assemblage between law-text and comparativist, Peter Sloterdijk offers a particularly fruitful line of (metaphorical) reasoning showing how the two figures must ultimately be seen to form part of one integrated arrangement. As the comparativist transports himself away from himself toward the foreign law-text, as he (figuratively) puts himself outside himself, *hors de lui, aus sich heraus*, as the law-text becomes the medium of his expansion, he creates a space of co-existence, an interior, a solidarity, a sphere of intimacy embracing the text. In Sloterdijk’s language, the comparativist’s exoteric mission features as an act of “sphere-formation.”<sup>76</sup>

75. A further illustration is in BRIAN UPTON, *THE AESTHETIC OF PLAY* 265 (2015) (“We can debate whether or not Hamlet experiences homosexual attraction toward Horatio, but not whether or not Hamlet is a raccoon”). Kennedy offers a prominent view of law-as-politics, which recognizes how “judges operate under a norm of fidelity to the materials” and refers to “a norm of interpretive fidelity.” DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 4 (1997). In other words, “the reading . . . cannot legitimately transgress the text toward something other than itself.” DERRIDA, *GRAMMATOLOGIE*, *supra* note 25, at 227. As a comparativist, “I can interrogate, contradict, attack, or simply deconstruct a logic of the text that came before me, in front of me, but *I cannot and must not change it*.” DERRIDA, *PAPIER*, *supra* note 30, at 374 (emphasis added).

76. 1 PETER SLOTERDIJK, *SPHÄREN: BLASEN* 14 (1998).

This situation, which has nothing to do with “a merely dominating control by a subject over a manipulable object mass,” involves the law-text being ascribed meaning through a breathing-in of inspiration, that is, there takes place an arousal of the law-text to animated life so that it can be seen “as a *canal* for breathing by an inspirator.”<sup>77</sup> But there is mutuality intervening. In other words, “a reciprocal, synchronously interchanging relationship between the two breath poles [the breather and the one breathed on] comes into effect as soon as the infusion of the breath of life into the [other] is complete.”<sup>78</sup> (As Whitman confers an “increase in being” to the foreign law-text, it, too, ascribes an “increase in being” to him as the comparativist-at-law that he is contriving himself to be.<sup>79</sup>)

The foreign law-text, “a hollow-bodied sculpture awaiting significant further use,” “only awakens to its destiny” on account of the comparativist-at-law’s attribution of meaning to it.<sup>80</sup> The interpretive process thus expresses itself as “a correlative duality from the start”; it is “a dyadic union from the start, a union that can only last on the basis of a developed bipolarity. The primary pair floats in an atmospheric biunity, mutual referentiality and intertwined freedom from which neither of the primal partners can be removed without canceling the total relationship.”<sup>81</sup> In other words, there exists an entity like the-foreign-law-text-and-the-comparativist, and “[t]he two are bonded.”<sup>82</sup> Because “there cannot possibly be such a sharp ontological asymmetry between the inspirator and the inspired,” it may help to think of “a relationship of pneumatic reciprocity,” to envisage a “pneumatic pact.”<sup>83</sup> And the fact that, when it comes to the negotiation between text and interpretation, inevitable failure awaits “all the attempts at passage, at bridge, at isthmus, at communication, at translation, at trope, and at transfer that [one] . . . will try to pose, to impose, to propose, to stabilize,” the fact that within the bond “there are only islands,”<sup>84</sup> that the connection is a disconnection, that the

---

77. *Id.* at 40, 39 (emphasis original).

78. *Id.* at 40.

79. The expression “increase in being” (“*Zuwachs an Sein*”) is in GADAMER, *supra* note 24, at 145. Taylor pertinently remarks that “that of which we are trying to find the coherence is itself partly constituted by self-interpretation.” 2 CHARLES TAYLOR, *Interpretation and the Sciences of Man* (1971), reprinted in PHILOSOPHICAL PAPERS 26 (1992).

80. SLOTERDIJK, *supra* note 76, at 33, 35. For his part, Gadamer writes of the interpretive “re-awakening of the text’s meaning.” GADAMER, *supra* note 24, at 392.

81. SLOTERDIJK, *supra* note 76, at 42.

82. *Id.* at 44.

83. *Id.* at 40–41, 44.

84. DERRIDA, BÊTE, *supra* note 69, at 31 (2002). The gap between text and interpretation reveals “an infinite difference,” which the comparativist’s existential finitude does not allow him to surmount. *Id.* Derrida thus juxtaposes “*entre*” (“between”) and “*antre*” (“cavity” as in “hollow place” or “void”), which in French would be pronounced identically: DERRIDA, DISSÉMINATION, *supra* note 19, at 240. Cf. BECKETT, INNOMMABLE, *supra* note 8, at 66: “The island, that’s all the earth I know.” The English version of Beckett’s text is his own. BECKETT, UNNAMABLE, *supra* note 8, at 39.

only relation there can be is ultimately a *disrelation*, fails to disable the comparativist's intervention on foreign law-texts.<sup>85</sup> While a continuous chain of reference (for example, the reading, the musing, the discerning, the writing) can be seen to be joining the text and the interpreter into a Sloterdijkian assemblage, thus annulling the rigidly dualist Cartesian categorization, it remains that the structural hiatus, the disjointure, across modes of existence cannot be overcome so that the text continues incontrovertibly to exist as text and the interpreter as interpreter, there being the shared exposure of the text and of the interpreter, their *compearance*, to the incommensurable singularity and finitude that separates them. Sloterdijk's idea of sharedness thus resolves itself as a situation of *shared-separation*, as a "partaking" or "*partage*" (interestingly, verbs like "to partake" or the French "*partager*" mean, at once, "to share" and "to separate").<sup>86</sup> Again, though, there is nothing in the presence of a shared spacing of separation to devalue the comparativist's earnest pursuit of ascription of meaning to the legal other's law-texts.

As he decides to inflect textuality in order to show this or that aspect of the differend awaiting performative elucidation, the comparativist's rendition of a law-text becomes ever more helpful to the understanding of it the more interpretive depth he brings to bear on the text's singular complexity or complex singularity. The more sophisticated the interpretation being applied to a foreign law-text, the more it is possible for the interpreter to address textuality's "endless multiplication of folds, unfoldings, foldouts, foldures, folders, and manifolds" so as to reveal the singularity of the law-text and probe the differend distinguishing this text, say, from another law-text in co-presence.<sup>87</sup> Always, for differentialism to act as a governing principle of invention of meaningful meaning (as opposed to superficial meaning), close reading, and more cardinally *hearkening*, must intervene as the comparativist-at-law's basic protocols of interpretation. In this regard, I heed Rudolf Bultmann, one of Heidegger's influential colleagues and disciples, who advocates "listening to [the] claim [of the text]."<sup>88</sup> For his part, Heidegger reminds one that "we

85. Wanting to specify "a non-relational relation," Ricco distinguishes the idea from either a "being-with" or a "being-without" and suggests thinking in terms of "being-with-out." JOHN PAUL RICCO, *THE LOGIC OF THE LURE* 3–4 (2002). Ricco also uses the expression "together apart." *Id.* at 55.

86. For an insightful exploration of the trope of "shared-separation," see JOHN PAUL RICCO, *THE DECISION BETWEEN US* (2014). Ricco draws on Nancy, who applies himself to the semantic tension inherent to the French term. See, e.g., JEAN-LUC NANCY, *LE PARTAGE DES VOIX* (1982).

87. DERRIDA, *DISSÉMINATION*, *supra* note 19, at 301. See also CATHERINE BELSEY, *CRITICISM* 116 (2016): "[I]nterpretation will require a familiarity with as many as is humanly possible of those traces that make up the difference—the uniqueness—. . . of the text."

88. 2 RUDOLF BULTMANN, *Das Problem der Hermeneutik* (1950), reprinted in *GLAUBEN UND VERSTEHEN* 228 (1952). Cf. RODOWICK, *supra* note 52, at 262–63 ("Reading or interpretation is understood here as listening, as being receptive and open to what the text says, what the other says").

are compelled, as soon as we set out upon a way of thought, to give specific attention to what the word says,”<sup>89</sup> to its “speaking-to-us” (“*Zuspruch*”)—a term frequently to be found in Heideggerian philosophical vocabulary. Indeed, “indefatigably at issue is the ear.”<sup>90</sup> In the process, comparativism equips itself with the ability to make a strong case for the recognition and respect of differential co-presence.

Having noted toward the beginning of his article the existence of “unmistakable differences in sensibilities about what ought to be kept ‘private’” as between “the United States and the countries of Western Europe,”<sup>91</sup> Whitman confirms this view many pages later as he reaches his conclusion. Upon completion of his analysis, he thus observes how “the emphases and sensibilities of the law on either side of the Atlantic remain *stubbornly* different”; indeed, taking the matter of difference one step further, he refers to “transatlantic privacy *conflicts*.”<sup>92</sup> (By my count, the words “conflicts” or “conflict” appear nine times in the course of the text to mark the contention between European and U.S. privacy laws, a persistence suggesting, at the very least, that the term is hardly being used accidentally.<sup>93</sup> Indeed, the very title of the article comprises the Latin term “Versus” to mark the antagonistic differentiation between European and U.S. laws.) Along the way, Whitman firmly rejects the idea that “all human beings share the same raw intuitions about privacy”—“as anybody who has lived in more than one country ought to know.”<sup>94</sup> In this regard, he repeats the primary import of cultural governance: “[W]e have . . . intuitions that *reflect* our knowledge of, and commitment to, the basic values of our culture.”<sup>95</sup> Thus, “[w]e possess American intuitions—or, as the case may be, Dutch, Italian, French, or German intuitions”; in sum, “the norms of ‘civility,’ far from being universal, vary dramatically from community to community.”<sup>96</sup>

---

89. MARTIN HEIDEGGER, WAS HEISST DENKEN? 88 (1984 [1952]).

90. DERRIDA, MARGES, *supra*, note 17, at x.

91. Whitman, *supra* note 46, at 1155.

92. *Id.* at 1219, 1160 (emphasis added).

93. *Id.* at 1155 (twice), 1160 (twice), 1163, 1170 (twice), 1203, 1209.

94. *Id.* at 1160.

95. *Id.* (emphasis added). There is no reason to suppose that Whitman, as he mobilizes the idea of reflection, is not mindful of Teubner’s warning against “the fatal calamities of any approach . . . in which each element reflects the whole societal culture and vice versa.” Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MODERN L. REV. 11, 14 (1998).

96. Whitman, *supra* note 46, at 1160, 1168. Whitman’s “norms of ‘civility’” evoke human rights. Coming to the matter of human rights from what is arguably a different position than Whitman’s on the political spectrum, Posner insists that “[a]ll countries are different and all countries have different needs.” ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 145 (2014). Although Whitman and Posner make a key claim, it still tends to be the case, as Frankenberg remarks, that “[t]he intervention of human rights in conflicts obeys the rules of a grammar and applies an idealizing vocabulary which, in general, neutralizes the underlying socio-economic, cultural, and political conditions.” Günter Frankenberg, *Human Rights and the Belief in a Just World*, 12 INT’L J. CONST. L. 15, 57 (2014). Observe, however, that this process of neutralization is not neutral, and note how the prevailing human-rights discourse

Conjoining the themes of law's enculturation and laws' differentialization, Whitman maintains that "we must *begin* by recognizing that continental European and American sensibilities about privacy grow out of much larger and much older differences over basic legal values, rooted in much larger and much older differences in social and political traditions".<sup>97</sup> For Whitman, the acknowledgement of law-as-culture and of difference across laws must come at the inception of one's comparative research (*finis origine pendet*). In other words, it must thoroughly *inform* it. Reminding his readership that "the distances between [continental Europe and the United States] can often stretch into the unbridgeable,"<sup>98</sup> a fact to be borne in mind "before we start proclaiming universal norms of privacy protection,"<sup>99</sup> Whitman underscores how "[c]omparative law is the study of *relative differences*."<sup>100</sup> He adds: "Indeed, it is the great methodological advantage of comparative law that it can explore relative differences."<sup>101</sup> With specific reference to the laws of privacy, Whitman asserts how, irrespective of the fact that "Americans and Europeans certainly do sometimes arrive at the same conclusions," "[i]n comparative privacy law, too, it is the relative differences that matter," that is, "[the] different starting points and different ultimate understandings of what counts as a just society."<sup>102</sup> His attention to difference across laws prompts Whitman to discern, "[o]n the one hand, a European interest

---

is speech in which "one readily perceives . . . the face of bourgeois liberal feminism, American constitutionalism as interpreted by [the U.S.] Supreme Court, or middle-class Judeo-Christian family life in North America or Western Europe today." Richard A. Shweder, *Comment*, 49 CURRENT ANTHROPOLOGY 377, 377 (2008). While Habermas's critical social theory purports to offer a particularly sophisticated statement in favor of a universal conception of communicative rationality, which would exist independently from cultural conditions of possibility and intelligibility, it is the case that "Habermas . . . does not have an ear for the plurality of voices in which reason can speak." KOMPRIDIS, *supra* note 29, at 86. For a persuasive critique of Habermas's Eurocentrist assumptions, see AMY ALLEN, THE END OF PROGRESS 37–79 (2016). Allen refers to Habermas's "Eurocentric fallacy." *Id.* at 67. Even the paradigm of multiple modernities arguably remains a Eurocentrist critique of Eurocentrism. See, e.g., GURMINDER K. BHAMBRA, RETHINKING MODERNITY 75 (2007) ("[T]heories of multiple modernities continue to rest on assumptions of an original modernity of the West which others adapt, domesticate, or tropicalize. *Their experiences make no difference to the pre-existing universals*") (emphasis original). The model of "multiple modernities" is Eisenstadt's. See, e.g., S.N. Eisenstadt, *Multiple Modernities*, 129/1 DÆDALUS 1 (2000); S.N. Eisenstadt, *Multiple Modernities in an Age of Globalization*, 24 CAN. J. SOC. 283 (1999). Now, when Whitman writes about "norms of 'civility'" and their "dramati[c]" differentiation worldwide, I certainly do not take him to be formulating a statement against human rights. But it seems to me that his claim can reasonably be enlisted in support of the view that human-rights work should be pursued in the name of a presently-located and a presently-ascertainable ideology asserting itself through a recognized inscription in power.

97. Whitman, *supra* note 46, at 1160 (emphasis added).

98. *Id.* at 1163. For Derrida, this differend is insuperable. See *supra* text at note 84.

99. Whitman, *supra* note 46, at 1160.

100. *Id.* at 1163 (emphasis original). See also *id.* at 1203.

101. *Id.* at 1163.

102. *Id.*

in personal dignity, threatened primarily by the mass media; on the other hand, an American interest in liberty, threatened primarily by the government.”<sup>103</sup> For Whitman, the disparity is therefore between European-style “privacy as an aspect of dignity,” or “the right to control the sorts of information disclosed about oneself,” and U.S. “privacy as an aspect of liberty,” that is, “the right to freedom from intrusions by the state, especially in one’s own home.”<sup>104</sup> Elsewhere in his article, Whitman frames the discrepancy in analogous terms by juxtaposing how “it seems fundamentally important not to lose public face” in Europe and how “it seems fundamentally important to preserve the home as a citadel of individual sovereignty” in the United States.<sup>105</sup>

In this regard, it appears unnecessary to dwell on the striking contrast between Whitman’s emphasis on legal differentialization or relativism and comparative-law’s orthodox project, which Konrad Zweigert and Hein Kötz have promoted most influentially (although, to be sure, the formation of a paradigm takes place under no single jurisdiction). As is well known, these two comparativists explicitly assert a “*præsumptio similitudinis*,” “a heuristic principle [that] tells us where to look in the law and legal life of the foreign system in order to discover similarities and substitutes” and that “acts as a means of checking our results,” so that “the comparatist can rest content if his researches through all the relevant material lead to the conclusion that the systems he has compared reach the same or similar practical results, but if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again.”<sup>106</sup> Importantly, Whitman’s differentialist stance avoids the stinging rebuke addressed to such technologies of “oneness” as Zweigert and Kötz’s to the effect that “the comparativist *presumes* similarities between different jurisdictions in the very act of searching for them.”<sup>107</sup> Incidentally, I claim that such critique also has in mind comparativists like Gordley who, taking what is other to be the same, feel able to write that “[t]here [is] nothing distinctively German, French or American about [German, French, or American judicial] decisions.”<sup>108</sup> For his part, Whitman obviates the

---

103. *Id.* at 1219.

104. *Id.* at 1161.

105. *Id.* at 1162.

106. All four quotations are from KONRAD ZWIEGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 40 (Tony Weir trans., 3d ed. 1998) (emphasis original). Observe that Zweigert and Kötz postulate how laws are similar “even as to detail.” *Id.* at 39. Instead of the German original, I deliberately refer throughout my argument to this English translation, if only to acknowledge its widespread currency within the field of comparative law.

107. JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN 65 (1986) (emphasis added).

108. James Gordley, *Comparative Legal Research: Its Function in the Development of Harmonized Law*, 43 AM. J. COMP. L. 555, 563 (1995) [hereinafter *Research*]. See also JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW 3–4 (2006) [hereinafter *FOUNDATIONS*],

impoverishment of meaning that the semantic economy of sameness must herald. Indeed, the purported identification of “sameness” across laws—that is, the *similarization* enterprise—can *only* be achieved if the historical, political, social, philosophical, linguistic, economic, epistemic, and other discourses *constitutive* of law-texts are dogmatically/artificially excluded from the interpretive framework. The frenetic search for commonalities—which-clearly-must-be-there-since-orthodox-comparativists-want-them-there is *necessarily* based on the repression of the singularity located in the factual matrix within which any manifestation of posited law is *inevitably* ensconced.

Remarking that privacy law is “the product of local social anxieties and local ideals”,<sup>109</sup> Whitman structures his comparison by “focus[sing] . . . primarily on the Continent, whose world is too little known among Americans, with only an abbreviated sketch of American law,” his “hope” being that “even a sketch of American law will stand out in much bolder and more revealing relief when placed *against* the continental background.”<sup>110</sup> Concerning the European situation, Whitman states the need to engage with the history of aristocratic and monarchical societies and to address their “centuries-long, slow-maturing revolt against . . . status privilege.”<sup>111</sup> For

---

where, in the context of a study devoted principally although not exclusively to the laws of England, France, and Germany, references are made to “common problems,” to “similar concepts,” to “similar problems,” and to the “same results.” Indeed, Gordley adds: “We will feel reassured when solutions are similar.” *Id.* For another prominent example of a comparativist arguing the case for “[c]omparability in the sense of *similarity*,” see VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 178 (2010) (emphasis original). Jackson denigrates a “focus on differences” as “a position of ‘hyperparticularity’” and opines, cryptically, that “hyperparticularity is too pessimistic a view of the possibilities of learning.” *Id.* at 179. (But what can it *mean* to assert that, say, an insistence on the specificity of French law, that is, an attempt to enunciate as thoroughly as possible the singularity of French law, can be denying “the possibilities of learning”? Does specifying a law or one’s knowledge of a law, that is, deepening the extent of the available information with respect to a law, augmenting the interpretive yield (or affordance) concerning this law, not illustrate precisely a resolute commitment *to* learning, to the acquisition of useful and teachable knowledge?) Yet another comparativist contends that “we must try . . . to show that foreign law is not very different from ours but only appears to be so.” Basil S. Markesinis, *The Destructive and Constructive Role of the Comparative Lawyer*, 57 RABELSZ 438, 443 (1993). Ever the philodox, Markesinis also remarks on “how similar our laws on tort . . . can be made to look with the help of some skilful (and well-meaning) manipulation.” Basil S. Markesinis, *Why a Code Is Not the Best Way to Advance the Cause of European Legal Unity*, 5 EUR. REV. PRIV. L. 519, 520 (1997). The (alarming) operational word is indeed “manipulation.” To be sure, if a Parisian is condemned by a court in Chicago for something he did there, which is illegal in Illinois although legal in France, he can still make sense of the fact that while in the Chicago courtroom, he is dealing with law, and he can still realize that the judgment condemning him is not, say, a poem or a political speech trying to attract his vote. But such facts cannot lead one to draw the conclusion that legal/cultural boundaries are of secondary importance. For example, in endlessly meaningful ways there is still “French law” and there is still “Illinois law,” each entity remaining singular vis-à-vis the other. But one must be prepared to *hearken* to these singularities and to *justify* them.

109. Whitman, *supra* note 46, at 1219.

110. *Id.* at 1164 (emphasis added).

111. *Id.* at 1166.

him, noteworthy aspects of this movement are indebted to Fascism. In particular, “the fascist period, seen in proper sociological perspective, was one stage in a continuous history of the extension of honor throughout all echelons of continental society.”<sup>112</sup> Specifically, “fascist politics involved precisely the promise that all members of the nation-state would be equal in ‘honor’—that all racial Germans, for example, would be ‘masters.’”<sup>113</sup> In Whitman’s words, “[a]s a matter of doctrine, the Nazis *did* endorse the general right of personality” and “[a]s a matter of social history, the Nazis did guarantee . . . the claim to honor of low-status Germans.”<sup>114</sup> It follows that “[p]lainful as it is to acknowledge, . . . Nazi law directly prefigured the law of postwar Germany [on a general personality right].”<sup>115</sup> Drawing on his own earlier extensive research on the law of insult,<sup>116</sup> in the context of which he wrote at length on “[t]he German culture of insult” and stressed “the rise [in France] of [a] culture of distinctly legalistic social norms of politeness,”<sup>117</sup> Whitman devotes nearly twenty-five pages to a historical, political, and social examination of continental Europe with specific reference to privacy laws.<sup>118</sup> None of this interdisciplinary work, of course, is to imply that the habitual references to statutes, judicial decisions, law textbooks, and law-review articles do not feature prominently in the article. In fact, they occupy more than thirty pages of text.<sup>119</sup>

Before I turn to Whitman’s disputant, I want to emphasize, in my own words (again, then, not in terms that Whitman himself would necessarily endorse), what I regard as Whitman’s signal epistemic achievements. Crucially, in my opinion, Whitman does not purport to accomplish a reconciliation or a globalization of the European and U.S. models in a kind of totalizing conceptual whole (the sort of *envoi* that mainstream comparativists tend reflexively

---

112. *Id.*

113. *Id.*

114. *Id.* at 1188 (emphasis original).

115. *Id.* In holding that such an evil ideology as German Fascism can have assumed a constitutive role in the making of the German law of privacy, Whitman is bravely conceding—as a serious comparativist-at-law must do—that even Nazism is owed its epistemic due in the sense at least that its supremacist policies call to be credited with situated rationality, to be accepted as having operated rationally in “local” terms (albeit unwarrantably so by practically any other measure of rationality). For a further creditable epistemic motion along analogous lines by two leading philosophers, see HUBERT DREYFUS & CHARLES TAYLOR, *RETRIEVING REALISM* 121 (2015) (“The Aztec sacrifice that shocked Cortés and his men evolved out of ritual languages, rich interweavings of gesture, symbol, and verbal exchange, which had come to express/constitute certain meanings in human-divine relations”). On “localism,” see *infra* at note 136.

116. See James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 *YALE L.J.* 1279, 1295–360 (2000) [hereinafter *Three Societies*]. See also James Q. Whitman, *On Nazi “Honour” and the New European “Dignity,”* in *DARKER LEGACIES OF LAW IN EUROPE* 243–66 (Christian Joerges & Navraj S. Ghaleigh eds., 2003).

117. Whitman, *Three Societies*, *supra* note 116, at 1295, 1345.

118. Whitman, *supra* note 46, at 1165–89.

119. *Id.* at 1171–202.

to favor). Rather than submerge difference or conflate discontinuity within “the one” through some sort of artificial synthesis into pseudo-oneness,<sup>120</sup> Whitman discloses legal pluralism and defends its insurmountability (not at all an insignificant resistive stance to behold in the face of the worldwide spread of neoliberalism). As he eschews the possibility of a fully-inclusive transnational rational consensus and as he retains the idea of an agonistic public sphere within which different hegemonic legal projects can find themselves in co-presence, as he countenances energizing democratic confrontation, he easily withstands the orthodox view that “differences are really immaterial” (again, for him differences are “unmistakable”).<sup>121</sup> Defying the intimation that the dissemination of signifying forms, of meanings, and of understandings should be taken to suggest that not enough has yet been done to efface multiplicity, accepting (or perhaps simply resigning himself to) the irreducibility of more than one paradigm, Whitman, despite the connections he produces across laws through the inventive specification of these different laws’ singularities, leaves the laws enisled, that is, “*outside* one another,” “respecting and preserving this *exteriority* and this distance” so that, instead of any enforced subsumption under a prescribed overarching harmony, dispersion ultimately holds.<sup>122</sup> Toward the very end of his text, Whitman thus aptly, and seemingly serenely, without apparently thinking in terms of sacrifice, loss, or renunciation, in non-traumatic fashion, certainly forswearing any expression of regret, reminds one that “there is little reason to suppose that Americans will be persuaded to think of their world of values in a European way any time soon . . . . Nor is there any greater hope that Europeans will embrace the American ideal.”<sup>123</sup> However, this sanguine call for pragmatism is not to be confused with an apology for quietism. As Whitman observes, “we are all free to plead for a different kind of law—in Europe or in the United States.”<sup>124</sup> In other words, Whitman accepts that the fact of legal relativism—there *are* different laws—is not incompatible with militancy advocating one legal framework in particular, whether one’s “own” or another’s.

According to Whitman, the comparativist-at-law ought not to seek to have a particular model vindicated in the name of “universalism,” one of “those little phrases that seem so innocuous and, once you let them in, pollute the whole of speech.”<sup>125</sup> A symbolic

---

120. Cf. Werner Hamacher, *One 2 Many Multiculturalisms*, in *VIOLENCE, IDENTITY, AND SELF-DETERMINATION* 325 (Hent deVries & Samuel Weber eds., 1997) (“[T]here is only one that would be one too many, which would be one and one only”).

121. ZWEIGERT & KÖTZ, *supra* note 106, at 62; Whitman, *supra* note 46, at 1155.

122. MAURICE BLANCHOT, *L'ENTRETIEN INFINI* 453 (1969) (emphasis original).

123. Whitman, *supra* note 46, at 1221.

124. *Id.*

125. SAMUEL BECKETT, *MALONE MEURT* 12 (1951) [hereinafter *MALONE MEURT*]. The English version of Beckett's text is his own. SAMUEL BECKETT, *MALONE DIES* 17 (Peter Boxall ed., 2010 [1956]) [hereinafter *MALONE DIES*].

stratagem, “universalism” is always someone’s “universalism” since, in fact, someone assigns reference to the word—which means that what is being propounded as “universal” is the expression of a dilated selfhood: is it not a self that ultimately purports (for something) to be spoken in universal terms?<sup>126</sup> However, the “universalizing” motion cannot hide an invidious form of essentialism as the legal diversity characterizing humankind is reduced to a narrow set of features said to pertain to all human beings at some fundamental level. It follows that “common humanity is a trap since it defines divergence as secondary.”<sup>127</sup> To return to the topic at hand, “[i]f Europeans protect ‘privacy,’ it is not because they understand universal moral truths, which Americans fail to understand. It is because they live in societies that have been shaped by certain kinds of cultural expectations and certain kinds of egalitarian ideals.”<sup>128</sup> To make the case for the irrelevance of universalism within comparative law, Whitman harnesses a succinct example, in my view successfully so. Having remarked that in countries like France and Germany, the state reserves the prerogative to intervene in the parents’ choice of first names for their children, Whitman continues: “[I]f you tried to introduce a law of names into a state like Texas, you might face an armed rebellion. But does that mean that it is wrong or evil, by some universal standard, to have such a law of names?”; otherwise put, “[t]here is no such thing as privacy *as such*.”<sup>129</sup>

Because Whitman’s article recognizes, effectuates, and maintains a disrelation between the laws that he has made into his focus of study—since these laws continue as being different from each other even after they have been comparatively examined—its commitment to decentered or nomadic difference allows for resistance to the siren call of any assertion of truth in favor of one law over the other. Indeed, Whitman argues that “the issue is not that one side of the Atlantic has discovered true ‘personhood,’ while the other lags behind”; he adds that “the correct concept of personhood is not what

---

126. Assignment of reference has been described as “an obscure notion, subject to no extensional criterion of individuation and definable only in terms of other, equally obscure, intensional notions.” Harry Deutsch, *Extensionalism*, in *A COMPANION TO METAPHYSICS* 160 (Jaegwon Kim & Ernest Sosa eds., 1995). For his part, Waldenfels refers to “the convergence of the One with the Universal.” Bernhard Waldenfels, *Comparing the Incomparable: Crossing Intercultural Borders* (Ming Xie & Yu Gu trans.), in *THE AGON OF INTERPRETATIONS* 88 (Ming Xie ed., 2014).

127. Isabelle Stengers, *Comparison as a Matter of Concern*, 17 *COMMON KNOWLEDGE* 48, 62–63 (2011). Cf. Homi Bhabha, *The Third Space*, in *IDENTITY* 209 (Jonathan Rutherford ed., 1990) (“The difference of cultures cannot be something that can be accommodated within a universalist framework”).

128. Whitman, *supra* note 46, at 1211.

129. *Id.* at 1218, 1221 (emphasis original).

is at stake here.”<sup>130</sup> For Whitman, then, comparative law is emphatically not the “*école de vérité*” that Zweigert and Kötz state it to be as these two comparativists, although on the basis of unspecified criteria, would transform singular sites of legal enunciation into absolute locations of truth.<sup>131</sup> While Zweigert and Kötz insist that “one of the aims of comparative law is to discover which solution of a problem is the best,”<sup>132</sup> Whitman holds that there does not exist a “better” law of privacy and contends that “we will not do justice to our transatlantic conflicts if we begin by declaring that American privacy law has ‘failed’ while European privacy law has ‘succeeded.’”<sup>133</sup> Again, while Zweigert and Kötz’s orthodox utterance of comparativism would have comparativists-at-law “deepen [their] belief in the existence of a unitary sense of justice,”<sup>134</sup> Whitman takes the view that “law . . . work[s] by the light of local knowledge.”<sup>135</sup> He thus resolutely valorizes localism over every purported universalism: “[Comparativists] have to identify the fundamental values that are at stake in the ‘privacy’ question as it is understood in a given society,” and “[their] task is not to realize the true universal values of ‘privacy’ in every society.”<sup>136</sup> And Whitman continues to appreciate local knowledge even though the very situatedness of knowledge ultimately makes understanding across cultures impossible: “At the end of the day, Americans do not really grasp the European idea of the protection of privacy” (a point Whitman knows he could also have made regarding European bafflement vis-à-vis U.S. conceptions).<sup>137</sup>

---

130. *Id.* at 1164, 1219.

131. ZWEIFERT & KÖTZ, *supra* note 106, at 15. In using the French phrase, without italics, the English translation duplicates the original German version of the book. See KONRAD ZWEIFERT & HEIN KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG 14 (3d ed. 1996).

132. ZWEIFERT & KÖTZ, *supra* note 106, at 8.

133. Whitman, *supra* note 46, at 1160.

134. ZWEIFERT & KÖTZ, *supra* note 106, at 3.

135. CLIFFORD GEERTZ, LOCAL KNOWLEDGE 167 (1983).

136. Whitman, *supra* note 46, at 1220. I admit that the notion of locality requires to be problematized, and that there is nothing that obviously exists as local—or does not. Perhaps adverting to the fact that when one identifies knowledge as local one is presumably mobilizing a local conception of the local, Whitehead refers to the “fallacy of simple location.” WHITEHEAD, *supra* note 67, at 137. Note that Whitman’s brand of localization, which is committed to the pursuit of a conversation beyond borders, differs in all significant respects from the fey provincialization of legal knowledge that followed upon the coming into force of European civil codes in the nineteenth century.

137. Whitman, *supra* note 46, at 1221. Spivak underlines “the irreducible misunderstanding in successful human communication.” GAYATRI C. SPIVAK, AN AESTHETIC EDUCATION IN THE ERA OF GLOBALIZATION 518 (2012). For an earlier (and famous) pronouncement along analogous lines, see 7 WILHELM VON HUMBOLDT, ÜBER DIE VERSCHIEDENHEIT DES MENSCHLICHEN SPRACHBAUES UND IHREN EINFLUSS AUF DIE GEISTIGE ENTWICKLUNG DES MENSCHENGESCHLECHTS (1836), reprinted in GESAMMELTE SCHRIFTEN 64 (Albert Leitzmann ed., 1907) (“All understanding is always at the same time a not-understanding”). See also Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 15 (1983) (“[U]nification of meaning . . . exists only for an instant, and that instant is itself imaginary”). On their face, Spivak’s, Humboldt’s, and Cover’s statements can be read as (significant) variants of Gadamer’s influential assertion: “[O]ne understands

Because culture is both a liminal (or empowering) and a finite (or constraining) space, there is what Derrida styles as “the *cruel* law of difference,”<sup>138</sup> the ferocity arising in part from the fact that the differend across laws is “irreducible,” to repeat Derrida’s term (there *is* more than one law).<sup>139</sup>

Still on the subject of Whitman’s leading epistemic accomplishments, his re-presentational strategy takes comparative law away from positivism’s unexamined reliance on the categories of identity that would allow it to draw a firm line between “the law” here and “the non-law” there. In other terms, Whitman opposes the erasure or suppression of culture—what positivism wishes to exclude as the law’s other through a naming of it as not-law (to the extent that it is willing to name it at all). Whitman’s argument serves to overcome this effacement and to rehabilitate culture by showing how it is not exterior to law, how it operates as a constitutive dimension of law that can be located on the hither side of law, how it exists as *hyper-law*, as law at its *lawmost*. Note that as he recognizes law-as-culture, Whitman is making law become *what it always has been and what it already is* rather than turning it into something that it has not been or that it is not. In other words, it is not that there is an “uncultured” law, which can finally become encultured if only comparativists will allow it to realize its potential and purpose. It is instead that law has always already been encultured, but that comparativists acting as earnest positivists have been unwilling to address *law-as-culture*, no matter how extravagant the ramifications of their will to labor under a complete acatalepsy upon the subject of culture.<sup>140</sup>

---

in a *different* way, if one understands at all.” GADAMER, *supra* note 24, at 302 (emphasis original). Note, however, that Gadamer’s differential understanding arises in a context where he views a “fusion of horizons” (“*Horizontverschmelzung*”) between *interpretandum* and *interpretans*, an esemplastic idea of Hegelian inspiration, as achievable, desirable, and ultimately fixable. *Id.*, *passim*. Derrida perspicuously challenges these postulates. See, e.g., Derrida, PAPIER, *supra* note 30, at 306–07. For discussion, see Pol Vandeveld, *What Is the Ethics of Interpretation?*, in CONSEQUENCES OF HERMENEUTICS 288–305 (Jeff Malpas & Santiago Zabala eds., 2010); Pierre Legrand, *Derrida’s Gadamer*, in LAW’S HERMENEUTICS: OTHER INVESTIGATIONS 144–67 (Simone Glanert & Fabien Girard eds., 2017).

138. DERRIDA, *ECRIURE*, *supra* note 18, at 291 (emphasis original).

139. *Supra* text at note 66. For an investigation of the differend across laws, see Pierre Legrand, *The Same and the Different*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 240–311 (Pierre Legrand & Roderick Munday eds., 2003).

140. In a field where German influence has weighed *heavily*, one may be forgiven for discerning Kelsen’s very long shadow. See, e.g., HANS KELSEN, REINE RECHTSLEHRE 64 (§28) (1934): “The law counts only as positive law, that is, as legislated law” (“*Das Recht gilt nur als positives Recht, das heißt: als gesetztes Recht*”). Kelsen’s model, which he himself cast as “the theory of positive law,” continues as the decisive jurisprudential reference within the civil-law tradition. *Id.* at 38. Meanwhile, “the content of the law, even when its manifestation is a statute that seems to be concerned with only the most technical and mechanical of matters (taxes, for example), is *always* some social, moral, political, or religious vision”: FISH, *supra* note 52, at 131 (emphasis added). In other words, “technique is not *neutralizable*”: PIERRE LEGENDRE, DOGMA: INSTITUER L’ANIMAL HUMAIN 156 (2017).

Yet, the issue is not without complexity for even as he claims that culture is not not-law, Whitman sustains its heterogeneity vis-à-vis the law. This is to say that there is no attempt on Whitman's part to jettison culture's epistemic specificity even as he re-signifies law as law-as-culture. And, needless to add, Whitman does not purport to do away with law either. Indeed, he remains throughout a law professor writing on privacy laws for a law journal. His motion is therefore to embed culture into his legal analysis without ever leaving law. To understand how law can be configured as cultural without vanishing into culture, and how culture can be constitutively integrated within the making of law without dissolving into law, I find it helpful to suggest an exploration of the idea of trace chiefly as it has been insightfully theorized by Derrida—a philosopher who devoted much of his work both to the dynamics between text and interpreter and between self and other, arguably the epistemic sites of comparative law's two primary arguments.<sup>141</sup> My explanation on *architexture*—a hyper-reading to counter positivism's hypomnesis—enlists Giorgio Agamben's characterization: "Every culture is essentially a process of transmission and of *Nachleben*."<sup>142</sup> Importantly, "*Nachleben*" harbors a posthumous dimension; it evokes the notion of an after-life. More precisely, it combines the figures of "survival" and "influence" in a manner that sagaciously connotes law-as-culture and, as I shall elucidate presently, culture-as-trace and trace-as-law.

Without granting undue privilege to etymology and resisting any idea that, through the etymon, one would be able to recover some original linguistic "truth," it is relevant to observe at the outset that in Rome a "*textor*" was a weaver and that "*texere*" was "to weave." A text is indeed a fabric (consider the word "textile").<sup>143</sup> Thus, Emmanuel Levinas exclaims: "A text, a texture, a fabric, a work."<sup>144</sup> In the text, "a thousand threads of different sources intersect."<sup>145</sup> Accordingly, European and U.S. law-texts on privacy, like any law-text, exist as *intertextual* matrices, that is, they exist *as* interfaces

141. "Trace" is "a key Derridean word." J. Hillis Miller, *Trace*, in *READING DERRIDA'S OF GRAMMATOLOGY* 48 (Sean Gaston & Ian Maclachlan eds., 2011). Derrida himself credits the notion to Levinas (DERRIDA, *GRAMMATOLOGIE*, *supra* note 25, at 102–03) and, as "*Spur*," to Heidegger (DERRIDA, *MARGES*, *supra* note 17, at 73–78). As befits the idea of trace, it can also be linked to Freud and to Husserl and to Nietzsche and to . . . For a detailed examination of how regard for the trace can meaningfully assist comparative law, see Pierre Legrand, *Siting Foreign Law: How Derrida Can Help*, 21 *DUKE J. COMP. & INT'L. L.* 595 (2011). As Derrida attends to text and to otherness through the sinuous play of signifying traces, I accept that his occasionally extravagant style may confront the Anglophone reader with a significant challenge.

142. GIORGIO AGAMBEN, *STANZE* 131 (1977) (emphasis original).

143. See DERRIDA, *MARGES*, *supra* note 17, at 191 ("[F]abric means *text*") (emphasis original). See also BARTHES, *supra* note 2, at 73. Speaking of a theory of the text, Barthes uses the neologism "hyphology," the Greek prefix "hyphos" referring to a "web" (where "*hyphainein*" in Greek is "to weave"). 4 ROLAND BARTHES, *Texte (théorie du)* (1973), reprinted in *ŒUVRES COMPLÈTES* 452 (Eric Marty ed., 2d ed. 2002).

144. EMMANUEL LEVINAS, *SUR MAURICE BLANCHOT* 74 (1975).

145. SARAH KOFMAN, *LECTURES DE DERRIDA* 16 (1984).

where arrays of discursive threads have interlaced to be absorbed and transformed in order to be made to *speak legally*. The traces operate to colligate or fasten or bind or band, to collocate and collocate *as the law-text* as they come together to constitute it.<sup>146</sup> For example, traces of historical configurations enmeshed with traces of political rationalities intertwined with traces of social logics interwoven with traces of philosophical postulates plaited with traces of linguistic orders darned with traces of economic prescriptions interlaced with traces of epistemic assumptions become a foreign statute: they change into *this law-text*, which then periplicates within itself all these traces. Crucially, the discourses therefore assembling to *constitute* a law-text, thus being gathered, consciously or not, by the authors of the law-text, are not to be regarded as external to the law-text or contextual vis-à-vis it or as some sort of parergon pertaining to the realm of non-law. Rather, these discourses concern the very texture of the law-text: they inform the making or fabrication of it, and they remain of it, as survivancies, they lurk within it, once the law-text has emerged as the law-text that now exists. In sum, they leave a *trace* within the law-text, which entails that the text exists as “a fabric of traces,”<sup>147</sup> that it is marked, from its very inception, as the instantiation of a historical configuration, of a political rationality, of a social logic, of a philosophical postulate, of a linguistic order, of an economic prescription, of an epistemic assumption, and so forth.

On account of these ascertainable traces, a law-text thus operates palimpsestically: it harbors *remains*; it conceals vestigial presences; it retains the past (through the trace, a text is “retentional”).<sup>148</sup> It follows that one can associate the naming of a trace to a work of mourning: the thought of the trace involves acceptance of death—the historical configuration, the political rationality, and other facticity that inform the law-text existed *before* the text’s emergence into textuality, and they are no longer in the way they once were. Death, then, is in the text, within what remains alive, within what *lives on* as the law-text—hence, Agamben’s “*Nachleben*.”<sup>149</sup> In Derrida’s stunning formulation, “[d]eath strolls between the letters,”<sup>150</sup> so that a text can legitimately be understood as giving a tangible form to the living dead (I am moved to insist that *the traces are not contextual vis-à-vis the law-text*. They are of the law-text, they

146. In French, Derrida repeatedly uses the verb “*bander*.” In familiar French, “*bander*” is for a man to have an erection. Derrida’s pun is plausibly that as the traces proceed to band as the text, they allow the text to stand, erect, as text. See JACQUES DERRIDA, GLAS 151b (1974) (“I suggest that we try everywhere to replace the verb to *be* by the verb to *band*”) (emphasis original).

147. JACQUES DERRIDA, PARAGES 118 (2d ed. 2003 [1979]).

148. JACQUES DERRIDA, LA VOIX ET LE PHÉNOMÈNE 95 (1967) [hereinafter VOIX].

149. Cf. Jacques Derrida, *Living On* (James Hulbert trans.), in HAROLD BLOOM ET AL., DECONSTRUCTION AND CRITICISM 62–142 (2004 [1979]) [hereinafter *Living On*]. For Agamben’s formulation, see *supra* text at note 142.

150. DERRIDA, ECRITURE, *supra* note 18, at 108.

are the law-text. Importantly, this fact protects the traces from their relegation by positivism to the context of the text and thus avoids their elimination from the *law-text* on that score.)

Borrowing the spectral metaphor, one of the leading tropes in Derrida's work on text and interpretation, it can be said that the various traces *haunt* law-texts—this image allowing a reconciliation of the abditive character of traces with the fact of their presence. In Derrida's terms, "the spectral structure is the law here."<sup>151</sup> To be sure, "[s]pectrality does not involve the conviction that ghosts exist," but rather the view that "the living present is scarcely as self-sufficient as it claims to be."<sup>152</sup> In other words, "[t]here *are* phantom effects, even if phantoms do not exist."<sup>153</sup> Again, "[i]t is a matter of heteronomy, of a law come from the other—of the other [in the text], an other greater and older than [the text]."<sup>154</sup> There is "the non-legal or pre-legal origin of the legal," what Heidegger styles (inimitably, although helpfully) as the law's "where-from-out-of" ("*[das] Von-wo-aus*").<sup>155</sup> Once more, it is not that the traces form a network which would constitute the law's context so that the traces would exist, if you will, besides the law. It is indeed vital to emphasize that the traces are *not* contextual vis-à-vis the text. Rather, through a practice of linguistic encryption ("[ghosts] are engrained in our language"),<sup>156</sup> the traces innervate the law-text into which they morph to the point where they *are* the law-text itself and make it, in sum, a polytext. Think of traces as "jurimorphs," as being "jurimorphed," as "jurimorphing" into the law-text.<sup>157</sup>

Since they have been "[b]uried alive" as constitutive elements of the text,<sup>158</sup> because they are not out of the law-text or of the law, the traces cannot justifiably—as a matter of the justice owed to the text—be interpretively out-lawed. For the text's interpreters to relegate the traces to the exteriority of the text is to institute an

151. DERRIDA, PAPIER, *supra* note 30, at 307.

152. Fredric Jameson, *Marx's Purloined Letter*, in *GHOSTLY DEMARCATIONS* 39 (Michael Sprinker ed., 1999).

153. NICHOLAS ROYLE, *THE UNCANNY* 278 (2003) (emphasis original).

154. JACQUES DERRIDA, *VOYOUS* 123 (2003).

155. JACQUES DERRIDA, *POLITIQUES DE L'AMITIÉ* 176 (1994); 18 MARTIN HEIDEGGER, *GRUNDBEGRIFFE DER ARISTOTELISCHEN PHILOSOPHIE* (1924), in *GESAMTAUSGABE* 284 (Mark Michalski ed., 2002).

156. OWEN DAVIES, *THE HAUNTED* 249 (2007).

157. The terms are McGee's. They are also deployed by Latour, who credits McGee. See Kyle McGee, *On Devices and Logics of Legal Sense: Toward Socio-Technical Legal Analysis*, in *LATOUR AND THE PASSAGE OF LAW* 61–92 (Kyle McGee ed., 2015); Bruno Latour, *The Strange Entanglement of Jurimorphs*, in *LATOUR AND THE PASSAGE OF LAW* 331–53 (Kyle McGee ed., 2015). Contemplate also the image of seamless suturing. Miller reports that there are two English meanings of the word "trace" that suggest "connection," one having to do with the straps or chain attaching a horse to a wagon or farm implement, the other concerning a bar that transfers movement from one part of a machine to another. In Miller's terms, "[t]he trace is a hinge." Miller, *supra* note 141, at 51.

158. MARK WIGLEY, *THE ARCHITECTURE OF DECONSTRUCTION* 169 (1993).

“artificial exteriority” through striation—and it is therefore to transgress the text, which is the kind of over-interpretation that would be unjust and that cannot be allowed.<sup>159</sup> The traces are the text’s *text-ness* itself, which means that the text exists *as its traces*. (Note that the dynamics at stake involve much more intimacy within the dyad trace/text than would be suggested, for example, if one were to say that the traces inhabit the text. To inhabit is to be inside something. To inhabit a house is to live inside of it. But the individual and the house very much remain two separate entities. To say that traces haunt the text, or that an individual haunts a house, evokes a co-extensiveness—a constitutive correlation—that inhabitation fails to capture, but that a spectroscopy would convey. Consider traces as the film negative, the other side of the image that will appear if held to the light, and think of the inherence between the negative and the image.)

Now, each trace is traceable to a further trace, which in turn interlaces with another trace, itself being intertwined with yet another trace, to the extent that this concatenation of traces calls to be approached in terms of structural infinity. For example, a German judicial decision on the law of privacy can be traced to the text of German legislation, which can itself be traced to a conception of honor within German society, which can be traced further to the ideology of Fascism—or so Whitman’s argument goes as he unravels the skein of yarn that is German law’s complex singularity. In all rigor, though, there is an ever-nextness to the trace so that one could pursue the tracing of the law-text endlessly. Not unlike the circus juggler adding more clubs, more devil sticks, more spinning plates, more knives, the comparativist, pretending to ever-increasing levels of virtuosity, could pursue his interpretive engagement and trace the emergence of Fascism within German society to ascertainable political or social moments. These moments themselves could then be traced to certain intellectual influences, which themselves could subsequently be traced to . . . The trace’s fissiparous and rhizomatic features indeed prompt Derrida to observe that “it is impossible absolutely to justify a point of departure,” that there is “above all no originary trace,” a fact which, importantly, entails how “*there is no absolute origin of meaning in general.*”<sup>160</sup> In other words, what

159. DERRIDA, GRAMMATOLOGIE, *supra* note 25, at 52. For Derrida’s disavowal of any deformation of the text, see *id.* at 227.

160. *Id.* at 233, 90, 95, (emphasis original). In other words, there is “[t]ext as far as the eye can see”: DERRIDA, DISSÉMINATION, *supra* note 19, at 371. Cf. BECKETT, INNOMMABLE, *supra*, note 8, at 212 (“Set aside once and for all . . ., all idea of beginning and end”). The English version of Beckett’s text is his own. BECKETT, UNNAMABLE, *supra* note 8, at 108. See also SAMUEL BECKETT, LE DÉPEUPLEUR 53 (1970) (“So on infinitely towards the unthinkable end”). The English version of Beckett’s text is his own. SAMUEL BECKETT, THE LOST ONES (1972), reprinted in TEXTS FOR NOTHING AND OTHER SHORT PROSE, 1950–1976 117 (Mark Nixon ed., 2010).

the law exists as, the law's "as-ness", is infinite: *the law incessantly divides into itself*.<sup>161</sup>

Note that the interminability of the text's finitude does not confer any transcendental character upon it so that it remains firmly enplaced or embedded within its constitutive facticity. Moreover, the active involvement of the comparativist-at-law in the configuration of the tracing—and therefore the input of the comparativist's own finitude (again, all human beings, as encultured beings, must contend with a contingent cultural horizon)—prevents the syntax of the trace from falling prey to any idealizing tendency. If you will, every trace remains to be decided, which means, for instance, that every trace harbors the potential not-to-be-elicited: it is exposed to the force of erasure (erasing is an act also), it is vulnerable to the interpreter's withdrawal or retreat—which, although it would not involve the trace's annihilation or destruction, would mean its "decreation."<sup>162</sup> Because it is the comparativist-at-law who is "that someone who holds gathered into a single field all the traces of which the text is constituted,"<sup>163</sup> it is he who pronounces on traces through the making of singular interpretive decisions. And yes, something different could always be said about the text, which would ignore *this* trace and insist on *that* trace; something more could always be written which would feature one additional trace—which means that the text is doomed always to be different from itself (which is also the text's opportunity always to remain current).<sup>164</sup> In the

161. Cf. BECKETT, MALONE MEURT, *supra* note 125, at 12 ("Everything divides into itself"). The English version of Beckett's text is his own. BECKETT, MALONE DIES, *supra* note 125, at 6.

162. RICCO, *supra* note 86, at 27. Derrida maintains that "[a]n unerasable trace is not a trace." DERRIDA, *ECRIURE*, *supra* note 18, at 339.

163. Roland Barthes, *The Death of the Author*, 5/6 ASPEN (Richard Howard trans., 1967) (translation modified). Each issue of this three-dimensional magazine, a leading art publication that was released irregularly between 1965 and 1971, appeared in a customized box or folder filled with materials in a variety of formats (including, for example, sound recordings, posters, cardboard sculptures, or critical essays). The contents of the issue of interest to me, featuring Barthes's article as "Item 3," are available at <http://www.ubu.com/aspens/aspens5and6/index.html> (last visited April 15, 2017). In as much as it preceded the French essay in print, the English version of Barthes's *Aspen* contribution deserves to be regarded as the *editio princeps*. For the French text, see BARTHES, *supra* note 2, at 67 (1968).

164. Cf. SAMUEL BECKETT, *Lexpulsé*, in NOUVELLES ET TEXTES POUR RIEN 37 (1958) ("I don't know why I told this story. I could just as well have told another. Perhaps some other time I'll be able to tell another"). The English version of Beckett's text is his own and Richard Seaver's. SAMUEL BECKETT, *The Expelled* (1962), reprinted in *THE EXPELLED/THE CALMATIVE/THE END* 16 (Christopher Ricks ed., 2009). Elsewhere, Beckett offers an interesting variant of this idea: "There are many ways in which the thing I am trying in vain to say may be tried in vain to be said." SAMUEL BECKETT, *Three Dialogues* (1949), reprinted in *DISJECTA* 144 (Ruby Cohn ed., 1984) [hereinafter *Three Dialogues*]. For yet another Beckettian insight into the matter of the range of possible narratives, see SAMUEL BECKETT, *FIN DE PARTIE* 69–71 (1957) ("It was an extra-ordinarily bitter day, I remember, zero by the thermometer. . . . It was a glorious bright day, I remember, fifty by the heliometer. . . . It was a howling wild day, I remember, a hundred by the anemometer. . . . It was an exceedingly dry day, I remember, zero by the hygrometer." The English version of Beckett's text is his own. SAMUEL BECKETT, *ENDGAME* 31–33 (Rónán McDonald ed., 2009 [1958]).

words of Latour, “a good account [i]s one that *traces a network*,” one key question being “how much energy, movement, and specificity our . . . reports are able to capture” as they enunciate, in performative manner rather than by means of direct indication, what a law exists as.<sup>165</sup> In this regard, Derrida does very well to emphasize that “the thought of the trace . . . cannot not take flair into account.”<sup>166</sup> Out of the countless possible assemblages, all of them different from one another, one thing about a text is clear, however, and it is that any gathering of the text’s constitutive traces that the comparativist undertakes to re-present can never be complete and must therefore always escape finality. (In this sense, tracing exceeds interpretive coordination.) Accepting that one will want to eschew so unceasing a mode of analysis that it would threaten the sanity of writing, to avoid a mad polygraphy (again, there will be tears in the web of knowledge), “[t]he more *attachments* [the text is shown to have], the more it exists.”<sup>167</sup>

A law-text therefore stands as a massively incorporative cultural formation. In other terms, “[a] text . . . is simultaneously the condensation of a scarcely delimitable history . . ., of language, of the encyclopedia”—which means that through the traces, as text, “can be gathered the greatest potentiality of historical, theoretical, linguistic, philosophical culture.”<sup>168</sup> In this regard, Theodor Adorno makes an argument about history, which I think can help one understand Derrida’s claim. Adorno thus remarks that “history does intrude on every word and withholds each word from the recovery of some alleged original meaning.”<sup>169</sup> Adorno’s observation can be extended to the whole of culture for it is also politics, society, philosophy, language, the economy, epistemology, *und so weiter* that “intrude[s] on every word” and “withholds . . . some alleged original meaning.” This fact means that, in addition to its graphical features, a text also exists as *world*. A law-text, for example, is *intra-worldly*.

I must insist that, if only on account of “the failure of the threads ever to come neatly together,”<sup>170</sup> it is the comparativist-at-law *himself* who brings the traces into interpretive existence, who makes the traces actively signify, who ascribes dynamic meaning to them, who acts as a facilitator of resonant sense. As he commits to this protocol of elevation to interpretive relevance, as he elects to emphasize certain traces rather than others (while all traces are existent, he will not deem all of them to be equally pertinent), as he proceeds

165. LATOUR, *supra* note 50, at 128, 131 (emphasis original).

166. DERRIDA, *GRAMMATOLOGIE*, *supra* note 25, at 233.

167. LATOUR, *supra* note 50, at 217 (emphasis original). The threat of excess brings to mind Beckett’s castigation of “[a]ll these demented particulars.” SAMUEL BECKETT, *MURPHY* 11 (J.C.C. Mays ed., 2009 [1938]).

168. Derrida & Attridge, “Etrange institution,” *supra* note 70, at 262. The words are Derrida’s.

169. THEODOR W. ADORNO, *JARGON DER EIGENTLICHKEIT* 11 (1964).

170. Miller, *supra* note 141, at 30.

to an assemblage of the traces that he wishes to treat as relevant, the comparativist is, strictly speaking, involved in a process of iterability, which recalls the point I indicated about invention. While the comparativist reproduces what there is out of fidelity to the text, yet he inevitably proceeds in his “own” (encultured) key, not least because of the surfeit of available information that the traces carry between them. It follows that each comparativist, even as he finds himself confined by the pre-existing text, inscribes the text to signify a meaning which is potentially at variance with other comparativists’ inscriptions. It is indeed each comparativist’s prerogative to conduct his own process of inscription of meaning. A foreign law-text can therefore reasonably be expected to signify differently depending on the meaning-making strategy deployed by each singular interpreter, the heterogeneity of significance revealing interpretation to operate as an inherently productive process of ascription of meaning. If you will, each interpretation is a re-interpretation.

Ultimately, since no trace being recovered or made manifest features a full presence which would have been thoroughly mastered, on account of the fact that every trace refers to constitutive traces of its own, since each trace harks back to *its* constitutive traces, and given that each of these earlier traces likewise . . . , there will persist, at the very least, something of the law-text being read that will remain untraced, something other still at issue, something yet to come, another trace eventually to be interpreted by one interpreter or other. Given that a full understanding of a text must always be deferred, because any narrative about a law-text must necessarily be partial and provisional, any interpretation—and, specifically, any reading of foreign law’s traces—can be said to be structurally subtractive in that it necessarily intervenes as “t-1” (the omissions depending on the comparativist’s needs or desires, not to mention the various limits with which he must contend, say, physiologically or materially). In other terms, any interpretation of a law-text will always feature less than the whole of the traces that there are, than the whole of the meaning of the foreign law that there is. Inevitably, an interpreter of foreign law, no matter how much patient deliberation he can allow, will be at the minimum one trace short of the foreign law’s full presence, which entails that there is a feature of foreign law, no matter how meticulous the interpretation of the foreign on offer, that will remain unconcealed and unmarshalled.<sup>171</sup> Unavoidably, because the law-text at issue is structurally unmasterable in as much as it cannot be coerced into full presence, there is an aspect of foreign law that will stay inaccessible, intractable, ineffable,

---

171. Derrida talks of “structural non-saturation.” DERRIDA, LIMITED, *supra* note 66, at 20. Cf. Ian Angus, *The Intercultural Horizon of Contemporary Understanding*, in THE AGON OF INTERPRETATIONS 33 (Ming Xie ed., 2014) (“The values expressed in traditions and cultures are not capable of discursive totalization”).

inexpressible, indescribable, hidden, encrypted, *secret*, both for the comparativist himself and for his readership. (One could claim that it is precisely in the way in which foreign law exceeds phenomenalization that it genuinely exists as *foreign* law.) Yet, notwithstanding the structural inexhaustibility of the other law, of the other's law, despite the foreign's zone of tenacious inscrutability, its obdurately remaining remainder, the comparativist's (aporetic) commitment to the constitution of meaning holds. Even in the face of *communicatio interrupta*, which is also *communio interrupta*, despite the fact that the other exists, at least partly, in a beyond of the self and is therefore beyond unqualified encountering, which indicates that there is no form of intentionality whatsoever, no matter how empathetically dedicated, that can allow the self to meet the other as other (in the full sense of the term),<sup>172</sup> Whitman's article thus offers a fine example of the coruscating cognitive advances that can be achieved, of the (controversial) interpretive gains that can be made (revealing along the way how tracing pertains neither to perpetual prevarication nor to perdurable paralysis).<sup>173</sup>

One significant implication resulting from this understanding of law-texts—"the elaboration of a concept of the text that does not leave 'reality' outside and does not reduce itself to the graphy on the page and in the book,"<sup>174</sup> that is not reductively logocentric—is the appreciation that, contrary to what positivism holds, an exclusively and exclusionary "legal" text *never was*. While for positivists "[an] explanation must encompass the law as a whole, but nothing beyond the law,"<sup>175</sup> "law" here effectively meaning *Recht*, the fact is that there has been, that there is, and that there can be no such thing as double-distilled, essential, "pure" law. Any idea of a "legal" *proprium* is out of place. Indeed, on account of its traces, every foreign law-text exists as a singularly plural entity or features a plural singularity. It exists, to borrow from Jean-Luc Nancy's, as a plural singularity.<sup>176</sup> What has classically been understood as other-than-law (history, politics, society, philosophy, language, economics, epistemology, and so forth) is, through the law-text's structuring spectral principle,

172. Note that otherness's escape from full cognition is the other's opportunity not to dissolve into the self, to remain the other. Indeed, if the self could fully make sense of the other, otherness would be cancelled as it would find itself being absorbed within the self's conceptual system. In Levinas's terms, "[i]f one could possess, seize, and know the other, it would not be the other." EMMANUEL LEVINAS, *LE TEMPS ET L'AUTRE* 83 (1983).

173. There are more noteworthy illustrations such as MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986); THEODORE ZIOLKOWSKI, *THE MIRROR OF JUSTICE* (1997); TEEMU RUSKOLA, *LEGAL ORIENTALISM* (2013). For a circumstantial review of Ruskola's book, see Pierre Legrand, *Noted Publications*, 8/2 *J. COMP. L.* 444 (2013).

174. JACQUES DERRIDA, *POLITIQUE ET AMITIÉ* 106 (Michael Sprinker ed., 2011) [hereinafter *POLITIQUE*].

175. Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 *MICH. J. INT'L. L.* 1003, 1017 (2006).

176. See JEAN-LUC NANCY, *ETRE SINGULIER PLURIEL* (2d ed. 2013).

revealed to be very much present *as* the law-text: the self exists as the other, the self-in-the-law exists as the other-in-the-law—which means, in more challenging philosophical language, that, in Derrida’s words, “the same is the same only in affecting itself of the other, by becoming the other of the same.”<sup>177</sup> As applied to a foreign law-text, Derrida’s claim is that the foreign law-text exists as the foreign law-text that it exists as on account of its being imbued or infused by otherness—specifically, by other discourses such as history, politics, and so forth.<sup>178</sup> Put differently, the foreign law-text’s authentic self exists as something other than a pure self. It is a more complicated self than the pure self that positivists have assumed it to be. And it is precisely because of the fact that the trace attenuates the opposition between the self and the other, given that the trace is “where the relation to the other inscribes itself,”<sup>179</sup> or because the trace “strikes the opposition between the inside and the outside” of the law (and of the law-text),<sup>180</sup> that the idea of law being fully present as something that would be only the “legal” *stricto sensu* (whatever this may have been held or may still be held to mean) is shown to be epistemically fatally flawed. As “[a] fabric of differences, [the text] is always heterogeneous.”<sup>181</sup> Otherwise said, the text, as it harbors traces of history, politics, and so forth, thus exists as an intertextuality, that is, as an intrinsically differential entity: “Textuality [is] constituted by differences and by differences from differences.”<sup>182</sup>

Trying to convey the gist of his argument in pithy fashion, and complexifying the issue even further in the process, Derrida writes: “The Outside ~~is~~ the Inside.”<sup>183</sup> As I read him, the crossing of the verb—again, a Heideggerian/Derridean symbol affirming the impregnable semantic limitations of the best available word there is at one’s disposal—suggests that “inside” and “outside” are undialectizable (that is, that the terms cannot be reduced to opposing forces). But it is not simply a question of the “outside” being “inside” in the same way as “inside” is “inside.” To be sure, the “outside” has a claim to being comprehended as part of the inside (for example, through the idea of the haunt). Yet, it cannot be said, without more ado, that “outside” is “inside,” which would be foolish (*quaere*: would it help to claim that

177. DERRIDA, VOIX, *supra* note 148, at 95.

178. “The trace of the other ha[s] imprinted itself indelibly within the innermost part of the own, no matter how it might be disguised and covered up by new programmes.” PETER SLOTERDIJK, DERRIDA EIN ÄGYPTER 27 (2007). Cf. JACQUES DERRIDA, RÉSISTANCES 42 (1996) (“The trace . . . is at the heart of the present . . . a movement of referral to the other, to otherness”) [hereinafter RÉSISTANCES].

179. DERRIDA, GRAMMATOLOGIE, *supra* note 25, at 69.

180. KOFMAN, *supra* note 145, at 39.

181. *Id.* at 16. Cf. SAMUEL BECKETT, WATT 35 (C.J. Ackerley ed., 2009 [1953]) (“Everything that happened happened inside it, and at the same time everything that happened happened outside it. I trust I make myself plain”).

182. DERRIDA, DISSÉMINATION, *supra* note 19, at 111.

183. DERRIDA, GRAMMATOLOGIE, *supra* note 25, at 65 (emphasis omitted).

the trace or the haunt is outside the “outside?”). As the long-honored binary distinction between the inside and the outside of the law-text is deposed in favor of an economy of survival or inheritance (again, a trace is that which lives *on*), the traces require to be mobilized as an interpretive lever by the comparativist seeking, through the deployment of adamant attention to the matter of signification, to bring forth a deep meaning of the foreign law-text by way of a disentangling or an unfolding of textuality. Through a more sophisticated epistemic appreciation, the different discourses that have classically been asserted simply to lie outside of the law are thus re-signified, or represented, as not existing outside of it after all, but as being *of* it. It is important to note that the fact that history or politics are *of* the law does not mean that these discourses lose all individuality so as to disappear or vanish into law. Once more, one must think in terms of “trace.” The point is that history or politics have left their trace within the law, say, as constitutive features of a statute or of a judicial decision. They have transformed themselves into law, they have been transposed as law, they have morphed into law. Yet, at the same time as they are *of* the law, history or politics exceed it—an intricate disposition that the Derridean notion of “supplement” attempts to capture.<sup>184</sup> After all, what history or politics leave as law is a trace, not the whole of “them.” There is therefore an “exteriority” or an “otherness” subsisting “elsewhere,” an overflow beyond the law-text.

As one performs “that task of entering the ‘[legal] memory’ of other [laws],” acknowledging that a foreign law-text exists irreducibly as plurality and assuming responsibility vis-à-vis such discursive variegation with a view to striving to do *justice* to the law-text, one must discern how “remainder effects . . . have presence effects.”<sup>185</sup> In other words, one must accept that the text’s presence constitutively consists in significant ways of a past which was once present,<sup>186</sup> a past which is now “occulted” within the language of the

---

184. At the same time as they are *of* the law, history or politics are *supplemental* to it. Vis-à-vis the legal as it has been positivistically understood, history or politics exist as exorbitances even as their textual inherence, the fact that they are always already constitutive of law-texts, can be traced so as to rebuke any orthodox pretense at the purity of law. Noting that the supplement is “out of the positivity onto which it adds itself,” Derrida ascribes to it a virtue of “reparation” since it serves to correct the way in which the presence of the text has traditionally been (mis)represented. DERRIDA, GRAMMATOLOGIE, *supra* note 25, at 208; DERRIDA, MARGES, *supra* note 17, at 373.

185. GAYATRI C. SPIVAK, READINGS 42 n.13 (2014); DERRIDA, PAPIER, *supra* note 30, at 385.

186. Cf. Miller, *supra* note 141, at 49 (“[T]he trace undoes the metaphysical . . . concept of time as made up of a present which is present here and now [and] a past which was once present”). In Heidegger’s parlance, the text exists as *having-been*. The German language allows Heidegger to write “[*I*]ch bin-gewesen,” literally “I am-been” (instead of “I have been”). MARTIN HEIDEGGER, SEIN UND ZEIT 328 (2006 [1927]) (emphasis omitted). As long as the text exists factually, its traces continue to constitute it. There is, then, the primordial “beenness” of the text (its “*Gewesenheit*”) as a constitutive element of its very existence. See also SLOTERDIJK, *supra* note 178, at 65 (“[The text] stands as its own sepulchre, remembering itself—while the voices of its own beenness sound from the depths”).

text,<sup>187</sup> a past which exists within the text as trace. The comparativist thus unconceals the so-called “othernesses” dwelling within the textuality of the foreign law-text, recovering what has been repressed, that which positivism’s systematic strategy of purification has sought to eliminate in order to avoid any “contamination” of the legal in the hope of preserving (a false sense of) order within a commodious and self-serving, if artificial, system of disciplinary knowledge. On account of the making-manifest of what has been censorially camouflaged—because of the disclosing of the foreign law-text existing also as history, politics, and so forth—the law is, *paradoxically*, seen to exist also as what it is not, or at least as what it has not been wanted to be, positivistically speaking. “The living present springs forth on the basis of its non-self-identity . . . . It is always already a trace.”<sup>188</sup>

Without a doubt, as it seeks to get the comparativist-at-law at once further away from what the law-text is said to be according to positivist dogma and closer to what the law-text effectively exists as, because it disrupts habitualization, since it allows for the recognition of a multiplicity of knowledges as law, an articulation of the legal which “exceeds the tranquil relation of a subject to an object,”<sup>189</sup> a tracing of the foreign law-text, endows interpretation with more capacious or edifying insights into the legal and accords the comparative intervention concrete cultural significance not least in terms of its political earnestness. In other words, tracing *re-signifies* comparison-at-law. As I read Whitman, he argues for “the necessity . . . to elaborate this new concept of text,”<sup>190</sup> for the assignment of an immense critical potential to the trace in recognition of the inherently allogeneous character of the foreign law-text. Hence his references to history, politics, and so forth, not as being exterior to privacy law, but as being *of privacy law*—or, if you will, as *supplementing* privacy law.

Concerning the comparativist’s response to the *fragmentary demand*, that is, to the interpellation made by traces as textual fragments, it must be emphasized that while traces are to be seen as providing a crucial interpretive capital, they cannot, whether explicitly or implicitly, determine an exact understanding, whether on their own or with the comparativist-at-law’s interpretive assistance. Tracing simply is unable to lay claim to Zweigert and Kötz’s

---

187. DERRIDA, GRAMMATOLOGIE, *supra* note 25, at 69.

188. DERRIDA, VOIX, *supra*, note 148, at 95. Of Heideggerian inspiration, the expression “always already” wants to mean in this usage that “presence” (say, the presence of a text) simply cannot be fathomed otherwise than as trace. Textual presence cannot have existed as other than that, ever, not even for the briefest moment. *Cf.* BENJAMIN NOYS, THE PERSISTENCE OF THE NEGATIVE 44 (2010) (“Hauntology is ‘always-already’ inscribed in any concept of the living present as its necessary division, which opens it to alterity”).

189. JACQUES DERRIDA, DONNER LA MORT 48 (1999) [hereinafter DONNER].

190. DERRIDA, POLITIQUE, *supra* note 174, at 107.

sought-after “scientific exactitude” or to reach “the right resul[t]”; in fact, to quote Beckett, here “[t]he danger is in the neatness of identifications.”<sup>191</sup> Indeed, comparative law is about otherness (other laws and other discourses-in-the-law) far more than it is about correctness. Very much, then, depends on the interposition of the comparativist and, specifically, on the aims that he pursues, not to mention the opportunities available to him (including the time he can use). It is the comparativist’s predilections that preside over his selection of traces (and of traces of traces) within the latent or potential knowledge network and that orient his insistence on particular constitutive features of the law-text, and not others, in the light of his competence, resources, and interests. And it is the comparativist who provides the interpretive ligature between the various traces that he invents in order to structure a narrative regarding foreign law. Indeed, the trace—the event of the other-in-the-law—cannot emerge of its own accord; rather, it must be induced, prodded, supported, constructed. The trace is never simply encountered as object, in the form of brute empirical data. Instead, there is always an interpretive insinuation of the comparativist, which at the very moment of decidability inevitably entails a transformation of the law-text, a mutation that is inscribed through the act of re-presentation. Observe that this process of selection, which is necessary since the comparativist simply cannot answer the call of each and every trace, entails an ethical compromise in the sense that some “othernesses” will get sacrificed—a fact affirming that *the tracing of the trace is a politics*. (In this sense also, the comparativist’s elected tracing is inseparable from an act of mourning for everything that will not be traced.) Since no text can be traced in full, because the tracing process knows no end, strictly speaking no interpretation can ever be exact or correct.

---

191. ZWEIGERT & KÖTZ, *supra* note 106, at 45, 34. For his part, while busily fabricating an abatis for the comparative orthodoxy, Bogdan claims that “[t]he basis of any meaningful comparative legal work is, of course, the obtaining of correct information about the rules to be compared.” Michael Bogdan, *On the Value and Method of Rule-Comparison in Comparative Law*, in *FESTSCHRIFT FÜR ERIK JAYME 1237* (Heinz-Peter Mansel et al. eds., 2004) (emphasis added). Meanwhile, references to “accurate comparison” (at 11, 179, 181, 291) or to an “accurate understanding of what [foreign] courts have held” (at 189) are found *ad tædium* in JACKSON, *supra* note 108. For its part, Beckett’s warning is in SAMUEL BECKETT, *Dante...Bruno.Vico..Joyce* (1929), reprinted in *DISJECTA 19* (Ruby Cohn ed., 1984). Interestingly, the editor indicates that Beckett’s text is his “first non-juvenile publication.” Ruby Cohn, *Notes*, in *DISJECTA 169* (Ruby Cohn ed., 1984). I refer to the very first sentence of Beckett’s essay. Cf. GAYATRI C. SPIVAK, IN *OTHER WORLDS 41* (2006 [1987]), where, in a text devoted to Virginia Woolf’s *To the Lighthouse*, Spivak writes at the outset that “[her] essay is not necessarily an attempt to . . . lead us to a correct reading.” A comparativist beginning his research on the English law of estoppel who would be more concerned with trace-haunting than truth-hunting might insightfully adopt Spivak’s qualification and write as follows: “This essay relating to the English law of estoppel is not necessarily an attempt to lead us to a correct reading of it.” For an intriguing challenge to correctness or rectitude and the defense of an argument from inclination pursuant to which one must, altruistically, show oneself to be *inclined* toward others (arguably the primordial comparative posture), see ADRIANA CAVARERO, *INCLINAZIONI* (2014).

No doubt perturbatively from the standpoint of positivism, tracing thus attests to inescapable interpretive ambivalence or oscillation.

As it orients dissemination of meaning, as it chooses to disclose and arrange specific aspects of the singularity of a foreign law-text and, unavoidably, not to realize some of its other interpretive possibilities (again, the singularity of the text can never be fully present in the comparison),<sup>192</sup> any tracing proves a singular act of commingling and of *bricolage*. In the final analysis, no intervention on a foreign law-text by a comparativist can convincingly be dissociated from an engagement with self-portraiture. If you will, the comparison always already appears as *imago vitae suae* as it contains at the very least the comparativist's judgment about himself—which must mean that the quality of any comparative research endeavor is a function of a *travail de soi sur soi*, that the governance of the other has to do with the governance of the self, that a way to improve knowledge of otherness is to improve knowledge of selfness through an act that consists in making the comparing self into a self-reflective comparativist upon whom a critical education can be performed, an exercise in *Bildung* can be accomplished.<sup>193</sup> While Zweigert and Kötz regard as problematic the fact that “the picture presented by a scholar [be] coloured by his background or education” and enjoin comparativists to copy foreign lawyers, to practice a kind of heterotautology, to do “as they do,”<sup>194</sup> it is the case that the comparativist must content himself with the articulation of a mode of adjacency as regards foreignness so that his investment into the other law cannot be to reproduce it, but only to re-produce it. Vis-à-vis otherness, the comparative motion, which can never reach beyond the vergency of the other—which always writes *toward* the other's law—is inherently non-mimetic. After all, any comparison-at-law is *someone's* comparison-at-law.<sup>195</sup> Accordingly, the radical necessity of (encultured) decision precedes, traverses, and survives comparison. And because

192. “Everything plays out in this paradox . . . : that singularity is never *present*.” DERRIDA, *POLITIQUE*, *supra* note 174, at 85 (emphasis original).

193. As I mention the word “*travail*,” I am reminded of Foucault's understanding of the term as “what is susceptible of introducing a significant difference in the field of knowledge at the cost of a certain exertion.” 4 MICHEL FOUCAULT, *Des travaux* (1983), reprinted in *DITS ET ÉCRITS* 367 (Daniel Defert & François Ewald eds., 1994). Observe that *Bildung* and the self-formative processes in the search for an optimized interpretive yield (or affordance) that the German term wants to capture are incompatible with method. See RABINOW & STAVRIANAKIS, *supra* note 30, at 59–60.

194. ZWEIFERT & KÖTZ, *supra* note 106, at 47, 36.

195. For a thoughtful reflection on adjacency, see PAUL RABINOW, *MARKING TIME* 33–50 (2008). “How does one read? One inserts oneself inside the text of the other.” SPIVAK, *supra* note 185, at 31. *How does one compare? Does one insert oneself inside the law of the other?* Is the penetrative imagery apt? Would “caress,” for example, not suit more optimally what Goodrich calls the “modest[y]” of comparative law? Peter Goodrich, *Interstitium and Non-Law*, in *METHODS OF COMPARATIVE LAW* 215 (Pier Giuseppe Monateri ed., 2012). For a tentative introduction of the idea of “caress” within comparative dynamics, see Legrand, *supra* note 139, at 311. Remarkably, Barthes would approach otherness through the motif of the “not-to-want-to-grasp” (“*non-vouloir-saisir*”). ROLAND BARTHES, *FRAGMENTS D'UN DISCOURS AMOUREUX* 275 (1977).

tracing works as an infinitely inquisitive archaeological or genealogical sequence (to query is to quarry), since there is still tracing to be had even when one would have thought that one had reached the bottom or the source (although one may think one has attained the ultimate trace, there always exists another constitutive trace within that trace itself), given that comparison is an indefinite process, one must therefore endlessly decide “until one loses one’s sight and one’s voice.”<sup>196</sup> There are never, then, exhaustive comparisons, only exhausted comparativists (ascription of meaning thus falling prey to the body and being ultimately interrupted by it). One key implication is that in the face of foreign law-texts, “[comparativists-at-law] are caught up in the extraordinarily complex texture of textuality which [they] cannot unravel”; no single answer is possible, only singular ones: the foreign law-texts can be read this way, but they can also be read that way. In Derrida’s words, “[a] thousand possibilities will always remain open even as one understands something of that sentence which makes sense.”<sup>197</sup> *There are no guarantees*—or, rather, to refer to Beckett’s aesthetics of steady ambivalence, “[h]aze sole certitude”.<sup>198</sup>

As I purport to identify Whitman’s main epistemic achievements, I note how he consistently accentuates the personalization of his analysis, not least through the use of first-person pronouns. While for the comparative *doxa* the dose of personal input is expected to fit on a molecule, Whitman, unabashedly, without seeking to shelter behind “objectivity” or “truth” or any other *Luftgebäude*, avoiding even the slightest intimation of rubricism, assumes responsibility for performing *his* tracing of the laws of privacy under scrutiny—no matter how contentious this exercise proves to be as when he traces German law-texts to Fascism, whether this interpretation can produce stability of conviction in his readership then depending on the extent to which the conclusions on offer are perceived plausibly to elucidate the development of German law. Looking at the matter of creditability through the readers’ eyes, the issue will involve, perforce,

196. KOFMAN, *supra* note 145, at 26. Cf. UPTON, *supra* note 75, at 260 (“Although theoretically the open nature of texts might allow infinite wanderings, our actual experiences will always be finite”).

197. JOHN D. CAPUTO, *RADICAL HERMENEUTICS* 201 (1987); DERRIDA, *LIMITED*, *supra* note 66, at 122. For an impressive illustration of the extent of the narrator’s interpretive authority, see SAMUEL BECKETT, *MOLLOY* 293 (1951) (“Then I went back into the house and wrote, It is midnight. The rain is beating on the windows. It was not midnight. It was not raining”). The English version of Beckett’s text is his own. SAMUEL BECKETT, *MOLLOY* 184 (Shane Weller ed., 2009 [1955]). In principle, the U.S. comparativist ascribing meaning, say, to French law-texts on the matter of religious attire at school enjoys much the same (subversive) latitude as Moran, Beckett’s character, writing about the time and the weather.

198. SAMUEL BECKETT, *MAL VU MAL DIT* 61 (1981) [hereinafter *MAL VU MAL DIT*]. The English version of Beckett’s text is his own. SAMUEL BECKETT, *ILL SEEN ILL SAID* (1981), *reprinted in COMPANY/ILL SEEN ILL SAID/WORSTWARD HO/STIRRINGS STILL* 70 (Dirk Van Hulle ed., 2009) [hereinafter *ILL SEEN ILL SAID*].

questions of differential institutional power—what is the comparativist’s institutional affiliation? Where is he publishing his work? What are his interdisciplinary credentials? What *impression* is he making? Ultimately, whether one’s readership finds one’s constructed comparative narrative persuasive and deems it more compelling than other narratives—whether one’s readership is prepared to show *faith* in one<sup>199</sup>—will also have to do with the readers’ enculturation and be affected by the goals being pursued through the act of reading. A historian’s illustration aptly emphasizes the readers’ decisive role in the matter of interpretation: “Strictly speaking, it was not Schiller’s essay which influenced Schlegel, but *Schlegel’s own reading* of it; nor was it the ideas in Schiller’s essay which influenced Schlegel, but *Schlegel’s understanding* of those ideas.”<sup>200</sup>

Interpretation—or more accurately the desire called “interpretation”—is pivotal to comparative legal research. Only through (fully-fledged) interpretation can the foreign law-text escape the positivist strait jacket and find itself being deployed meaningfully, or “(almost)-full” of its meanings, within comparative discourse, by reference to its depth, immanence, or *texture*, that is, by advertence to its constitutive heterogeneous complexity. And only if interpretation is understood as a complicated exercise in anamnesis (a recollection or a recollective thinking, as opposed to an amnesia or a forgetting), allowing for the return of repressed traces, can it attest to the way in which the lifeworld *is* active within the foreign law-text (which is itself active within the lifeworld). Because no law-text exists *in der Luft*, since every law-text is encultured, given that every law-text is emplaced, somewhere, only on account of (encultured) interpretation can a law-text be made to exist interpretively in a manner that purports to do justice to its signifying intricacy (the unwritten conjecture being that this brand of justice is a value worthy of realization not as some sort of sanitized and congealed ideal, but as an active “always-under-construction” constellation of identity markers).

199. Cf. Marc Redfield, *Wordsworth’s Dream of Extinction*, 21/2 *QUI PARLE* 61, 68 (2013): “[R]epresentations perform their ‘adequations’ or acts of ‘binding’ only as acts of faith.”

200. LOUIS O. MINK, *Change and Causality in the History of Ideas* (1968), reprinted in *HISTORICAL UNDERSTANDING* 221 (Brian Fay, Eugene O. Golob & Richard T. Vann eds., 1987) (emphasis modified). As regards interdisciplinarity, the tractability of interdisciplinary competence (which is not constellatory omnicompetence) is ultimately to resolve itself, to an important extent, along Spivak’s lines: “I am not erudite enough to be interdisciplinary, but I can break rules.” GAYATRI C. SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON* xii (1999). Cf. DUNCAN KENNEDY, *SEXY DRESSING ETC.* xi (1993).

It follows from this quandary—necessarily encultured texts must be read by necessarily encultured interpreters<sup>201</sup>—that no interpretation is definitive, that no interpretation can ever be the last interpretation. In this regard, the striving to ascribe meaning to a law-text hardly differs from an interpretive endeavor bearing on, say, *King Lear*.<sup>202</sup> And because a given interpretation emphasizes these traces rather than those (again, it is the comparativist who *possibilitates* singularity), the law-text is made to differ from what it had been said to mean on account of earlier interpretations. Each time the foreign law-text is subjected to another interpretation, to another authorial inscription—each time an earlier interpretation or inscription is defeated—the text is made to overcome any fixed identity it might have been thought to harbor (although all the while retaining its identity). If A is a text and A' the interpreter thereof, there simply can never be a definitive situation whereby A=A'. (Why would such an equivalence be wanted anyway? If the anthropologist becomes a Boyowan, he is no longer an anthropologist and can no longer contribute an anthropological perspective on the Boyowan.) Indeed, the space and the spaciousness of separation between *interpretandum* and *interpretans* is the only place where an interpretation aiming at something can emerge (distance enacts the condition for all unblurred understanding). The law-text thus exists as a moving target. On reflection, it exists not so much as that which is posited or positioned, in the sense at least of a matter that would be stabilized or fixated, but as an entity under way, always on the edge of itself. To those who wonder whether there is ever an end to such interpretive itinerance, whether the text's uncertainty is eventually surpassed, one's answer must be, again, that interpretation is at once unceasing and interminable, that indetermination is language-determined, that a word can only be a word by not being a thing. In the face of all hollow assurances and considerations, the final interpretation is always *to come*. Writing with specific reference to the

201. Cf. SAMUEL BECKETT, *Peintres de l'empêchement* (1948), reprinted in DISJECTA 136 (Ruby Cohn ed., 1984): "The one will say, I cannot see the object to represent it because the object is what it is. The other, I cannot see the object to represent it because I am what I am." The English version of Beckett's text is his own. Samuel Beckett, *The New Object* (1948), 18 MODERNISM/MODERNITY 878, 879 (2012).

202. More than 400 years after *King Lear* was first staged at court on 26 December 1606, the inherently open-textured character of interpretation means that new readings of Shakespeare's text continue to be advanced. Recall that James VI, King of Scots, acceded the English throne as James I in March 1603 and appointed Shakespeare to the royal household in May 1603. Casting the playwright as a court official, one of the "King's Men" seeking to please his new masters after a shift in power, Shapiro makes a case for the importance of the Jacobean Shakespeare, whom he argues is too often overlooked in favor of the Elizabethan writer. See JAMES SHAPIRO, *THE YEAR OF LEAR* (2015). This illustration shows the incessancy of interpretation. And the fact that interpretation is an endless process means that Shapiro's is not, and cannot be, the last interpretive word either on Shakespeare or on *Lear*. Indeed, see BRIAN VICKERS, *THE ONE KING LEAR* (2016). See also Stephen Greenblatt, *Can We Ever Master King Lear?*, NEW YORK REV. BOOKS, Feb. 23, 2017, at 34–36.

interpretation of judicial decisions, Michel Rosenfeld puts the matter in suitably evocative terms: “[T]he final formulation . . . must always be postponed until the dusk will have settled on the last of the future adjudications,” that is, to quote Sloterdijk, until “the Sunday after history.”<sup>203</sup>

Whitman’s comparative law, rather than approach the legal as an improper compound that the purely exegetical act of some Platonizing positivist would promptly disambiguate, acquiesces—perhaps *surrenders*—to the restlessness of impregnable indeterminacy. His tracing of the law asserts at once the comparativist’s powerlessness vis-à-vis foreign law (he cannot/will not trace the foreign law-text to the end) and his empowerment (he can/will trace the foreign law, make the other law signify through his writing, thus revealing the law-text’s constitutive intricacy). As Whitman’s comparativism is riven by a tension that it cannot resolve, his interpretive errancy or investigative wandering appositely leaves an interrogation in the hands of his comparative interventions’ addressees. Whitman’s readers, although foreign law has now been elucidated for them, are left wondering, as Fascism appears in the glare of narrative revealment as the archive of German law-texts, insurgently interrupting the normalizing apparatus of positivism: “Fascism, *really?*” Note that while the addressees’ involvement in the validation of suggested meaning can generally be seen to act as an indispensable guardrail ensuring that interpretation will not transgress the text and will therefore not ascribe any meaning whatsoever to it, thus protecting the text from something like interpretation malpractice, addressees can also stifle innovative imputation of meaning to the text. *Let us see. A voir. Mal sehen.*



As one of Whitman’s most astute potential colloquists, as a particularly knowledgeable and experienced interlocutor, as a comparativist-at-law fully conversant with the languages and laws of France and Germany, Gordley proposed a rejoinder in the 2007 edition of the *Louisiana Law Review*.<sup>204</sup> Within the field of comparative law, one has long been familiar with Gordley’s annealed argument that “when one compares the private law of common and civil law systems, most of the problems are similar.”<sup>205</sup> According to Gordley, “the problem of

203. MICHEL ROSENFELD, *JUST INTERPRETATIONS* 32 (1998); SLOTERDIJK, *supra* note 178, at 15. The ceaselessness of interpretation (famously underscored by Montaigne) extends to science. See, e.g., Francesco J. Varela, *The Creative Circle: Sketches on the Natural History of Circularity*, in *THE INVENTED REALITY* 322 (Paul Watzlawick ed., 1984) (“[W]e live in an apparently endless metamorphosis of interpretations following interpretations”). Varela, a Chilean biologist and neuroscientist, famously introduced the notion of autopoiesis to biology.

204. James Gordley, *When Is the Use of Foreign Law Possible? A Hard Case: The Protection of Privacy in Europe and the United States*, 67 *LA. L. REV.* 1073 (2007).

205. *Id.* at 1073. See also GORDLEY, *FOUNDATIONS*, *supra* note 108, at 3–4, where reference is made to “common problems,” “similar concepts,” “similar problems,” and the “same results.”

whether a boy is liable for injuring a playfellow or a seller is liable for defects in his merchandise is analysed in much the same way in Hamburg, Montpellier, Manchester, and Tucson, or for that matter in New Delhi, Tel Aviv, Tokyo, and Jakarta.”<sup>206</sup> Gordley is thus of the view that “when we describe [judicial] decisions as applications of German or French or American law, we mean little more than that the court making the decision had jurisdiction because the case arose in these countries. There [i]s nothing distinctively German, French or American about the decisions themselves.”<sup>207</sup> Given “common problem[s],” it follows that “jurists in one country should be guided by what those in other countries do”—a claim that supplies Gordley with a paramount rationale to underwrite comparative law.<sup>208</sup>

In his response to Whitman, Gordley’s goal, however, is to take matters one key step further and to show that “jurists in different legal systems should seek each other’s guidance even when *discrepancies* in their law are glaring.”<sup>209</sup> By way of specific illustration in support of his argument, Gordley turns his attention to “[t]he most glaring of all [discrepancies], perhaps, [which] is the protection granted to honor, dignity, and reputation.”<sup>210</sup> Addressing Whitman’s pronouncement that European laws differ from U.S. law, Gordley expresses agreement with this conclusion. “Whitman is right,” says Gordley without further ado, an opinion he confirms by repeating elsewhere in his text that “Whitman may be perfectly right” and that “Whitman is certainly right” in terms of his historical reflections and indeed remarking that “[Whitman’s] observations are an important contribution to understanding the way law impacted society.”<sup>211</sup> Yet, Gordley is keen to emphasize that “[h]is [own] account of nineteenth century French law is much different from the one given by Whitman in his article.”<sup>212</sup> But if Gordley thrice acknowledges that Whitman’s comparative research is “right,” why would he want his own inquiry to be “much different” from it? And where lies the disparity that Gordley announces?

Gordley underlines that “we must be clear about the issue we are discussing.”<sup>213</sup> As regards French law, he maintains that “Whitman’s story is not concerned with when French *law* formally protected the honor and dignity of lower class people. It concerns

---

206. JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 1 (1991).

207. Gordley, *Research*, *supra* note 108, at 563.

208. Gordley, *supra* note 204, at 1073.

209. *Id.* at 1073–74 (emphasis added).

210. *Id.* at 1074.

211. *Id.* at 1095, 1077, 1077, 1077. Elsewhere, however, Gordley writes that “Whitman’s image of American attachment to freedom is a man sitting on his property with a shotgun ready to defend himself against all intruders”: GORDLEY, *FOUNDATIONS*, *supra* note 108, at 257. He adds that “[Whitman’s] image of continental attachment to dignity is an almost aristocratic sense of honor”: *Id.* at 257–58.

212. Gordley, *supra* note 204, at 1077.

213. *Id.*

the importance attached to the protection of honor in French *society*.”<sup>214</sup> In other words, Gordley insists that Whitman’s account would not have to do with French “law,” but rather with French “society.” As regards Germany, Gordley again takes the view that Whitman’s report does not bear on the law. Rather, says Gordley, “his is the story of nineteenth century German thinkers”; indeed, “Whitman describes how German intellectuals regarded the protection of honor and dignity.”<sup>215</sup> For Gordley, “Whitman’s observations should not be confused with a *description* of how *the law* supposedly in force changed”; the fact is, as Gordley reprises his contention, that “[Whitman] and [he] tell a different story.”<sup>216</sup>

Gordley is categorical about his own agenda: “I am concerned with *what the law was*.”<sup>217</sup> As it discloses an ontological preoccupation, this declamation, as resounding as it is terse, explains why, from Gordley’s standpoint, there is no need to refer to “culture” in his text—a notion that, from his perspective, indubitably pertains to society or to intellectual history rather than to “law.” Unsurprisingly, then, Gordley’s argument prescind entirely from “culture.” Indeed, in his article Gordley offers impeccable positivist credentials: out of one-hundred-and-thirty references, all but one are to law-texts or authoritative legal commentaries.<sup>218</sup> Specifically, Gordley mentions statutes on eighteen occasions (I count the *Digest*) and judicial decisions forty-three times. He also features forty-eight acknowledgments to textbooks (I include ancient works) and twenty citations to law-review articles.

For the purposes of my critique, the pivotal passage in Gordley’s attempted refutation of Whitman’s statement is clearly the phrase where he indicates, in the plainest terms, his abiding preoccupation with “what the law was.” It is on the basis of this specific interest that Gordley rebukes Whitman’s narrative as not having to do with “a description of . . . the law . . . in force,”<sup>219</sup> and it is on the strength of this particular outlook that he proceeds to marginalize Whitman’s account. Now, I am unwilling to disqualify Gordley’s formulation as mere rhetorical flourish or to ascribe an accidental character to his words. On the contrary, Gordley’s scholarly talent compels me to take his writing most seriously and to attend to his statement with the meticulous attention it deserves as this brief sentence presents the reader with the prose condensate of a particular form of existence in the law, with a *Weltanschauung* also.

As I read Gordley, his conception of “being-concerned-with-what-the-law-was” or, if I may be allowed to presentize the matter,

---

214. *Id.* at 1078 (emphasis added).

215. *Id.* at 1081.

216. *Id.* at 1077, 1081 (emphasis added).

217. *Id.* at 1081 (emphasis added).

218. For the exception, see *id.* at 1086 n.55, where Gordley adverts to the *Nicomachean Ethics*.

219. *Supra* text at note 216.

“being-concerned-with-what-the-law-is,” consists in an investigative endeavor that finds itself closely circumscribed. It is bounded. As such, Gordley’s scholarly project very much features “insiders”—those who, like him, are applying themselves to the identificatory enterprise within law—and “outsiders”—others who, unlike him and like Whitman, are engaged in alternative scholarly pursuits. For Gordley, as I read him, either one’s scholarship legitimately qualifies as a description of the law or, at least, aspires to propound such a descriptive account, or else one’s work lies beyond the province of “being-concerned-with-what-the-law-is.” Scholarship, including comparative research, that pertains to the latter category simply cannot be asserted either to be describing the law or to be attempting to describe it. On my most charitable reading of Gordley’s apprehension, the comparativist who is not preoccupied with law’s description must be envisaged as purporting to achieve *other* ambitions. For Gordley, Whitman’s article, since it is not strictly applying itself to law’s description, indeed pursues a different aim. Irrespective of how “important [a] contribution to understanding the way law impacted society” Whitman’s narrative reveals itself to be making,<sup>220</sup> it is, at best, located at the edge of the law. According to Gordley, Whitman’s account is peripheral to law.<sup>221</sup> Indeed, Gordley regards Whitman’s inquiry as being exterior to any descriptive concern with “what the law is.” In Gordley’s view, then, Whitman’s text falls on the wrong side of his divide. And since Whitman squarely locates his exposition of the law within “culture,” given that for Whitman law evidently exists as culture—again, in his title Whitman expressly refers to “cultures of privacy” without even feeling the need to mention the words “law” or “legal”—it is fair to say that it is precisely this conception of the legal that Gordley aims to distinguish from the scholarly texts that he deems valuable as legal scholarship, the texts that reveal themselves as “being-concerned-with-what-the-law-is.” For Gordley, Whitman’s “culturalism” “tell[s] a different story” and thus fails to offer “a description of . . . the law . . . in force”; in this regard, that is, in

---

220. *Supra* text at note 211.

221. I do not forget that Gordley also exists professionally as a historian. And when he fixates his gaze on what the law is—indeed, on what the law was—he is therefore also expressing himself in his capacity as historian. Far from contradicting his positivism, however, Gordley’s historical scholarship remains entailed within it. It is a continuation of his positivism by other means. Indeed, Gordley’s epistemic commitment to description immediately brings to mind Leopold von Ranke who, as the pre-eminent nineteenth-century historian and a “founding father” of contemporary historiography, used to say that the past had to be told “*wie es eigentlich gewesen*,” that is, “as it really was,” “as it actually was,” or “as it essentially was.” These English translations are an immediate reminder of Gordley’s terms in his *Louisiana* article and readily show how one can be a committed historian and still positivistically defend the practice of description. Recall how Schauer adjoins “positivism” and “description”: *supra* text at note 11. For an influential discussion of Ranke, see PETER NOVICK, *THAT NOBLE DREAM* 21–46 (1988). A more detailed study is LEONARD KRIEGER, *RANKE: THE MEANING OF HISTORY* (1977).

terms of its contribution to “a description of . . . the law . . . in force,” Whitman’s report must be admonished as inadequate.<sup>222</sup>

I accept that many of his readers will reckon that Gordley exudes interpretive rigor, and I assume that many comparativists will salute what they see as the high epistemic standard he is setting for legal scholarship. For my part, if I may be allowed to mark my dissidence somewhat provocatively, I fear that one is being offered *rigor mortis*, the transformation of the law’s corpus into a corpse, Gordley’s indebtedness to the black letter of the law a black debt, or so I now want to argue. I claim that Gordley’s position reveals positivism’s unsustainable imposition of a deficient articulation of space, *twice*. As I try to ascertain how Gordley constructs his comparative work, I see him implementing two major epistemic motions, both of which I regard as being imbued with political significance and as bearing the discernibly orthodox stamp of an (obsolete) epistemic framework most famously promoted by Descartes, who held a primordially dichotomized version of life whereby soul and body, mind and world, subject and object were kept firmly separate not unlike weights on either end of a barbell (the relation between the relata remaining mysterious). Gordley, it seems, fails to “evince awareness of the new thing that has happened,” that is, the “breakdown” of the split between subject and object.<sup>223</sup> To be sure, Gordley’s Cartesianism is tacit, and he appears to remain impervious to his enmirement within it, not least because he demonstrates scant interest in the express theorization of his practice (given the irrevocably anachronistic character of Cartesianism, would perceivingness perhaps lead to embarrassment?). Yet, I contend that Cartesian dualism is very much animating Gordley’s comparativism (even as I accept that Gordley might see himself as being liberated from Cartesianism’s thrall). Moreover, I maintain that the Cartesian epistemic model informs the research practices of comparativists in general, that it infuses the commitments, concepts, and explanations that constitute the deep postulates governing comparative law’s orthodoxy.<sup>224</sup>

When Gordley says, somewhat messianically, that he is interested in “what the law is,” his research project thus postulates that it can operate as a medium whereby texts deemed to be law-texts and law-texts deemed to be complete in themselves, reputed to be

222. *Supra* text at note 216.

223. SAMUEL BECKETT, *Recent Irish Poetry* (1934), reprinted in DISJECTA 70 (Ruby Cohn ed., 1984). The illustration of the weights and the barbell is Haugeland’s. JOHN HAUGELAND, DASEIN DISCLOSED 94 (2013).

224. Hill chastises orthodox comparativists like Gordley who would “stumbl[e] upon the broader theoretical issues only by accident, and randomly.” Jonathan Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXFORD J. LEG. STUD. 101, 111 (1989). For a claim that Cartesianism innervates comparative law’s orthodoxy, see Pierre Legrand, *Paradoxically, Derrida: For a Comparative Legal Studies*, 27 CARDOZO L. REV. 631, 645–54 (2005).

enjoying full epistemic presence, are taken to be thoroughly accessible to explicit depiction, to description beyond doubt, that these texts can be transparently revealed independently of any worldly relations in which they may stand and apart from any worldly relations in which Gordley himself may stand. But Gordley's analytical compulsions are only apparently bereft of ideological presuppositions and political predilections. In other words, Gordley's practice, far from being impartial, provides an important reminder of the committedness of the comparativist's positivism notably on account of the way in which it requires the expulsion of various discourses from the province of the law in order to maintain (if fancifully) the legal's contention to purity, coherent plenitude, and conceptual empowerment. Gordley's analytics carry the weight of his pre-formed perspective on the fashioning of legal knowledge—any idea that one could neutralize one's pre-understanding consisting, in my opinion, in a form of impudence, the purported transparency and disinterestedness, the ataraxy, a masquerade. As I just indicated, I perceive Gordley's situated construction of space to feature two main epistemic undertakings. As I turn to consider these, I see each one as harboring a crippling epistemic deficit.

Firstly, Gordley wants to draw a sharp distinction between what would be law and what would be non-law. Although he fails to supply a criterion allowing for the delineation of the two areas or for making possible a theory of the "distinctively legal,"<sup>225</sup> his exclusive interest in "what the law is" readily evokes a mindset known (to lawyers) as "legal thinking" or "thinking like a lawyer."<sup>226</sup> At the very least, advocates of this approach regard the legal aspect of an issue as discrete and as crisply detachable from its other dimensions, which are then relievingly left to sociologists or philosophers to ponder. These lawyers insist that they only do *law*. Their omnivorous demand is for ever more linearity or flattening: they want a single voice, a continuous speech, a *legal* parlance only. Comparativists-at-law such as Gordley, as they seek to limit themselves to the very narrow mode of rendition of meaning that would be description, attest to their repugnance for mixing. To the extent that comparativists-at-law like Gordley are prepared to concede that a given law-text could materialize *also* as culture, they nonetheless proceed to confine themselves strictly to what they choose to apprehend as the "legal" features of it. For Gordley, it is evident that, epistemically speaking, culture is external to law, that it pertains to a world not summoning his scholarly attention as a lawyer—or, at any rate, that it is to be treated so.

---

225. I borrow this expression from 9 PHILIP SELZNICK, *Law: The Sociology of Law*, in INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCES 51 (David L. Sills ed., 1968).

226. For example, see FREDERICK SCHAUER, *THINKING LIKE A LAWYER* (2009). See also PAUL W. KAHN, *MAKING THE CASE* 11 (2016), who refers to "the task of learning to think and argue as a lawyer." For a critical argument, see ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL* (2007).

Culture would be apprehended as comprehending an array of manifestations (history, politics, and so forth) that are unsuturable to law and, for analytical purposes, that must be kept apart from law so as to allow for law's uncluttered revelation as what it is. While culture might be offering information about law, this data would remain extrinsic to the legal or at least to the handling of the legal. At best, vis-à-vis law culture would be akin to a canvas in relation to a painting, that is, it would be what offers support, but what must appear, from an artistic standpoint, as largely devoid of interest. Just as the canvas is external to the painting even as it sustains the art work, culture could likewise be envisaged as undergirding the law, but as being, in the final analysis, external to it, other than it, that is, as being devoid of significance as law, as being legally meaning-less. Literally speaking, culture would be beyond "what the law is" very much in the way in which the canvas is beyond the painting. In other terms, Gordley, as he is driven by his interpretive requirements, by his analytical priorities and ambitions, posits a space between the legal and the cultural so that both discourses are seen to differ from each other and so that one discourse can be safely said to be located beyond/outside the other. There is law *here*, and there is culture *there*.

In the words of Zweigert and Kötz's leading text on comparative law, to ascertain "what the law is" entails that "the solutions . . . [found] in the different jurisdictions [be] cut loose from their conceptual context and stripped of their national doctrinal overtones"—which is precisely what Gordley proceeds to do when he asserts that "[t]here [i]s nothing distinctively German, French or American about [German, French, or American judicial] decisions."<sup>227</sup> Gordley, then, agrees both that the task Zweigert and Kötz assign to comparativists is worthy of achievement and that it is achievable. Law *can* be "cut loose" from culture; it *can* be "stripped" of it: a space can be configured delineating law from culture. For Gordley, Whitman thus problematically fails to abide by the orthodox injunction as he addresses the way in which Fascism informs the making of the German law of privacy. In particular, Whitman inappropriately refuses to "cut [German law] loose from [its] conceptual context and stri[p] [it] of [its] national doctrinal overtones." In other terms, Whitman chooses not to engage in a demarcation between law and culture (no doubt because he regards this dichotomy as artificial and unpersuasive). For his part, Gordley does not hesitate to fault Whitman for what he perceives to be Whitman's lack of epistemic discernment. (In fact, Gordley feels enough discomfort to justify writing a fully-fledged response and having it published in a U.S. law journal.)

As is well known, "it is not uncommon for those who, by profession or context, are deeply involved in a given legal system to act as

---

227. ZWIEGERT & KÖTZ, *supra* note 106, at 44; Gordley, *Research*, *supra* note 108, at 563.

if 'The Law' is quite separable from other elements of cultural life."<sup>228</sup> Yet, even the most devotedly formalistic attitude hardly affects the empirical fact of the law's enculturation. In George Fletcher's laconic formulation, "law *is* culture-specific."<sup>229</sup> How indeed could law credibly be dissociated from the world within which it dwells and that dwells within it through the traces that haunt the legal? The fact is that law is inevitably within-the-world and that world is just as inevitably within-the-law. Again, how could law-texts exist otherwise than as within-the-world, and how could the world not haunt the law through the law's texts (recall how traces *haunt* texts)? And the structural and inherent enmeshment of law and world means that "law is thoroughly a cultural construct" so that culture simply cannot stand independently over and against the law as something with which the legal analyst could plausibly maintain but an estranged acquaintance in his quest for law's meaning.<sup>230</sup> Accordingly, an appreciation of law's embeddedness becomes necessary to any significant encounter with a foreign law-text and to any revealing understanding of the foreign. Nonetheless, Gordley has Whitman's article falling outside the law's purview because it purposefully addresses law-as-culture—and, at times, perhaps culture *tout court* as its title might be taken to suggest. It remains unclear, however, how Gordley can so confidently posit, let alone ascertain, law's borders so as to cabin his reductive inquisitiveness. How can Gordley know that at a particular juncture the comparativist would have left the realm of the law, moving beyond its cutting limits in order to enter other fields? How far does one have to travel before "law" comes to an end? I can only suspect a (discredited) Platonic commitment of some sort to grounded, static, essentialist configurations whereby "the law" would be deemed to exist as a disciplinary "box" closed in on itself, which would display both a readily identifiable inside and an immediately ascertainable outside. Nonetheless, I contend that Gordley's dubious metaphysics cannot assist comparative law in its search for a strong interpretive yield (or affordance) as comparative thought seeks to make sense of the other's law and have it interact with one's "own." And the matter is not, as Gordley appears to surmise, simply about solving a malicious semantic tangle. Instead, the impossibility of decisively separating "law" from "culture" arises from a structural issue concerning law's very making.

Secondly, and somewhat contradictorily, while Gordley's positivist economy introduces a space that would allow for the detachment of law from culture and of culture from law, thus purposefully marking a discontinuity between what would be two epistemically

---

228. LAWRENCE ROSEN, *LAW AS CULTURE* 6 (2006).

229. George P. Fletcher, *What Law Is Like*, 50 S.M.U. L. REV. 1599, 1610 (1997) (emphasis added). For an understanding of law as "a collective fabric of justification," see RICHARD HYLAND, *GIFTS* 106 (2009).

230. BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY* 128 (1997).

discrete worlds, it simultaneously purports to *abolish* the space between law and its interpreter so as to efface any interruption between *these* two worlds although they arguably exist as two epistemically discrete entities. Gordley's positing and his positioning of this putative epistemic seamlessness between, say, the foreign law-text and the comparativist raises once more the matter of positivism's psittacistic ambitions. Indeed, Gordley's claim that his object of study is "what the law is" must assume that, in pursuit of "scientific exactitude" or of "the right resul[t],"<sup>231</sup> the comparativist's prejudices can somehow *not* be brought to bear on his description of the law. Gordley's "I" (as in "I am concerned with what the law is"), although inevitably an "I-in-the-world" (where else would it be?), would in one way or another not be a situated "I"; at the very least, when it comes to the law, it could avoid being a positioned "I" (that is, it could eschew being an "I" with a position, with an attitude, with a stance). To quote Zweigert and Kötz one more time with reference to a statement that I have every confidence Gordley would endorse, the comparativist must show himself to be "objective, that is, free from any critical evaluation"; and, to mention Zweigert and Kötz yet again, if the comparativist can avoid "allow[ing] [his] vision to be clouded by the concepts of [his] own national system," "cut [himself] loose from [his] own doctrinal and juridical preconceptions and liberate [himself] from [his] own cultural context,"<sup>232</sup> he will then be well on his way to being able ultimately to offer a correct account of "what the law is." As Zweigert and Kötz advocate a division between the self and the self's culture (and the self's legal culture), they clearly postulate that such a withdrawn stance on the part of the comparing self is within epistemic reach. As I read him, Gordley agrees.

While Gordley clearly shows, to my mind, that he regards the interpreter's culture as an obstacle to the wielding of the brand of reliable analytics that would allow access to the law as such, *comme tel*, or *an sich*, he offers no clue as to how the interpreter's severance from his culture or legal culture, which he posits as advisable and as attainable, can be reliably conducted. However, if Hans-Georg Gadamer's insight is sound, as I think it is, and if "[u]nderstanding is to be thought of less as a subjective act than as participating in an event of tradition," and if Derrida's observations are luculent, as I take them to be, and if "[t]he 'subject' of writing does not exist if one means by that some sovereign solitude of the writer" and if "[t]he subject of writing is a *system* of relations between layers: . . . mental, society, world,"<sup>233</sup> it

---

231. ZWIEGERT & KÖTZ, *supra* note 106, at 5, 34.

232. *Id.* at 43, 35, 10.

233. GADAMER, *supra* note 24, at 295 (emphasis original); DERRIDA, *ECRITURE*, *supra* note 18, at 335 (emphasis original). "In the depths of subjectivity, there is no self, but a singular composition, an idiosyncrasy, a secret cipher like the unique chance that those very entities were retained, wanted, that very combination drawn: that one and not another." This "singular composition," this "idiosyncrasy," this "combination"

must follow that Gordley's epistemic model is chimerical. Indeed, not even the sincerity of his commitment to the ascertainment of "what the law is" proves able, of its own motion, to alchemize epistemic emplacement into something like transcendental assertionation. To be sure, conviction is a force, but it can only accomplish so much. And it cannot fuse the horizons of law-texts with those of their interpreters. To intimate any such fusion is to spell confusion.

Not only, as I have indicated, do I adopt the view that there is no such thing as an a-cultural "law-as-it-is" in the manner Gordley takes for granted (the space between law and culture does not materialize as Gordley posits it), but the idea that an interpreter could under certain circumstances connect with law's "is-ness," assuming *concessio non dato* that such were to exist, strikes me as being likewise fantastic. While Gordley's statement regarding the dynamics between the interpreter and the law's "is-ness" raises both ontological and epistemic matters, I propose not to pursue the former concern—that is, not to probe my conviction that the phrase "what the law is" finds itself being devoid of any referent except, of course, in imaginary or mythical terms—but rather to emphasize the latter issue, a move that allows me to insist on what I regard as the more charitable critical argument.

Even though some texts are more easily interpretable than others, that is, they require less effort for an interpretation to be delivered, it remains that there is no non-interpretational *immediacy* of meaning. This is not to say that interpretation can do whatever it wants: again, there are *these* words in the statute and *those* words in the judicial decision. But since law can only exist as interpretation, and because interpretation can only exist as the work of an interpreter, and given that every interpreter can only exist as a situated being ("who am I if I am not what I inhabit and where I take place?"<sup>234</sup>), the grasping of a law-text, its interpretation, is inevitably done *at a certain angle*, whether positivistically or otherwise—what Stanley Fish calls an "angle of lean"—no matter how much Gordley would want it differently: "Prejudices are so pervasive that

---

concerns "entities" such as one's language, one's family, one's teachers, one's interlocutors, one's favorite authors, one's preferred speakers, and so forth. The self consists in that particular assemblage, that "secret cipher," that exceptional arrangement, that "unique chance." GILLES DELEUZE, *CRITIQUE ET CLINIQUE* 150 (1993). For his part, Derrida notes how "[i]n a minimal autobiographical trait can be gathered the greatest potentiality of . . . culture." Derrida & Attridge, "Etrange institution," *supra* note 70, at 262. The words are Derrida's. Appropriating Levinas, Derrida exclaims: "The subject: a host." JACQUES DERRIDA, *ADIEU* 102 (1997). For Levinas's text, see EMMANUEL LEVINAS, *TOTALITÉ ET INFINI* 334 (1971) ("The subject is a host"). Cf. SAMUEL BECKETT, *Textes pour rien*, in *NOUVELLES ET TEXTES POUR RIEN* 139 (1958) ("[T]he subject dies before it comes to the verb"). The English version of Beckett's text is his own. SAMUEL BECKETT, *Texts for Nothing* (1974), reprinted in *TEXTS FOR NOTHING AND OTHER SHORT PROSE, 1950–1976* 6 (Mark Nixon ed., 2010).

234. GEOFFREY BENNINGTON & JACQUES DERRIDA, *CIRCONFESSON* 279 (1991). The words are Derrida's.

it is unreasonable to project their eradication.”<sup>235</sup> Now, vis-à-vis textuality, no angularity can eschew the interpreter’s singularity; when it comes to interpretation, the idea of a neutral angle is but oxymoronic. And because interpretation is, perforce, interpretation-in-the-world, every interpretation effectuates institutionalization (one’s institutionalization), socialization (one’s socialization), culture (one’s culture): it is at once empowered and constrained accordingly.

While law cannot exist beyond interpretation (in order to make sense, law depends on an interpretive experience), interpretation cannot exist beyond world. In other terms, because it is inherently worldly, since it is structurally encultured, it is impossible for interpretation to take the form of a white writing that would simply supply an anaemic duplication of the text that it is interpreting. (Indeed, how could such cloning legitimately be called an *interpretation*?) Because any interpretation of foreign law is thus inscribed culturally and since it purports to relate to foreign law as it exists in its foreignness, in its “own” enculturation, elsewhere, the *interpretans* will necessarily find himself at some variance from the *interpretandum*. Since the self cannot be the other, because of this ineluctable stricture, what the comparativist is doing is not to write foreign law “as such” (even if foreign law “as such” were to exist, which through the ontological argument that I am not pressing, I claim cannot be the case). Rather, he is writing toward foreign law, in the face of it, “in the face of the event of another’s text, as it comes to [him] at a

---

235. MAKKREEL, *supra* note 52, at 95. Fish’s helpful syntagm is in FISH, *supra* note 52, at 32. This is why Heidegger holds that “it would violate the meaning of interpretation generally if we cherished the view that there can be an interpretation which is non-relative, that is, absolutely valid.” HEIDEGGER, *supra* note 89, at 110. See also FRANK KERMODE, *THE GENESIS OF SECRECY* 68 (1979) (“[A]ll interpretation proceeds from prejudice, and without prejudice there can be no interpretation”); GADAMER, *supra* note 24, at 274. Cf. BECKETT, *supra* note 40, at 515 (“The observer infects the observed with his own mobility”). This situation allows an ingenious comparativist to remark that, when it comes to law, every comparison must resolve itself as a fiction. See Raluca Bercea, *Toute comparaison des droits est une fiction*, in *COMPARER LES DROITS, RÉSOLUTION* 41–68 (Pierre Legrand ed., 2009). In the anti-interpretation vein, Wittgenstein famously argues that interpretation does not necessarily mediate between a rule and its extension. In his words, “there is a way of grasping a rule which is *not* an interpretation.” LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 87 (§201) (P.M.S. Hacker & Joachim Schulte eds., P.M.S. Hacker, Joachim Schulte & G.E.M. Anscombe trans., 4th bilingual ed. 2009 [1953]) (emphasis original). In their authoritative exegesis of Wittgenstein’s work, Baker and Hacker illustrate this statement by saying that one does not interpret when asked what time it is, that one simply reacts: 2 G.P. BAKER & P.M.S. HACKER, *WITTGENSTEIN: AN ANALYTICAL COMMENTARY OF THE PHILOSOPHICAL INVESTIGATIONS* 149 (1985). I disagree. If it is mid-evening in San Diego and someone asks me for the time as I am strolling through La Jolla en route for “Brockton Villa”, I will answer, say, “8h00” (or “eight o’clock”). But if, one week later, it is mid-evening in Arles and someone asks me for the time as I am walking through the age-old streets of the Roquette on my way to Rabanel’s, I will answer, say, “20h00” (or “vingt heures,” that is, “twenty hours”). As I hear the question, my reply is not “blind” or wholly unreasoned. It is at least minimally reflective, which means that I am *interpreting* the word “time” to refer either to a twelve-hour or a twenty-four-hour clock.

particular, very singular, moment”: “There is as it were a duel of singularities, a duel of writing and reading, in the course of which a countersignature comes both to confirm, repeat and respect the signature of the other, of the ‘original’ work, and to *lead it off* elsewhere, so running the risk of *betraying* it, having to betray it in a certain way so as to respect it, through the invention of another signature just as singular. Thus redefined, the notion of countersignature gathers up the whole paradox: you have to give yourself over singularly to singularity, but singularity then does have to share itself out and so compromise itself, *promise to compromise itself*.”<sup>236</sup>

It is the “couterness” of the comparatist-at-law’s signature, a “couterness” that is inherent to his signature (even as it affirms foreign law, the comparatist’s self-affirmation is always already under way), that forces the conclusion that there is a gap, a space—that there *must* be a space—between *interpretandum* and *interpretans*, between, say, foreign law and the comparatist striving to make sense of foreign law. It is this inevitable interval—which Derrida’s islandy philosophizing unflinchingly thematizes—that necessarily interrupts Gordley’s wished-for epistemic seamlessness, that makes it impossible for the comparatist to avoid the “jolt” of epistemic discontinuity as he proceeds to interact with foreign law. Sloterdijkian pneumaticity notwithstanding, the co-existence within an assemblage of the interpreter and the text, of the self and the other, does not entail a fusion of the two singularities. Rather, interpretation acts as a mode of substitution and therefore as a misprision: the interpreter recounts in “his” language the other’s law as it exists in the other’s language (the interpreter having no other language but “his,” for “[one] cannot get out of language through language.”)<sup>237</sup> A hard-eyed acknowledgment that language maps or organizes or constructs the lived world and that interpretation takes place within language indeed confirms both the futility of the phenomenological quest *zu den Sachen selbst* and the inescapable secondariness of interpretation. Bearing in mind that any single word in a language is a fragment of a system that the translated word must leave behind, and appreciating that while the translated word relinquishes the differential web of the source language the word in translation

236. Derrida & Attridge, “Etrange institution,” *supra* note 70, at 280, 287. The words are Derrida’s. For the formulation of the interpretive tension arising between “self-surrender and self-affirmation,” see COLIN DAVIS, *CRITICAL EXCESS* 29 (2010).

237. For Derrida’s claim mobilizing the metaphor of the island, see *supra* text at note 84. For a discussion of Derrida’s resolute (and courageous) stance on the irreducible character of the space between the self and the other, see Pierre Legrand, *Jacques in the Book (On Apophasis)*, 23 L. & LIT. 282 (2011). “Jolt” wishes to convey “*heurt*,” which is Bonoli’s French translation for the German “*Anstoß*,” a term he tracks to Gadamer’s philosophy. LORENZO BONOLI, *LIRE LES CULTURES* 58–60 (2008). For Sloterdijk’s argument, see *supra* text at notes 76–83. The quotation is from LUDWIG WITTGENSTEIN, *PHILOSOPHISCHE BEMERKUNGEN* 54 (Rush Rees ed., 1984 [1930]). Cf. 5 ROLAND BARTHES, *Leçon* (1978), reprinted in *ŒUVRES COMPLÈTES* 432 (Eric Marty ed., 2d ed. 2002): “[H]uman language is without an exterior: it is a closed-door [situation].”

mobilizes the differential web of the target language, not even the most decided orientation toward what foreign law *really* says, not the most liege interpretive answer to a text's force, will therefore produce "as-suchness." The fact that the reading of a text inevitably engenders more text, the enunciation of which intervenes on the reader's terms, evidences the unavoidable domestication of textuality by way of the interpretive narrative being anchored to it.

Still, Gordley maintains, as I read him, that after externalization of culture has been achieved and immunization from prejudice accomplished, a comparative account can legitimately claim for itself a faithful replication of the legal based on a pristine perception thereof, a grasp of foreign law as such. In other words, a comparativist-at-law can argue having placed himself, at some juncture, in a position whence he is able to report exactly, accurately, or correctly on "what the law is," to offer a "naked" rendition of foreign law as that which is there, before one, as a stable object featuring a fixed meaning that simply awaits picking—and that *can* be picked if only the interpreter (unlike Whitman) will keep his interpretive endeavors, so to speak, on a very tight leash. For my part, I argue that Gordley's assumption that one could be only spectating vis-à-vis foreign law, that one's interpretation of a law-text could be stringently referential, that one's vocabulary could be strictly declarative, evokes, quite simply, another unexamined (Platonic) fallacy. As is his wont, Beckett punctures this delusion in the briefest of ways as he acknowledges the "rupture of the lines of communication [between subject and object]," and as he has one of his characters exclaim: "[W]hat is the word? What the wrong word?"<sup>238</sup> Not only is there a prejudiced (that is, encultured) vision of what there is, there, as the other's (encultured) law, but there is a prejudiced (that is, encultured) expression of that vision.<sup>239</sup> (Again, the Beckettian disavowance does not contest Sloterdijkian pneumaticity: because entities find themselves within an assemblage cannot be taken to mean that they are *ad idem*.)

238. The first quotation is from Beckett, *supra* note 223, at 70. The second excerpt is from BECKETT, MAL VU MAL DIT, *supra* note 198, at 49–50. The English version of Beckett's text is his own. BECKETT, ILL SEEN ILL SAID, *supra* note 198, at 51. See also SAMUEL BECKETT, WORSTWARD HO (1983), reprinted in COMPANY/ILL SEEN ILL SAID/WORSTWARD HO/STIRRINGS STILL 97 (Dirk Van Hulle ed., 2009): "Said is missaid" [hereinafter WORSTWARD HO]. Note that Beckett arranged for his last text to express the fact that he still could not find the right word to account for the world. His final published writing was therefore a poem entitled "Comment dire," which he himself translated as "what is the word." THE COLLECTED POEMS OF SAMUEL BECKETT 226–29, 474 (Seán Lawlor & John Pilling eds., 2012 [1989]). Cf. GEOFFREY H. HARTMAN, SAVING THE TEXT 7 (1981) ("[T]he illusion of mastering the hazards of language is itself suspect").

239. Hence, Beckett's title, *Ill Seen Ill Said* (*supra* note 198). In this work, Beckett pithily frames the aporetic character of the interpreter's conundrum as he writes "The mind betrays the treacherous eyes and the treacherous word their treacheries." BECKETT, MAL VU MAL DIT, *supra* note 198, at 61. The English version of Beckett's text is his own. BECKETT, ILL SEEN ILL SAID, *supra* note 198, at 70.

In the event, Gordley does not defend his configuration of an a-cultural interpreter or comparativist-at-law, although this articulation needs justification like any other stance for it is neither obvious nor common-sensical. Gordley's text thus represents a claim to epistemic control whose ascendancy has not been earned (despite what Gordley's own experience may suggest to him regarding the reasonableness of his point of view). The fact is that "independently of . . . influences [situational, disciplinary and otherwise], a proposition has no epistemic status whatsoever," which means that even Gordley's position on legal knowledge must suppose an investment in a particular way of seeing, thinking, reasoning, believing, even feeling, and which implies that "[t]o claim to know is always to value certain ways of knowing."<sup>240</sup> In other words, any collection of knowledge must assume, at the outset, various epistemic proclivities like an understanding of what is worthwhile (and of what is not), an appreciation of what is significant (and of what is not), and a sense of what is possible (and of what is not). It cannot be adequate simply to impart, without further ado, that one is *able* to produce an account of foreign law, which somehow can prove "impartial," "dispassionate," and "neutral"; and it cannot be satisfactory to assert, no matter how forcefully, that "[one] do[es] not wish to enter into the largely sterile and boring discussion of what can be considered law."<sup>241</sup> *How much epistemic naïveté must comparative law behold?* I maintain that any description, colligation, conceptualization, explanation, or evaluation is necessarily ascriptive. Indeed, if only on account of the commentator's inflection of vocabulary, the tamest commentary has always already changed the text that it is reprising, irrespective of how deliberately loyal it purports to be. (Consider photography: if only because of the photographer's deflection of posture, the straightest photographic exposure has always already changed the scene that it is capturing, no matter how purposefully allegiant the photographer seeks to be.) And no knowledge practice can circumvent the incorporation of elements of self-characterization, that is, no ascription can avoid a measure of self-referentiality or self-portraiture, even if the interpretive self's presence should bring to mind Beckett's "[m]erest minimum."<sup>242</sup> To adopt and adapt Stanley Cavell's insightful declamation: "We do not so much look at the world [or the foreign law] as look *out at it*, from behind the self."<sup>243</sup>

240. MICHAEL WILLIAMS, UNNATURAL DOUBTS 119 (1991); RODOWICK, *supra* note 52, at 40.

241. The three one-word quotations are from von Bar & Lando, *supra* note 15, at 222, 222, 228. The other excerpt is from Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 13 n.37 (1997).

242. BECKETT, WORSTWARD HO, *supra* note 238, at 82.

243. STANLEY CAVELL, THE WORLD VIEWED 102 (2d ed. 1979) (emphasis original). See also RODOWICK, *supra* note 52, at 235 ("[A]ll we can know of the world is from behind the screen of our consciousness"). Is it necessary to add that there is no question of proclaiming foreign law to be unthinkable because it must endlessly evade its total

In my opinion, Gordley's intimation that the "is-ness" of the law ought to act as the comparativist's lodestar is not usefully distinguishable from a primordial faithfulness to truth. Indeed, Gordley has written, in words as quaint as the general store, of "the search for truth to which one is committed as a scholar."<sup>244</sup> Now, as is well known to comparativists-at-law, Zweigert and Kötz have expressly introduced comparative law as an "école de vérité"; they, too, insist that comparative research's "ultimate goal is [to] discove[r] the truth."<sup>245</sup> For orthodox comparativists-at-law beholden to what Bernard Williams calls a "truth-acquiring" type of investigation,<sup>246</sup> the epistemic alignment that is postulated between *interpretandum*, *interpretans*, and truth cannot possibly happen through anything like a (contumacious) cultural exploration. In Gordley's eyes, Whitman's text, being indisputably concerned with culture, is simply unable to access or enunciate the "is-ness" of law, the correct, exact, or true French or German law, for example. In other terms, Whitman's incautious research cannot reveal "what the law is." Interestingly, culturalists acknowledge as much, although, contrary to Gordley, they do not regard this limit as lamentable. Instead, they accept, seemingly placidly, that "[a] cultural inquiry into law's rule cannot make any claims to an unconditioned truth, either empirical or normative."<sup>247</sup> Gordley's assumption is that, contrariwise, *his* comparative analytics are in a position to achieve what Whitman must be unable to accomplish on account of his culturalism.

Gordley's postulation—readily evocative of Plato's exclusion of poetry from the philosophic city—is ultimately indebted, in my view, to the projection of an epistemic ideal of theory derived from the methods or forms of explanation pertaining to the natural sciences.

---

translation into the comparativist's thought or language? And that it is not a case either of claiming that comparative thought can only think itself (of contending that because foreign law cannot be reduced to comparative thought, foreign law could not exist beyond comparative thought so that foreign law and comparative thought would have become indiscernible with comparative thought somehow *cancelling* foreign law)? Yet, the fact remains that, as I maintain, the comparativist's thought cannot thoroughly correlate with foreign law or, if you will, that foreign law, however accessible to the comparativist's thought, cannot be fully captured by thought. No comparative thought, no matter how rigorous, can be strictly aligned with foreign law. Given the inevitability of a remainder (that which within foreign law the comparativist's thought cannot access, the genuinely *foreign*), what is needed is a comparative thought allowing itself optimally to be affected by foreign law's immanence. The burden of the argument I defend is that Whitman deploys a discernible and commendable concern for this preoccupation—which, incidentally, has nothing to do with the silly claim from immersion. See generally KATERINA KOLOZOVA, *CUT OF THE REAL* (2014).

244. James Gordley, *Statement of Teaching Philosophy*, in *WHAT GOOD TEACHERS SAY ABOUT TEACHING* (Center for Teaching and Learning, University of California, Berkeley, 1993) (on file).

245. ZWIEGERT & KÖTZ, *supra* note 106, at 15, 3.

246. BERNARD WILLIAMS, *TRUTH AND TRUTHFULNESS* 127 (2000) (emphasis omitted).

247. KAHN, *supra* note 72, at 39.

Recall that Zweigert and Kötz expressly analogize comparative law to “physics,” “microbiology,” and “geology.”<sup>248</sup> But how can the epistemic framework guiding a laboratory experiment in, say, biochemistry, prove of any meaningful relevance as regards the protocols governing the interpretation of a (foreign) law-text? It is not as if interpretation consisted of some technique that could be copied from one interpreter to the next. Because a law-text is very much unlike a chain molecule, the transposition I critique involves an “improper extension of [scientism] to domains of cultural activity to which it does not and cannot apply.”<sup>249</sup> (If the science envy I discern does indeed inform the establishment of knowledge by comparative law’s *doxa*, this means that the comparativist’s longing for the identification of “what the law is” finds itself being trumped by another form of metaphysical pathos, such as the *drive* to science, which would de-identify the “is-ness” of the law, cast it as something that it is not, and thus *redeem* it—this theotropism however assuming a certain view of science now regarded in many circles as so archaic, “a spell-bound backwash,” as to prove epistemically indefensible.<sup>250</sup>)

248. ZWEIFERT & KÖTZ, *supra* note 106, at 15.

249. RODOWICK, *supra* note 52, at 55. Hacker refers to such projections as “illicit.” P.M.S. Hacker, *Wittgenstein and the Autonomy of Humanistic Understanding*, in WITTGENSTEIN, THEORY AND THE ARTS 42 (Richard Allen & Malcolm Turvey eds., 2001) (emphasis omitted). While “[i]t is inconceivable that France would follow Ptolemy and Italy would adopt Copernicus,” in contrast to planetary orbits “law is culture-specific”—to recall Fletcher once more. Fletcher, *supra* note 229 at 1610.

250. The quotation is from SAMUEL BECKETT, DREAM OF FAIR TO MIDDLING WOMEN 120 (Eoin O’Brien & Edith Fournier eds., 1992 [1932]). A growing number of sophisticated interdisciplinary accounts challenge the traditional understandings of scientific practice and of the construction of scientific knowledge, all of these statements holding the view that no persuasive argument purporting to explain why some scientific claims triumph over others can draw either on objective evidence or on the truth of the victorious statement. For instance, it is observed that even the vaunted objectivity of the biologist is informed by a determined interest. Cf. Varela, *supra* note 203, at 322–23 (“objectivity . . . as progressive elimination of error for gradual attunement is . . . a chimera”). Or it is noted that the instruments used for describing the world are at once historically determined and qualified (and that if one wants to assess these instruments, one requires other instruments, which are equally determined and qualified). For a selection of pioneering texts whose titles and sub-titles offer revealing insights into the intellectual approaches governing work in the field now habitually known as “science and technology studies (STS),” see BARRY BARNES, DAVID BLOOR & JOHN HENRY, SCIENTIFIC KNOWLEDGE: A SOCIOLOGICAL ANALYSIS (1996); KARIN D. KNORR-CETINA, THE MANUFACTURE OF KNOWLEDGE: AN ESSAY ON THE CONSTRUCTIVIST AND CONTEXTUAL NATURE OF SCIENCE (1981); BRUNO LATOUR & STEVE WOOLGAR, LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS (2d ed. 1986); ANDREW PICKERING, CONSTRUCTING QUARKS: A SOCIOLOGICAL HISTORY OF PARTICLE PHYSICS (1984); STEVEN SHAPIN & SIMON SCHAFER, LEVIATHAN AND THE AIR-PUMP: HOBBS, BOYLE, AND THE EXPERIMENTAL LIFE (1985); MARIO BIAGIOLI, GALILEO, COURTIER: THE PRACTICE OF SCIENCE IN THE CULTURE OF ABSOLUTISM (1993); CHRISTIAN LICOPPE, LA FORMATION DE LA PRATIQUE SCIENTIFIQUE (1996); STEVEN SHAPIN, A SOCIAL HISTORY OF TRUTH: CIVILITY AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND (1995); HELEN E. LONGINO, SCIENCE AS SOCIAL KNOWLEDGE (1990). For a helpful overview of philosophy of science not written from an STS standpoint, but nonetheless repeatedly casting doubt on the pertinence of “truth” in science, see generally PETER GODFREY-SMITH, THEORY AND REALITY (2003). STS, as it heralds a differentiation between method and experience (or a way), evokes one of the important philosophical controversies having marked the effervescent intellectual

Perplexingly (and perhaps presumptuously also), Gordley fails to tell his readership why his own comparative work would not be cultural, too. What feat of intellectual prestidigitation can Gordley deploy, which would allow him, and not Whitman, to write beyond culture, to inscribe *his* work in frameworkless fashion, to escape *his* primordial and indissoluble involvement in the world (and in the law-world) as cultural being? No matter how devoted he is to the identification of truth, how can Gordley, and how can his research and his law-review article, avoid being embedded in (largely ascertainable) facticity? Surely, one cannot assume that a more or less explicit pledge to objectivity and truth as values worthy of underwriting comparative legal research does not exist as a cultural stance, that the fact that one would be silent about culture would somehow lead one's commitments to operate a-culturally. After all, even exegesis is dedicated to certain identifiable values such as, say, clarity and certainty—at least as these values are understood by certain, encultured, exegetes. Indeed, “[t]he ‘space of reasons’ . . . is also a cultural space.”<sup>251</sup> Whether it likes the fact or not and whether it is aware of the fact or not, positivism thus intervenes as “purposive advocacy,” which means that empirically speaking, even if it unfolds from a positivist vantage point, “[c]omparing occurs on the horizon of a certain culture and not in a transcendental ‘nowhere.’”<sup>252</sup> If you will, it is the case that, whether from an avowedly culturalist or from a determinedly positivist perspective, “the creation of legal meaning . . . takes place always through an essentially cultural medium,” that “understanding is . . . always a ‘performative’ enterprise and therefore an alteration.”<sup>253</sup> Whatever Gordley says (in English) regarding French law, for instance, cannot be a neutral statement or anything of the kind for “languages, and acts of languaging, are

---

life that unfolded in Paris throughout the 1960s. In 1962, when he released *La Pensée sauvage*, Lévi-Strauss had already established himself as a prominent anthropologist. In his book, he distinguishes between two modes of thought. He identifies the “*bricoleur*”s and the “engineer”s or “scientist”s. CLAUDE LÉVI-STRAUSS, *LA PENSÉE SAUVAGE* (1962), reprinted in *ŒUVRES COMPLÈTES* 576–78 (Vincent Debaene et al. eds., 2008). In short, Lévi-Strauss’s “engineer” is someone who pursues truth and does so according to a method. A few years later, Derrida offered a critical reaction to Lévi-Strauss’s distinction between “*bricoleur*” and “engineer.” See DERRIDA, *ÉCRITURE*, *supra* note 18, at 409–28. For Derrida, Lévi-Strauss’s “engineer” is mythical. He writes: “The idea of the engineer who would have broken with all *bricolage* is . . . a theological idea.” According to Derrida, it is imperative that “one ceases to believe in such an engineer [as Lévi-Strauss’s],” accepts that “the engineer and the scientist are also species of *bricoleurs*,” and therefore admits that “every finite discourse is bound to a certain *bricolage*.” Derrida is emphatic: “One must say that every discourse is *bricolage*,” whether the engineer’s or scientist’s—or, so I claim, the comparativist-at-law’s. *Id.* at 418 (emphasis added).

251. Hacker, *supra* note 249, at 65.

252. HUTCHINSON, *supra* note 26, at 34; Waldenfels, *supra* note 126, at 85.

253. Cover, *supra* note 137, at 11; Werner Hamacher, *Lingua amissa: The Messianism of Commodity-Language and Derrida’s Specters of Marx*, in *GHOSTLY DEMARCATIONS* 193 (Michael Sprinker ed., 1999). Cf. RABINOW, *supra* note 195, at 59, who approaches understanding as negotiation.

not transparencies through which thoughts or objects are to be seen.”<sup>254</sup> Rather, any one of Gordley’s pronouncements about French law is an affirmation; it is moreover, as I have indicated, a prejudicial utterance. (As Niklas Luhmann would no doubt have put the matter, there is no observational system devoid of analytical noise.) Gordley’s comparative thought is not the expression of some divine afflatus, but of his researching self. Gordley’s assertions regarding French law are made *on his own behalf*. Gordley on French law is not Gordley doubling what French law “is” (to retain Gordley’s term). What obtains as Gordley pursues “what the law is” is but Gordley’s own reading of French law, which must be thoroughly immanent and cannot locate itself outside of its “own” historical situation. Gordley’s “is,” a husk without a kernel, is inevitably Gordley’s linguistically construed “is,” his interpreted “is,” his encumbered “is,” *his* “is.” Gordley’s “is” cannot be unselfed. What (superior) intelligibility Gordley (or Gordley-as-*Überleser*) brings to bear to the matter of French law remains necessarily relative to *what works for him*.

Because any “is” as such—again assuming *concessio non dato* such an “is” to exist—remains an instance beyond thought and beyond language, even beyond the old metaphysical desire to possess, control, master, or subjugate, Gordley’s own understanding of French law is all that one can ever secure from Gordley, irrespective of the excellence of any account of French law he may propose or regardless of the sophistication of any comparison he may advance and despite the deeply-felt persuasion that no doubt animates his work on foreign law. Gordley cannot escape a description of French law *as it seems to him* in terms of his capacities and practices. Gordley is therefore *implicated* in the French law he produces, which entails that the idea of invention holds: French law is *at once* what Gordley finds and what he creates. Gordley’s entailment is that of a situated interpreter, that of someone who is “involved in a given legal tradition (a peculiar story of law); and involved in a specific mode of thinking and talking about law”; meanwhile, what “the fictitious neutrality” does is to “stabiliz[e] the influence and authority of [Gordley’s] own perspective.”<sup>255</sup> But the fact remains that “nothing grounds [Gordley’s] practices, nothing legitimizes them, nothing shows them to be in touch with the way things really are”; and, in the absence of a meta-yardstick against which Gordley’s account of French law can be matched isomorphically so that it becomes known whether what Gordley is saying about French law is cognitively correct and corresponds to what

---

254. JAMES B. WHITE, *JUSTICE AS TRANSLATION* 215 (1990). Cf. JOHN LEAVITT, *LINGUISTIC RELATIVITIES* 215 (2011) (“[T]hinking in words take[s] place only in the medium of particular languages and must bear the imprint of their peculiarities”). See also *id.* at 210 (“[A] language organizes *meanings* in a way that comes to be perceptible particularly when one passes from one system to another”) (emphasis original).

255. Frankenberg, “Comparisons”, *supra* note 37, at 443, 425, 425.

French law “is,” given Gordley’s *monitoring*, the further fact follows: that there is nothing to Gordley’s comparative practice allowing it to escape the epistemic predicament whereby “[n]o interpretation is safe.”<sup>256</sup>

Every comparativist’s thematic projection involves a correlative projection of himself along the investigative path leading to his ends. Although an interpreter might wish to be somewhere other than where he is, every interpreter is emplaced, somewhere. And, inevitably, every interpreter’s perspective is announced or framed by the linguistic and conceptual resources that the culture within which he has been socialized, and that he has incorporated, and whence he operates, has put at his disposal. In other words, one cannot but intervene on foreign law-texts with what cultural equipment is accessible within one’s epistemic toolbox—which means that one’s eye, as it comes to the *interpretandum*, is an “already ‘encoded’ eye.”<sup>257</sup> It follows that Gordley’s unpreparedness openly to theorize his approach to foreign law or his comparativism cannot salvage that apprehension from contingency or perhaps arbitrariness. Not only is this not the case, but even an examination revealing the comparative process of interpretation to be precarious (for example, an evaluation ascertaining that a given interpretation unfolded in the way it did because it included *that* comparativist, because it took place *where* it did and *when* it did . . .) would *itself* prove precarious. One’s interpretive slate is never clean, one’s page is never white. (Evidently, my interpretive slate is not clean either so that, as I sit in the *Café du Progrès* to claim that Gordley cannot objectively address “what the law is,” I am not making an objective statement. And my page is not white either so that when I argue that Gordley cannot enunciate “what the law is” as a matter of truth, I am not making a true

256. Richard Rorty, *From Logic to Language to Play*, 59 PROC. & ADDRESSES AM. PHIL. ASS’N. 747, 753 (1986); CAPUTO, *supra* note 197, at 73.

257. MICHEL FOUCAULT, THE ORDER OF THINGS xxi (Anon. trans., 1994 [1966]). The quotation is from a preface that Foucault wrote for the 1970 English edition of his *Les Mots et les choses*. Curiously, what is posthumously presented as the original French text is much shorter than the published English writing and does not feature the passage of interest to me. See 2 MICHEL FOUCAULT, *Préface à l’édition anglaise* (1970), reprinted in DITS ET ÉCRITS 7–14 (Daniel Defert & François Ewald eds., 1994). Foucault’s claim is that “one always starts up from the middle, as it were.” RODOWICK, *supra* note 52, at 127. Consider Heidegger, who explains in his early correspondence that “[he] work[s] concretely and factically from [his] ‘I am’—from [his] spiritual and in particular factual origin—[from his] environment—[from his] life as a whole (*Lebenszusammenhängen*)”, from what is, from there, accessible [to him] as living experience, from that within which [he] live[s].” Letter from Martin Heidegger to Karl Löwith (Aug. 19, 1921), in 2 ZUR PHILOSOPHISCHEN AKTUALITÄT HEIDEGGERS 29 (Dietrich Papenfuss & Otto Pöggeler eds., 1990) [hereinafter Heidegger, Letter]. The limitation on aesthesis is also biological or neurological. Cf. VARELA, *supra* note 203, at 320 (“[W]e cannot *step outside* the domain specified by our body and nervous system. There is no world except that experienced through those processes given to us and which make us what we are” (emphasis original)).

statement.<sup>258</sup>) The difference between Gordley and Whitman, then, is not that Gordley is unencumbered, but rather that he is differently encumbered—another manifestation of the irreducibility of the differend that manifests itself within comparative law.

If anything, the news is even worse for Gordley since, on reflection, the very idea of “what the law is,” of an “is-ness” of law, wishful thinking or faith notwithstanding, is epistemically unavailable in the sense that it is, literally, *inconceivable* (not unlike, say, the “is-ness” of my friend’s foot). How, indeed, could the (legal) mind envision something—“what the law is”—that *ex hypothesi* is deemed to be beyond the mind, safe from the mind’s prejudices? The fact is that one cannot have law-without-the-mind in mind without having it in mind, which must mean that one cannot have law-without-the-mind in mind. To be sure, Gordley offers an *a priori* posit that there is such a “matter” as “what the law is,” as the “is-ness” of the law. But this assumption remains so thinly accoutred conceptually that it discloses no more foundation than Gordley’s earnest determination to abide by it. Upon closer examination, Gordley’s “is-ness” amounts to an arrangement of law’s determinacy confining the epistemic range of its determinability. In sum, Gordley exercises “a sovereignty always essentially colonial, which tends, repressibly and irrepressibly, to reduce languages to the One, that is, to the hegemony of the homogeneous.”<sup>259</sup> The various pronouncements on the law would be adjudicated by reference to “what the law is,” which would have to be all there is to *law*. And the authority for the configuration of law’s “is-ness” within the available gamut of interpretive possibilities, the source of this monistic regulative assumption, would be Gordley’s

---

258. According to Dworkin, “a scholar who labors for years over a new reading of *Hamlet* cannot believe that his various interpretive conclusions are no more valid than the contradictory conclusions of other scholars . . . [I]f [interpreters] have come to think that one interpretation of something is best, they can also sensibly think that that interpretation meets the test of what defines success in the enterprise, even if they cannot articulate that test in much or any detail. So they can think there is objective truth in interpretation.” RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 151 (2011) (emphasis original). For my part, I cannot see how Dworkin’s interpreter is legitimately—and creditably—able to move from “sensibly think[ing] that [his] interpretation meets the test of what defines success in the enterprise” to “think[ing] [that] there is objective truth in interpretation.” Consider a comparativist-at-law researching a foreign (human-rights) law. Assume further that this comparativist is acting seriously and wishing to be taken seriously. One can expect this comparativist to deem his interpretation of foreign (human-rights) law to offer a more compelling reading than, say, other extant interpretations to be found in various books or journals. But such sense of achievement does not mean, need not mean, and must not mean, that this comparativist-at-law should hold his interpretation to be “true.” What this comparativist requires to believe, and what others need to believe about his work, is that his interpretation carries a higher interpretive yield (or affordance) than other interpretations. No one needs to think of it as “true.” Indeed, no one ought to think of it as “true.” “Truth” is superfluous as regards any expression of conviction in the supremacy of one interpretation over others. Moreover, it is misleading for while it evokes authority, it fails to account for the vulnerability that inherently befalls any interpretation.

259. DERRIDA, *MONOLINGUISME*, *supra* note 23, at 69.

(acknowledged and uncontested) eminence. From the perspective of a subjacent standing, I maintain that the “is-ness” of the law simply cannot be framed as the “center” that Gordley desires it to be. Even to envisage the idea as a “*defective* corner-stone” would seem to be making an overly generous concession.<sup>260</sup> (It occurs to me that analogies might assist. Imagine I am attending a performance of *En attendant Godot* in Paris. Six months later, I am seeing another performance in Arles by a different theater company. Assume I much prefer the Arles version for reasons I can explain having to do with the staging, the costumes, and what not. Surely, it would be quite otiose—it would in fact obfuscate rather than clarify—to claim that the Arles performance comes closer to what *En attendant Godot* is. What I would effectively be saying—all I could effectively be contending—is rather that the Arles re-presentation comes closer to the way I think *En attendant Godot* ought to be played on the basis of my theatrical education, my knowledge of Beckett’s work, and my preferences. To return to law, when a majority of the U.S. Supreme Court ascribes meaning to the Second Amendment to the U.S. Constitution, it is not stating “what the Second Amendment is” or the text’s “true” meaning. Rather, it is offering an interpretation—its interpretation—of the law-text, this specific interpretation, this Supreme Court pronouncement, then operating particularly authoritatively as a matter of U.S. law.)

It follows that, strictly speaking, no comparativist-at-law should feel entitled to write “With respect to fundamental breach, the English law of contract is that . . .” or “In France, the law governing the rights of foreign investors is that . . .,” unless one is aware of the illusory character of the purported erasure of the difference between law and law’s interpreter and unless one means such statements as assertions made by one, *qua* comparativist, that give themselves *as* English law or *as* French law. Because of the comparativist’s counter-signature, there can be, strictly speaking, neither “*the* English law of \_\_\_\_\_ is” nor “*the* French law of \_\_\_\_\_ is” [fill in the blanks]. In other terms, no comparison is inert: “English law” is always the comparativist’s English law and “French law” the comparativist’s French law. It is a law that the comparativist will have *invented*, most probably in the library, by reflecting, pondering, wondering, and deciding, for instance, to refer to this case rather than that, to quote from this judgment rather than that, to cite to this textbook rather than that, to mention this law-review article rather than that, and to dispose the selected information (and not other) in this way rather than assemble it in that fashion. “English law” or “French law” is a “law” that the comparativist will have articulated in writing, on the computer screen or on the page, using these words rather than those and this turn of phrase rather than that, italicizing these expressions

---

260. JACQUES DERRIDA, MÉMOIRES 82 (1988) (emphasis original).

rather than those, and indenting this quotation rather than that. Again, the idea of invention etymologically captures the fact that the comparativist will have *at once* found and created the foreign law. “Invention” yields (or affords), simultaneously, discovery and configuration. Once more, as he is shown to be inventing the law, the comparativist is seen, *crucially*, not to be extraneous to the operation that consists in re-presenting or scribing the foreign.

Discreetly perhaps, in silence even, no matter how seemingly self-effacing or external to the matter, the comparativist is actively intervening within the framing of foreign law. As he pursues a negotiation between the text that he makes appear on his computer screen or on his page and his ongoing reaction to this very text, he is continuously structuring what he deems to count as the legal. Far from merely concerning revelation, the study of foreign law involves production or performance, not least by virtue of the vocabulary adopted to give expressive form to one’s ascriptions of meaning, the semantic zone of the pertinent foreign law-text thus finding itself shaped (whether through expansion or constriction) by the comparativist’s choice of words. The statement of foreign law is *ars inveniendi*. And so therefore is the configuration of the comparison. Incidentally, throughout his intervention the comparativist-at-law readily depends on the views of individuals whom he is willing to regard as local experts—although it is far from clear how he judges a local author to be a reliable repository of knowledge in an area in which he himself, being from elsewhere, often cannot act as an authoritative source. Having ascertained what he deems to be trustworthy texts, it is rare indeed that the comparativist-at-law pursues the chain of authority very far. In his urge to use documentation rather than verify it, he habitually fails to seek a “first knower,” that is, he *satisfices*. The fact that so many enunciations from within foreign law are left uninvestigated in a context where the main material for comparative writing is foreign texts compels one to ask whether one ought not to be talking about the comparativist holding a *belief* about foreign law rather than having knowledge of it. Be the credal hypothesis as it may, it should be obvious that the comparativist-at-law’s avouchments regarding foreign law, including Gordley’s, are framed as *meshwork*, the outcome of adventitious and messy tactics—and cannot have much to do with truth.

Indeed, any close examination of Gordley’s research-*cum*-writing intervention on foreign law-texts as it is deployed in his *Louisiana* article ought to reveal how his work involves from beginning to end not a report on any foreign law’s “is-ness,” but a strategy of invention of “the laws of privacy in France and Germany.” As he encounters foreign law, Gordley fabricates it. Statements like “[o]ne cannot say . . . that the protection of dignity, which the [French Civil] Code never mentions, is in some way part of a ‘system’ embodied in the Code” or “not only during the nineteenth century, but well before [did French law formally protect the honor, dignity, and reputation,

even of lower class people]” are not French law “as it is,” but (pre-eminent) effectuations of the uncircumventable Gordleyization of French law.<sup>261</sup> What Gordley will eventually style (whether expressly or not) as “The French Law of Privacy,” for instance, would thus more appropriately deserve to be entitled “My Very Best Interpretation of the French Law of Privacy as I Sit in My New Orleans Study at This Stage in My Career and in My Life, in the Light of My Overall Cultural and Legal Education Including My Socialization into Comparative Law and My Linguistic Competence in French, on the Basis of My General Experience as a Comparativist-at-Law and of My Familiarity With French Law and French Legal Culture in Particular, Given What I Wanted to Establish, by Reference to the Materials I Came Across in Paris in the Time I Could Spend There, Regarding the Texts I Decided to Use, in Connection With the Arguments I Chose to Mobilize, With Respect to the Evidence I Elected to Retain, Apropos of the Quotations I Opted to Feature, and Concerning the Words I Preferred to Deploy in Order to Account for What Inevitably Remains Less Than the Whole.” Such qualifications indeed befit *l’écriture comparative*, which can never be shorn of its evaluative engagement: when Gordley asserts that French law is *thus*, this *thus* is “a thus without objective reference,” a thus “ineluctably in theory.”<sup>262</sup>

Along the way, the French law of privacy, to continue to track this illustration, is revealed not to be simply available as *data*, but as the outcome of an intricate exercise in design. Among the singular meanings of foreign law available to him, the singular meaning of foreign law on which Gordley will have finally settled (not, then, “the” meaning of foreign law) does not exist as such in the law-texts, but will have been generated through the specific interpretive strategy of invention that he will have resolved to marshal. What Gordley re-presents as “the French law of privacy” arises from an incessant movement of differencing. The foreign law’s “identity” manifests itself out of Gordley’s assemblage of the different texts that he will have elected to read and interpret, which must differ from the documentation another comparativist would have chosen to consider and from the organization this other comparativist would have proposed of the information he would have deemed pertinent. Even assuming, implausibly, that Gordley and the other comparativist-at-law would have elected to work on the self-same texts regarding the French law of privacy and moreover that they would have retained precisely the same information as being relevant (say, the same excerpts and the same quotations), Gordley will inevitably bring to

---

261. Gordley, *supra* note 204, at 1077, 1078.

262. Ricco, *supra* note 85, at 76; JONATHAN CULLER, *THE LITERARY IN THEORY* 3 (2007). For a detailed illustration featuring Imogene in the law library, see PIERRE LEGRAND, *POUR LA RELEVANCE DES DROITS ÉTRANGERS* 1–31 (2014).

bear a manner of reading and an approach to interpretation that must differ from the other reader and interpreter's. What is called "French law" (or "English law") is therefore the outcome of a performance in knowledge production being pursued by a certain individual in a certain place over a certain time with certain materials and in a certain fashion. Through the application of close reading—the idea of closeness evoking both intense scrutiny of the *interpretandum* and continuous reflection on the process of understanding while reading, that is, combining criticality *and* self-criticality—it becomes clear that *the foreign law being re-presented is Gordley's foreign law*, and comparative law is thus seen to be deploying itself in significant ways *as self-portraiture*.

Still, there is Gordley's ontological quest! Gordley is a truth-seeker and a truth-asserter—not, of course, in the sense that he would be seeking or asserting an originary truth in the (narrowly) philosophical understanding of the term, but at the very least as he purports to write something like truth-in-the-law, that is, as he means to display foreign law as a matter of truth. (Again, my focus is Gordley's epistemic motion rather than foreign law's ontology.) Now, the fact of the matter is that there is no epistemic strategy, regardless of how rigorously analytical it proves to be, that can make truth accessible and that can prove truth-assertable, that can bring "truth" within the compass of the comparativist-at-law's knowledge as he expresses himself in "his" language, that can make any text about foreign law or any comparison averrable, that can confer upon it any discursive strength other than the comparativist's warrant. Accordingly, I claim that statements having law as their focus of study do not, as a matter of principle, admit of the characterization "true"; they are not truth-apt enunciations. In other words, the finitude of the interpretive dynamics pertaining to comparative analysis (both the laws being compared and the comparativist comparing them are encultured) permits no breakthrough to any hypothetically existing "truth" allowing for an understanding of foreign law that would be immune to the sensible intuitions whereby individuals endowed with cognitive capability can apprehend other law-worlds. There is simply nothing in a study of foreign law or in a comparison to make it true to anything, the fact that certain enunciations will subsequently be taken to be true or ascribed truth-value being epistemically irrelevant.<sup>263</sup> (I emphasize that I am concerned with

---

263. Cf. MING XIE, *CONDITIONS OF COMPARISON* 161 (2013), who insists that any "truth-formation" is "always culturally and historically determined"; FISH, *supra* note 52, at 344 ("[T]ruth, correctness, validity and clarity . . . are intelligible and debatable only within the precincts of the contexts or situations or paradigms or communities that give them their local and changeable shape"). Mauthner, a linguist who influenced Wittgenstein, Beckett, and Borges, firmly locates "objective truth" within "the common use of language." 1 FRITZ MAUTHNER, *BEITRÄGE ZU EINER KRITIK DER SPRACHE* 695 (3d ed. 1923). *Adde*: SPIVAK, *supra* note 185, at 151 ("[T]here is no truth but in fiction"). The argument I defend must extend to translation for no form of words can

writings on law, in particular on foreign law or on more than one laws, and that I do not address the natural sciences.<sup>264</sup>)

Since what one calls “true” of an account of a foreign law-text (or of foreign law itself) cannot be but what one is willing to interpret thus, there seems little point in maintaining the term as it suggests an epistemic virtue putatively attaching to one’s pronouncement on the law (or partaking of a law) that simply cannot exist. A report on foreign law being untruthable, “[t]he first step toward a new [comparative] legal stud[ies] is the bracketing of any truth claims for or about law.”<sup>265</sup> Deprived of any grounding in truth, it will remain to

---

be said to be true to a translated text, translation being “a practice producing difference out of incommensurability (rather than equivalence out of difference).” Meaghan Morris, *Foreword*, in NAOKI SAKAI, *TRANSLATION AND SUBJECTIVITY* xiii (1997). See Simone Glanert & Pierre Legrand, *Foreign Law in Translation: If Truth Be Told . . .*, in *LAW AND LANGUAGE* 513–32 (Michael Freeman & Fiona Smith eds., 2013). Cf. BIAGIOLI, *supra* note 250, at 234: “Bilingualism may make one aware of incommensurability, but does not solve it.” Incommensurability also impugns the fad that sees foreign law being translated into economic charts and other such metrics. For a critique of the trend toward the numeration of comparative law, see Pierre Legrand, *Withholding Translation*, in *COMPARATIVE LAW—ENGAGING TRANSLATION* 208–19 (Simone Glanert ed., 2014). Observe that in addition to revealing staunch positivism, Gordley’s commitment to the “is-ness” of law evokes an attraction on his part to the idea of “natural law”—an interest that, in fact, appears from his scholarly work. See, e.g., GORDLEY, *supra* note 206; James Gordley, *The Universalist Heritage*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 31–45 (Pierre Legrand & Roderick Munday eds., 2003). For another *mélange* of positivism and natural law, see ZWEIGERT & KÖTZ, *supra* note 106, at 45. While positivism and natural law feature ancient differences, both models seek to contain law within a logic of authority. See ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE* 120 (2d ed. 2003). Not unlike the search for “what the law is,” the implementation of the “one-law” scheme promoted by natural law also contests localism. Consider Habermas, a fervent defender of universalism who, locating himself at the intersection between positivism and natural law, writes that “[t]he law of a concrete legal community must, if it is to be legitimate, at least be compatible with moral standards that claim universal validity beyond the legal community.” JÜRGEN HABERMAS, *FAKTIZITÄT UND GELTUNG* 334 (1992). Upon further analysis, Gordley could therefore stand accused of demoting culture on two counts, firstly as a positivist, secondly as a universalist. Schlesinger’s work further illustrates the interface between positivism and universalism within comparative law. To be sure, Schlesinger was defending a comparativism “in terms of precise and narrow rules.” 1 Rudolf B. Schlesinger, *Introduction*, in *FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS* 9 (Rudolf B. Schlesinger ed., 1968). Yet, his ultimate goal was to formulate “universally understandable terms”, which “carry the same meaning to lawyers brought up in various legal systems.” Rudolf B. Schlesinger, *The Common Core of Legal Systems: An Emerging Subject of Comparative Study*, in *TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA* 78 (Kurt H. Nadelmann, Arthur T. von Mehren & John N. Hazard eds., 1961).

264. For a claim that the descriptions of entities that are the natural sciences’ focus (such as mountains and blizzards) must be gauged against an independent reality existing irrespective of human beings’ bodily presence in the world, see DREYFUS & TAYLOR, *supra* note 115, *passim*.

265. KAHN, *supra* note 72, at 34. Although it might appear to be consonant with the idea of tracing, Heidegger’s specific appreciation of truth cannot be endorsed. Distinguishing truth-as-unconcealment, which he regards as a valuable Greek legacy (truth  $\equiv$  ἀλήθεια, or *aletheia*), from truth-as-correctness, an inadequate understanding he associates with the Roman intellectual heritage (truth  $\equiv$  *veritas*), Heidegger argues that in order to get to the truth, the truth-seeker must unconceal what is latent within the entity under consideration. The basic goal of the truth-seeker accordingly becomes the

be seen, on every occasion, how the comparativist-at-law's argument fares—a fate that will very much have to do with the support (institutional and otherwise) that one can mobilize to sustain one's contention, that will therefore concern also the fact of a given audience's singular enculturation. (Gordley, like Whitman, is engaged in a complex negotiation with his readership.)

Percipiently, Beckett seizes the enigmaticity of comparative law's epistemic predicament as he refers to “the simple and necessary and yet so unattainable proposition that their way of being we, [is] not

---

unconcealment of the entity. In other words, one's aim is to take an entity out of its hiddenness and to let it be seen in its unhiddenness, that is, to allow it to manifest itself in the world. Note that the emergence of an entity into the unconcealedness of its being assumes that the truth-seeker allows the entity to reveal its whatness, its howness. Using idiosyncratic formulations, Heidegger summarizes his argument thus: “To say that an assertion *is true* signifies that it uncovers the entity as it is in itself. Such an assertion asserts, points out, ‘lets’ the entity ‘be seen’ in its uncoveredness. The *Being-true* (*truth*) of the assertion must be understood as *Being-uncovering*.” HEIDEGGER, *supra* note 186, at 218 (emphasis original). Unconcealment assumes a meaning-providing force that makes the entity visible rather than offer a simple description of it—that exposes the entity as being within a world, that worldifies it. In as much as truth is constituted by unconcealment, it is inextricably linked to human existence. It is the truth-seeker who acts as unconcealing agent, so that without him there can be no truth—which is to say that truth-as-unconcealment can only exist through the historicity of the truth-seeker. It follows that Newton's laws were not true before Newton, since they came to be unconcealed only through him and are true only in their unconcealment. *Id.* at 226–27. Again, only a truth-seeker can clear a space of intelligibility for truth's unconcealment, only a truth-seeker can open the field of significance for the self-showing of what is there. See STEPHEN MULHALL, HEIDEGGER AND *BEING AND TIME* 94–104 (1996). But if, as Heidegger holds, “[i]n every case . . . interpretation is grounded in *something we have in advance*—in a *fore-having*,” if the “unveiling” is “always done under the guidance of a point of view, which fixes that with regard to which what is understood is to be interpreted”; if “[i]n every case interpretation is grounded in *something we see in advance*—in a *fore-sight*”; if “the interpretation has already decided for a definite way of conceiving [the entity], either with finality or with reservations; if “it is grounded in *something we grasp in advance*—in a *fore-conception*,” how can the Heideggerian concept of truth continue to make sense? HEIDEGGER, *supra* note 186, at 150 (emphasis original). In effect, the notions of “*Vorhabe*” (“fore-having”), “*Vorsicht*” (“fore-sight”), and “*Vorgriff*” (“fore-conception”), as they operate a philosophical vindication of the idea of prejudice or prejudgment (“*Vorurteil*”), suggest that only within the pre-given sign-system within which one is framed does one understand, does one find meaning, does one experience what one apprehends as truth. To use Heidegger against Heidegger, if there is something like “*Vorgriff*,” however, there is a historical specificity to every critical (interpretive) intervention, and there is no sense in keeping truth as a heuristic goal. In fact, Heidegger himself accepts that “even the ontological investigation that [he] is . . . conducting is determined by its historical situation.” 24 MARTIN HEIDEGGER, *DIE GRUNDPROBLEME DER PHÄNOMENOLOGIE* (1927), in *GESAMTAUSGABE* 31 (F.-W. von Herrmann ed., 3d ed. 1997). In the words of Rorty, “historicity makes it hard to see how ontological knowledge can be more than knowledge of a particular historical position.” RICHARD RORTY, *ESSAYS ON HEIDEGGER AND OTHERS* 40 (1991). Now, Heidegger's pursuit of the idea of truth arguably pertains to his unresolved negotiation with religious mysticism, Christianity, and Catholicism. According to Caputo, “[t]he theological sources, analogy or presuppositions of *Being and Time* are unmistakable,” and even “Heidegger's later writings and readings of Greek philosophy continued to be inhabited or haunted by this theological analogy, continued to be guided by crucial theological presuppositions.” John D. Caputo, *People of God, People of Being: The Theological Presuppositions of Heidegger's Path of Thought*, in *APPROPRIATING HEIDEGGER* 87 (James E. Faulconer & Mark A. Wrathall eds., 2000). Otherwise said, “Heidegger certainly thought that he could simultaneously be both an ontological and a theological thinker.” John van Buren, *The Earliest Heidegger: A New Field of Research*, in *A HEIDEGGER COMPANION* 25 (Hubert L. Dreyfus & Mark A. Wrathall eds., 2005). Indeed, Heidegger

our way and that our way of being they, [is] not their way.”<sup>266</sup> In other words, when French law is being a law dealing with privacy, like U.S. law, French law’s way of being *that* (that is, a law dealing with privacy) or French law’s way of being a law that, like U.S. law, is dealing with privacy or, in short, French law’s way of being U.S. law as regards privacy, is not the United States’s way. The same can be said in reverse concerning U.S. law vis-à-vis French law. (I leave to one side the important fact that French law addresses not privacy, but “*vie privée*.”) And even as one allows for the (evident) circumstance that there are people in France who are drawn to the U.S. position and that an argument for privacy *à la française* could win some support in the United States, one expects that the foreign proposition would, as a matter of course, have to be adjusted, or localized, so that it could resonate beyond the legal culture of whose practice it is the theory. Incidentally, even if one claim were to be ascertained as more “adhesion-worthy” than the other from almost every perspective and for almost everyone, these facts would still not make it transcendently “true.” Rather, the argument, though shown to be very popular at a specific point in time and in a particular place, would remain fallible and contestable. It would stay, as is the case with every comparative claim, interpretively *defeasible*. Wisely, then, Whitman, to return to his text, does not assert any singular law to be telling the truth about privacy—nor does he claim himself to be telling the truth about any law of privacy. He insists that different laws tell different stories, and he proposes his own narrative about the stories these laws are recounting.<sup>267</sup> I shall return to Whitman and truth presently. For now, before I leave Gordley’s argument, I want to address two further difficulties, which indeed concern the orthodoxy’s positivism within comparative law more generally.

Firstly, Gordley appears to be effectively overlooking the specificity of the comparative project. At the local level, the creation of a harmonious legal environment in the name of predictability and certainty may well call, in the end, for the elimination of interpretive strife. Consider how a judge attempts to ensure that his decision

---

himself confessed: “I am a ‘Christian theologian.’” Heidegger, Letter, *supra* note 257, at 29 (emphasis original). Unsurprisingly, then, Heidegger acknowledges that “the contention that there are ‘eternal truths’ . . . belong[s] to those residues of Christian theology within philosophical problematics which have not as yet been radically extruded.” HEIDEGGER, *supra* note 186, at 229. As one of Heidegger’s English translators helpfully puts the matter, “[s]hould Heidegger . . . not reject [his own understanding of truth] as one of those residues of Christian theology that ought to be radically extruded from philosophy?” JOHN MACQUARRIE, HEIDEGGER AND CHRISTIANITY 26 (1999). For leading commentaries on Heidegger’s approach to truth, see DANIEL O. DAHLSTROM, HEIDEGGER’S CONCEPT OF TRUTH (1994); DENIS MCMANUS, HEIDEGGER AND THE MEASURE OF TRUTH (2012). For a thorough exploration of Heidegger’s deep-rooted Catholicism, see GUILLAUME PAYEN, MARTIN HEIDEGGER 25–145 & *passim* (2016). Both of Heidegger’s earlier authoritative biographers, Hugo Ott and Rüdiger Safranski, have insisted on the significance of Catholicism for him. ACCORD: PETER SLOTERDIJK, NICHT GERETTET 18 (2001).

266. SAMUEL BECKETT, *The Capital of the Ruins* (1946), reprinted in THE COMPLETE SHORT PROSE 277 (S.E. Gontarski ed., 1995).

267. See, e.g., Whitman, *supra* note 46, at 1163, 1220–21.

does not contradict legislation, and also how he seeks to reconcile his judgment with opinions previously written by other judges. And observe how the author of a textbook likewise purports to syncretize all judicial decisions on a given topic, to ensure that somehow they all fit together, that they do not repudiate one another. Throughout, the dominant values are irenic and prudential. The last thing that French or German lawyers operating in France or Germany would countenance is the kind of cacophony that would make it impossible to ascertain what the law in force posits as regards any given issue at any given time.<sup>268</sup> Is the situation not precisely the same on the supranational scene?

For legal agents engaging in legal analysis that involves more than one law, it is indeed arguable that predictability and certainty matter as much in this context as they do locally. Thus, I do not wish to dispute the affinity that can be maintained between the two sets of circumstances in this regard. But it is the case that irrespective of how much pacific and circumspective concerns are to be prized in cross-border settings, the values that one associates with these ideas have to contend with a competing set of claims being particular to a configuration involving the foreign. I have in mind the premisses that always already need to inform any interaction between self and other, specifically between self-in-the-law and other-in-the-law, between the self's law and the other's law. I contend that these primordial notions can usefully be labelled as "recognition" and "respect." They attest to the fact that the other is not just an other self, that he cannot be reduced to an *alter ego* (which is precisely the kind of ethnocentric configuration that comparative law must renounce). In the process, the ideas of recognition and respect must incline the self to resist hegemonic or totalitarian thinking (not to be apprehended, alas, as a strictly Nazi or Stalinist phenomenon) and to avoid positioning oneself as the referent by which the other ought to be assessed. While univocality may be desirable locally, the exigencies set by the co-presence of the foreign in supranational situations demand greater interpretive equivocity.

My basic contention is that the foreign makes especial demands on one. For the English reader, the poetry of René Char in French or of Paul Celan in German creates an interpretive situation challenging him in a manner that typically differs from, say, the way in which W.H. Auden's or Philip Larkin's poetry addresses him (if only because the question is far from being strictly about language and also implies, in the broadest sense of the term, *culture*—and the

---

268. Sacco develops this point as he writes that "[o]ne tends to see, within a legal order, the will of the legislator, who creates the norm, and scholarship and judicial decisions, which interpret and apply this will. In principle, the various rules (legal, scholarly, or judicial) should be identical. If there is a difference, it must be ascribed to an error on the part of the interpreter." RODOLFO SACCO, *INTRODUZIONE AL DIRITTO COMPARATO* 47 (5th ed. 1992).

intercultural basically differs from the intracultural as a comparison of the epistemic differend between the Spanish explorers and the Aztecs, on one hand, and that between Rousseau and Voltaire (or Hobbes and Boyle), on the other, ought to make clear). Within a supranational dynamics, in a situation where one is dealing with a law that is not one's "own," a law that is someone else's law, certain protocols imperatively need to be implemented in order to avoid the surfeit of ethnocentricity, of asymmetry, that would discredit the comparative analysis if it were simply conducted *à la débandade*, if it did not give expression to an ethics and a politics aiming not to circumscribe a foreign law-text within a familiar interpretive horizon, but to suspend a familiar interpretive horizon because of another law-text, *to interrupt the (restricted) economy of the same*. While it is good as a matter of a democratic politics of knowledge that selves (in-the-law) should be taking others (in-the-law) seriously, the formulation of an ethics and politics must respond *edifyingly* to the particular type of summons conjured by the co-presence of legal otherness. Surprisingly, I should think, this attitude still represents a minoritarian stance within comparative law.

Secondly, Gordley's strategy is not conducive to ascription of meaning, a task that must remain a primordial goal of comparative law. Ultimately, the comparativist-at-law aims to make sense of foreign law, to transform the otherness concealed within law-texts into knowledge through interpretation, to translate scenes of non-knowledge into relevant information. But does positivism assist the comparativist in appreciating the constitutive dimensions of (foreign) law—which, again, sustained research will show to prove singular to each law? As Gordley emphasizes, positivism is inherently about purporting to ascertain "what the law is." It is concerned with delineating what counts as "law." This is the process of ascertainment that, structurally so to speak, positivism claims to be in a position to accomplish. As regards foreign law, then, positivism, even on a most charitable reading of what it is able to achieve, can only ever allow one to *identify* the law in force. It cannot do more, and it cannot reasonably be expected to do more. When it comes to foreign law, positivism is thus seen to behave in stationary intellectual fashion. While it harbors detective value, it lacks epistemic valency. But how can a comparativist who is operating across borders and addressing a law that is not his "own," that is another law and an other's law, yet a law that requires to be understood, that calls for ascription of meaning, how can such a comparativist, then, be content with an attestive process?

Imagine that I am teaching my U.S. students in Southern California. Assume that I am trying to get my class to make sense of the 2004 French statute prohibiting the wearing of school attire "conspicuously" showing religious allegiance (the French word is "*ostensiblement*"), a law-text that, on account of their local experience, of

their predispositions and predilections (largely those that have been inculcated into them and that they have incorporated), of their prejudices (again, in the sense of anterior judgments), my U.S. students overwhelmingly regard as excessive, as intolerant, and as being contrary to what they envisage freedom of religion and freedom of speech to entail. While I think that my U.S. students would not deliberately harbor xenophobic or Francophobe inclinations, it remains that their conviction, their view of the world, their appreciation of their own place in the world—specifically, their understanding of the significance of freedom of religion and freedom of speech—turn, at some level of consciousness or other, on their exclusion of the French practice from the range of what is acceptable. From my U.S. students' perspective, the French banishment of young headscarf-clad Muslim women from the classroom partakes in an otherness that they are required to disparage in order for them to sustain their own sense of their cultural selves. In other words, for my U.S. students to be the sensible multiculturalists that they want to be, they must form a condemnatory view of the French practice: one cannot be a good multiculturalist *and* accommodate the French statute.

How do I help the case for understanding—I mean, needless to add, *deep, meaningful* understanding—if I engage in a positivist rendition of the French statute purporting to account for “what the law is?” What good is it for me to identify the French law in force, that is, to detect how French courts have interpreted the word “school” or to attest to the meaning, broad or narrow, that French textbook writers have lent to the term “religious” or indeed to ascertain how French judges have read the word “attire” (the French statute features the untranslatable “*tenu[e]*”)? What use is it for me to deploy the internal *coherence* of the French model? Will I get my U.S. students to deepen their understanding of the French statute to the point where, although they are likely to continue to disagree with it because of their own situation within a multicultural society, they can at least appreciate it? And will I induce my U.S. students to amplify their understanding of themselves, of their selves-in-the-law, in the process? The answer, I am convinced, must be plain on both counts. Because of its autistic attitude regarding culture, of its inherent epistemic limitations, positivism will simply not allow me to generate such sensitivity, either for the foreign or for the self. Positivism simply lacks this kind of epistemic momentum. However, if I invite my students to a deep analysis of the French statute, if I encourage them to trace this law-text to French history, French politics, the French view of republicanism, the French articulation of citizenship, the French conception of the school, and, yes, perhaps a measure of French anxiety or even Islamophobia vis-à-vis the growing Muslim presence on French territory (which is never to say that the entire French population thinks the same in this or in any other respect, for there is simply no such homogeneity), and if I explain how all these

historical, political, and other traces are constitutive of the statute—if I prompt my students to trace the French statute to its cultural fabric—I argue that my close-reading strategy, as opposed to the positivist’s closed reading, my instruction in “*savoir-lire*,”<sup>269</sup> may allow the more inquisitive students at least to question their assumptions and make space for a new interpretation of the French exclusion that they had readily excluded from their understanding of acceptability.

It is quite possible that only a limited number of U.S. students will be amenable to revisiting their initial appreciation of the French statute, and it may well be that the steps these students are prepared to take toward a new interpretation of the French law-text are few and slight. But one can well imagine how for these U.S. students the tracing I suggest may act as an “I opener,”<sup>270</sup> how it may take them beyond sheer self-vindication, although plausibly short of a willingness to unlearn, so that their intellectual and moral lives are permanently changed as a result. In the process, because it becomes recognized and respected, the French practice may cease to be unacceptable—or, at the minimum, it may become unacceptable otherwise/other-wise, that is, in a different sense of the term (it is no longer that it must be condemned, but that it appears, say, incongruous). It could be that the French practice’s otherness is not of the kind that must be deemed inadmissible anymore, but of the type that deserves to be understood. If you will, it has been made tenable. There is nothing here to suggest that my U.S. students would now agree with the French model for “coming to recognize the practices of another group as a form of reasoning is precisely not to foreclose the possibility of criticizing them.”<sup>271</sup> However, the tracing I will have promoted, unlike anything a positivist study might have hoped to attain, will now prohibit any ready and reductive appropriation of the French statute to the local idea of discrimination and qualify the local belief in the local point of view’s cognitive and moral superiority, which strikes me as hugely significant epistemic *advances*. By tracing the differend, observing, listening, giving it a hearing, attempting to make sense of it, by querying and quarrying (again!), I will have motivated some of my U.S. students’ hostility to subside, part of their fear to disappear. As they are learning to acknowledge

---

269. BARTHES, *supra* note 2, at 39. Note that according to Derrida, one must resist the (simplistic) image of a layered text. Not only does textuality not operate as neatly as the idea of layering (and the verticality it implies) would suggest, but the traces manifest themselves within the horizontality of the text. Now, this horizontality is not of the classical type in as much as it does not show itself at a right angle from verticality (in line with the traditional binary distinction). Rather, it is a horizontality that extends in all directions, like a network—a rhizomatic horizontality. A deep probing of a law-text—say, Barthes’s “*savoir-lire*”—therefore involves that “one plunges into the horizontality of a pure surface”: DERRIDA, *ECRIURE*, *supra* note 18, at 434.

270. SAMUEL BECKETT, COMMENT C’EST 147 (1957). The English version of Beckett’s text is his own. SAMUEL BECKETT, HOW IT IS 81 (Edouard M. O’Reilly ed., 2009 [1964]).

271. ANTHONY S. LADEN, REASONING 157 (2012).

difference, my U.S. students are coming to terms with the singularity of the other's law. No longer can the French model be so cavalierly dismissed in my U.S. classroom.

I am not saying that my U.S. students will now *know* French law—not, at least, in the strong sense of the verb “to know”—if only because what they may claim to “know” is very much indebted to my re-presentation, which had to be singular (other comparativists would have suggested other interpretations), which could not be exhaustive (other information might have been conveyed), and which had to be interrupted (other topics needed to be addressed in the course). As I was tracing the French statute, I could not have been seeking to produce an “objective” or “true” reading of it (and I certainly could not have been holding the view that as regards religious attire at school French law is “true” or “right” while California law would be “false” or “wrong”). Rather, my best hope was to offer a compelling interpretation of the French law-text even as I remained aware that my tracing was in important ways a projection of the self, of my self, an exercise in self-portraiture, the inscription of *my* countersignature. (It cannot but very much matter, for instance, that I myself hail from a multicultural society and, in particular, from a cultural minority within that society, that I bring to bear that experience of differentiation on my research into foreign law rather than, say, another experience of differentiation such as teaching as a “White” foreigner in South Africa during the apartheid years.) Yet, although my re-presentation was taking the form of an intervention and of an invention, I was acting as a mediator between my U.S. interlocutors and the French law-text. I feel strongly that I had to conduct this semantic negotiation with integrity from beginning to end. While I felt entitled to propose an exploration at once innovative and passionate, this investigation had to remain faithful and thorough as I had to seek to do justice to French law and could not allow myself to betray it. After all, the French law that I am introducing in Southern California as I give voice to it is but my iterated composition of it. Because I stand for a view of French legal culture that the French themselves, not being in my Southern California classroom, cannot hear, the debt that I incur as re-presentator is particularly significant.

To maintain that my U.S. students will now welcome the French model, that they will finally be willing to show themselves hospitable to the other, would probably be going too far. But I can legitimately claim that after tracing the French statute, my U.S. students are no longer so riveted to themselves, that some of their prejudices have been dismantled, and that the depth or range of their information has expanded. Now, far from pertaining to some mataeotechny, these various outcomes strike me as featuring valuable progressive or emancipatory ethical and political implications. In a way, the other has come along—the differend has emerged—to save my

U.S. students' law-selves from themselves. The U.S. law-selves in my classroom find themselves liberated from the facile view that the other must somehow be appropriated to their legal categories (for example, their "freedom of religion" or their "freedom of speech"), which is salutary. It is not that the French statute is suddenly being envisaged transcendently. Of course, the analysis of the law-text remains suitably descendent as it is seen through U.S. eyes (not only, then, is it "not us," but it is also "not U.S."). However, some of my U.S. students at least will now have awakened "to the possibility of [their] thought systems . . . being rendered finite by the presence of the other" and will now be disclosing "[a] capacity to hear that which [they do] not already understand."<sup>272</sup> And these students will be learning to talk of the other without experiencing the need to repudiate otherness. Beyond that development, one or two U.S. students might want to militate in order to change the conditions that produced the French statute and to which it can be traced—say, the French conception of citizenship. But for them to have any chance of making an impact in whatever conversation they could have with a French jurist, they must first be willing to recognize and respect the French approach. There is no significant opportunity for persuasion, it seems to me, without this prior acknowledgment. I maintain that positivism and its reductionist urge for the ascertainment of "what the law is" remain emphatically unable to foster the kind of edifying assumption of epistemic responsibility that I have just addressed.

To be sure, the identification of the law in force must be regarded as a necessary first step that the comparativist would therefore be hard-pressed to avoid when he encounters foreign law. It is *law* that comparativists-at-law make into their focus of study, and as one moves into foreign legal territory one obviously needs to determine what statutes are in force and to assess what these law-texts have been held to mean by authorized or authoritative interpreters. For example, if one wishes to consider religious attire at school as a matter of French law, one needs to refer to the relevant statute, to confirm that it is in force, to examine its wording, and to elicit the applications that have been made of salient statutory words by the competent institutions (say, the courts or school principals). To this extent, then, comparativism requires to operate positivistically. Yet, precisely because one is dealing with the foreign, it is unacceptably deficient to confine one's appreciation of the "legal" to a process of formal identification. As an account of foreign law, mere reference to "what the law is," or rather to what the law is *as envisaged through the comparativist's interpretive lenses*, cannot prove adequate. A more intricate form of understanding is needed. And this claim cannot be

---

272. DIPESH CHAKRABARTY, *HABITATIONS OF MODERNITY* 36 (2002). Chakrabarty expressly refers to Heidegger. See HEIDEGGER, *supra* note 30, at 160 ("to abandon our habit of always hearing only that which we already understand").

reduced to an esoteric contention concerning the academic practice of comparative law. On the contrary, this argument raises crucial ethical and political issues. Not only does the decision to move the comparative enterprise beyond strictly identificatory ambitions entail a radically different deployment of comparativism, but it leads to the formulation of different frames of pertinence and thus to the production of different relevant legal knowledge (or of different knowledge deemed legally relevant). My preceding discussion of article 1184 (3) of the 1804 French civil code exemplifies this epistemic distinction and its implications on the formation of knowledge-at-law. However, the matter can also be addressed by returning to the discussion between Whitman and Gordley.

The very idea of “law-as-culture” of the sort that Whitman defends—and that allows him to discuss Fascism as he addresses the German law of privacy—is profoundly inimical to any project such as Gordley’s seeking to ascertain “what the law is.” As Paul Kahn observes, “[t]he cultural study reveals the contingency of law’s rule and simultaneously the contingency of the self.”<sup>273</sup> Because Gordley’s intellectual endeavor aims above all for accuracy and fixity (or other semes associated with the ideas of precision or exactness), it can only find itself thwarted by something as inherently unstable, as unruly, as disorderly as culture—which very much appears as the agent of his project’s ruin. Dreading that an enculturation of the legal would lead the law to lose its assumed grounding and that any claim to stability law may harbor would evaporate, positivists like Gordley argue, unsurprisingly, that “the open-ended concept of ‘culture’ opens a Pandora’s box of interpretive nightmares.”<sup>274</sup> How, indeed, could any cultural reading legitimately claim to be *correct*, for example? By definition, so to speak, the cultural exists as flux and indeterminacy. It manifests itself as movement. It features a state of becoming. But how can one ever get to ascertain “what the law is” if law, as culture, is incessantly *under way*? While it is said to be a characteristic of culture “not to be identical to itself,” so that “[e]quivocality is the congenital mark of any culture,”<sup>275</sup> this endless process of emergence, this unceasing flouting of constancy, is anathema to positivists assembled. Indeed, it is diametrically opposed to the surety

273. KAHN, *supra* note 72, at 138.

274. CURTIS J. MILHAUPT & KATHARINA PISTOR, *LAW AND CAPITALISM* 208 (2008). Another expression of discomfort is that an account “must remain within the law without taking recourse to general societal culture, because culture and its relation to the legal rules and institutions are *unclear*.” Michaels, *supra* note 175, at 1017 (emphasis added). Along analogous lines, one finds the obligingly feeble observation that one is to dismiss a heuristic role for culture because of the fact that it cannot be *defined* crisply enough to assuage the positivist craving for reassurance. Jürgen Basedow, *Comparative Law and Its Clients*, 62 *AM. J. COMP. L.* 821, 836 n.44 (2014).

275. DERRIDA, *AUTRE CAP*, *supra* note 54, at 16 (emphasis omitted); Jacques Derrida, *Introduction*, in EDMUND HUSSERL, *L’ORIGINE DE LA GÉOMÉTRIE (DER URSPRUNG DER GEOMETRIE)* 106 (Jacques Derrida trans., 1962 [1954]). Recall Kompridis’s important caveat at *supra* note 54.

that positivists crave for law. And it is because it exposes the law-text to an uncertain encounter with its interpreter that orthodox comparativists-at-law have approached culture as the law's "dangerous supplement" of meaning—the only certainty from a positivist standpoint seemingly being the assurance that the culturalist interpreter will deem the law-text uncertain. Drawing inspiration from Beckett once more, remember how Godot's maker exclaims: "Haze sole certitude."<sup>276</sup>

Because culture is ultimately unencompassable, a force displaying a restless motion inherently disruptive of boundaries that will evade any attempt by positivism to arrest and stabilize it, the orthodox comparativists' only resort in order to contain the cultural threat is to harness the institutional code whereby they are able to define law's disciplinary area disciplinarily, that is, to implement a strict application of the relevant disciplinary structures and declare culture out of bounds, deem it to be outside the law, *out-law* it as a matter of epistemic governance. In as much as it generates interpretive insecurity (and there must be little doubt that culture has more to do with the flow of experience than with the statics of a conceptual system), a positivist such as Gordley will simply not want to accommodate culture within the realm of the legal. Here, lability is liability, and it is a predicament from which positivism emphatically feels that the law must be exempted. Culture (say, Fascism) would therefore pertain to society or to the history of ideas, but it would not concern law. Only by being ejected or externalized from law, by being deemed to have but excremental value vis-à-vis law, by being kept at bay from law—against the background of a binary configuration purporting to allow law to understand itself and to be understood as strictly or purely legal—will culture not obstruct access to "what the law is." In other words, only then will "what the law is" not find itself obscured through a process of enculturation either of the law itself or of the law's interpreter. Not only does positivism then deny culture, but positivism is positivism only in so far as it disavows culture—which is to say that only from this rebuttal itself does it derive its assumed strength at making decisions, at drawing lines, at bringing interpretive latitude under house arrest, at arresting meaning, and at generating predictability.

As I have indicated, it is not excessive to envisage positivism's exclusion of culture from its economy, along with its concomitant re-inscription of itself topographically *qua* culture-less zone, as

---

276. DERRIDA, *GRAMMATOLOGIE*, *supra* note 25, at 203. Note that "[the supplement] introduces the dangerous element of the incalculable, because the supplement is not calculated by the rules of that which it supplements." SPIVAK, *supra* note 185, at 12. Otherwise said, culture is not "calculated" by the rules of the posited. From the standpoint of positivism, culture is indeed incalculable, which makes the matter worrisome for positivists who value the idea of interpretive stability and the fixity that it connotes for them. For the reference to Beckett, see *supra* note 198.

an act of violence (if masked), of systemic brutality (if encrypted). What one witnesses is obviously not violence in the everyday sense of the word, for example the visible and palpable violence of an aggression perpetrated by one person upon another. But there is positivism's attempt—through a deployment of control, mastery, subordination, or confinement—domineeringly to drive a wedge between the legal and the cultural even at the risk of making the institutional precinct of the law as designed by positivists themselves appear uncannily disengaged from the lifeworld and frighteningly *Über*-conceptual, not to say *Über*-dogmatic. (Think of the “comparative” work issuing from Hamburg's Max-Planck Institute, if you can muster an interest.) The governing idea is to produce an effect of ground, of steadfastness—and to achieve this stabilization by expelling even information to which the law can be traced and that can be said constitutively to haunt the law. For instance, Gordley wants to still the disruptive force of Fascism, to foreclose any wavering in the legal significance of the German statutes and judicial decisions, to avoid any epistemic movement, any fluidity, to contain interpretive waywardness. One senses that for Gordley Euclidian geometry is the gold standard toward which comparative law should strive.

While Whitman would no doubt accept that the word “Fascism” necessarily represents a nominalist impoverishment vis-à-vis the world (again, how could Watt's word, “pot,” *name* Mr Knott's “pot?”), he would presumably argue—justifiably, in my view—that by claiming a discontinuity between law and culture, on one hand, and, culture having been discarded, by arguing for a continuity between law and the comparativist, on the other, positivism is much too complacent. It is making things far too easy for itself. Or, which is perhaps another way of stating this objection, positivism is keeping the disturbing news (say, Fascism) well under cover. By saying that law consists of law only and by asserting further that a comparativist-at-law can account for law as it is or tell “what the law is,” by defending such facile transparency, by positing the veritative possibility of its positivist writing (law would be law through and through *and* the positivist interpreter could see right through it), positivism is indeed being more than a bit of a trickster. In the end, its eloquent promises notwithstanding, the matter of the legal is more complicated than positivism would have one believe: law is more complex than positivists are prepared to acknowledge, and interpretation is more fraught than Gordley will allow. For example, the German law of privacy *could* be constitutively imbricated with Fascism. Only the conditional tense is possible, however, because Whitman, as the comparativist making this case, is defending the claim as a matter of interpretation, “his” interpretation—which proscribes any role for catchwords like “objectivity” and “truth.” Instead of casting himself in the role of truth-asserter, Whitman proves capable of resisting

the lure of so-called “scientific” certainty, a restraint for which he deserves to be commended.

Given positivism’s shortcomings—a number of which I have discussed—the goal for comparative law must be to challenge analytics’ empire, to dispute the way in which it seeks artificially to keep obstreperous readings at a distance so that law, what it deems to be properly pertaining to the legal, will not be subject to the kind of interpretive trembling that it regards as scandalous. This resistance—the restoration of foreign law, and thereby of comparison-at-law, to its difficulty—entails that comparativists-at-law must contest their own orthodoxy, even as they realize that positivism’s bewitchment to the “is-ness” of the law will be infinitely difficult to renounce irrespective of the fact that it pertains to the realm of utopia. After all, one can hardly expect established positivists simply to cease and desist. In the name of integrity and on account of the justice that is due to the other’s law-text, such confrontation could involve an array of arguments although, in my view, a key retort to be made to mainstream positivism concerns its unsubstantiated relegation of culture to an outside of foreign law precisely along the lines of Gordley’s unexamined assumptions. What I want to address here is therefore Gordley’s inscribed erasure of culture because it would be an insupportable source of interpretive dissonance—the trouble-making I have mentioned that Gordley associates with Whitman’s work. Before I take matters any further, let me emphasize that any recognition of culture’s incorporation into law, any re-configuration of law as culture, immediately exposes law’s intricacy. As it helps avoid the fall through the trap doors of “purity” (the law would be only law) and “truth” (the comparativist would be able to enunciate “what the law is”), culture takes law way beyond the positivist comfort zone. Indeed, it pushes law to the brink, carries it to the edge—which, to be sure, has the guardians of positivism, keen as they are to make things safe and secure in the law, very nervous indeed and prone to think that the wolves of irrationality are assuming authority—recall how culture would conjure an “interpretative nightmar[e]” (Milhaupt and Pistor), how it is so problematically “unclear” (Michaels). As an attempt at confronting the interpretive challenge that one encounters as one comes to foreign law and, if it is shown that one cannot fully surmount the asperity that is foreignness, as an effort at confronting this fact, too, culture is for the hardy.

One way to reply to Gordley and to other positivists is to assert that Gordley’s daring and far-reaching tactics of exclusion fail because to exclude is to include. What do I mean? For Gordley, to exclude culture by placing it outside the law would be to put it in its place, to control it. But for this gesture of expulsion to manifest itself, it is first necessary that the object of the expulsion be delineated. In other words, before he can say that culture is outside the law, Gordley must have a sense of what he names “culture,” and of

how “culture” distinguishes itself from “what the law is.” Otherwise, Gordley’s strategy of elimination is doomed. For Gordley to seek to ascribe meaning to culture in contradistinction to law thus requires a certain assimilation or appropriation of the notion of culture. And this assumption of interpretive authority, this domestication, compels the idea of culture to be understood by reference to the space of law, if ever so briefly. To put culture in its place, to control it, requires in advance of anything else to bring it within a definitional or conceptual space of inquiry, to assert it as “not-law,” a move that must ultimately relate to law. The “not-law” is therefore not to be absolutely detached from the law, but only relatively so. It is still governed by the law in as much as its ambit depends on what discursive space law is seen to occupy, so that culture’s province is contingent, dependent at least in part upon law. Accordingly, despite what Gordley would have one believe, it becomes impossible to think of exclusion in strictly exclusionary mode. (Also, one cannot consider Gordley’s move in a-cultural terms. The decision to exclude culture from law is indeed indebted to Gordley’s enculturation, not to mention the cultural patterns governing the local understanding of law whence Gordley is operating in situation.)

I can contest Gordley’s assumptions from another angle. Let me return to the painting and the canvas. I argue that only in a superficial way, and in misleading fashion, can the canvas be deemed to be external to the painting. The fact is that the canvas is constitutive of the painting or, to turn the statement around, that the painting is constituted by the canvas. Even as the canvas may appear to be exterior to the painting, it is, if only in the way in which it bounds the painting by its framing edge, always already a constitutive part of it—which entails that the painting simply cannot be imagined without the canvas. What seems to be a mere addition, something other, a supplement perhaps, fulfils a structural role in terms of the painting itself. The canvas is *of* the painting so that there cannot usefully be said to be space between the canvas and the painting—very much in the same way as there cannot helpfully be said to be space between culture and law given that culture is constitutive of law, since it is *of* the law (which is not to say that the canvas and the painting—or culture and law—are one; again, an assemblage does not entail that the assembled elements fuse into one: the unity there is, there, is that between distinct entities). Meanwhile, the viewer of the painting remains situated. For example, he is always already invested with a certain spatiality, which means that he cannot be imagined otherwise than as being in place. Between the painting’s place and the viewer’s place, there is space. And between the foreign law’s place and the comparativist’s place, there is space also. Indeed, there must be space, since if there were not, there would not be any way of stating that here is the law and there is the comparativist talking about the law. Space—the space of shared-separation—is required for the

comparativist's self to have its other, the foreign law. Otherness and spatiality cannot be dissociated. It follows that the idea that the viewer could have access to "what the painting is" cannot stand. What the viewer can do, and the best that he can do, is to offer an interpretation of the painting that will, perforce, be "his" interpretation, that is, he can only deliver an interpretation at a distance from the painting, against the background of his institutionalization or socialization or enculturation into the world of art theory, which means that the viewer (say, the comparativist-at-law) must contend with a Brechtian estrangement or *Verfremdungseffekt*.<sup>277</sup>

I maintain that the alleged outside—culture—is, in fact, located so that it reveals a very intimate relation with law and cannot therefore plausibly be regarded as being external to it. It is sutured to law. While culture can still be distinguished from law, not unlike the way in which the canvas can be differentiated from the painting, it is not outside of it any more than the canvas is outside the painting. *Culture is not an exterior entity to law*, no matter how indigestible this fact may appear to positivists. Observe that I am not suggesting that culture happens instead of law. It is not that law finds itself being displaced, lost, or dissolved. Within my proposed configuration, there remains ample room for statutes and textbooks, for judicial decisions and law-review articles, except that these texts are to be seen to exist as culture. *Law-texts are culture speaking legally*. It is not, then, that I am seeking to do to law what positivists have been doing to culture, that is, to efface it from the comparative scene. Indeed, it would be counter-productive to implement positivism's dogmatism in reverse. I am not seeking to flip the coin, but to change the coinage. My goal therefore is not to jettison statutes and judicial decisions within comparative research, but to approach them afresh, to come to them *obliquely*. The fact is that all formulations of the posited law can beneficially be envisaged as cultural expressions, and that no formulation of the posited law can safely escape a cultural interpretation. Carlyle's remark on history easily extends to law: "It is, in no case, the real historical Transaction, but only some more or less plausible scheme and theory of the Transaction . . . that we can ever hope to behold." Even leaving to one side the

---

277. I am reminded of Danto commenting on Andy Warhol's "Brillo Boxes": "What in the end makes the difference between a Brillo box and a work of art consisting of a Brillo Box is a certain theory of art. It is the theory that takes it up into the world of art, and keeps it from collapsing into the real object which it is . . . . Of course, without the theory, one is unlikely to see it as art, and in order to see it as part of the artworld, one must have mastered a good deal of artistic theory as well as a considerable amount of the history of recent New York painting." Arthur Danto, *The Artworld*, 61 J. PHIL. 571, 581 (1964). For a rewarding argument particularizing the work of art and its constituting object, see generally PETER LAMARQUE, *WORK AND OBJECT* (2010). For my understanding of "*Verfremdungseffekt*" as "estrangement," I draw on FREDRIC JAMESON, *BRECHT AND METHOD* 85–86 n.13 (1998). For Brecht's essay, see BERTOLT BRECHT, *Verfremdungseffekt in der chinesischen Schauspielkunst* (1935), reprinted in *SCHRIFTEN ZUM THEATER* 74–89 (Siegfried Unseld ed., 1957).

quixotic matter of the presence of something like “the real [legal] Transaction” (recall that my argument is about epistemology rather than ontology, although I would repeat that there is nothing for a comparison to be true to), the relevant insight is that one has nothing to offer but one’s plausible theory, that is, one has no tool to wield beyond one’s interpretation.<sup>278</sup> Beckett is reported to have fashioned this claim in vivid language: “What can you do, Sir, it’s the words, we’ve nothing else.”<sup>279</sup>

Foreign law is inevitably encultured, and it can only ever be *relevantly* studied as culture. Accordingly, culture is anything but an accessory element that can simply (and conveniently) be bracketed out of law’s economy—expelled from the law’s *oikos* (οἶκος) or house—as Gordley would have it. Vis-à-vis law, culture is not the elsewhere that Gordley represents it to be. I maintain that there is indeed no possibility for something like Gordley’s “what the law is” ever to close on itself, to enclose itself within its own interiority where only or purely law, bare law, would be present and from which culture would be legitimately excluded. Instead, culture constitutes every manifestation of law if only on account of the fact that law is fabricated by women and men who are situated in the world—both in terms of space and time—and who infuse statutes, judicial decisions, and other legal artifacts with “their” predispositions and predilections, “their” prejudices. I want to emphasize that the cultural does not feature as a contingent or accidental characteristic of the law, but rather as a significant mark, as a constructive trait of its locatedness—both in terms of space and time. I claim that law, any law, is necessarily *in place*. Place, then, is not a mere backdrop to legal meaning: it is a dynamic element of it. In other words, place is not simply a physicalist conception: it is also an existential notion. Law emerges only in and through place (an assertion that does not entail an essentialist, reactionary, conservative, or immobile understanding of “place”—one can indeed approach “place” as source rather than terminus, as that from which something begins in its unfolding, rather than that at which it comes to a stop). Law and place are inextricably enmeshed, which means, incidentally, that law can be constitutive of place in its turn (as it is, for example, when a statute or judicial decision changes a practice and thus makes a mark or leaves a trace within society). To be in place is the law’s way. It is how law exists. For law, any law, to be “as law,” it must stand

278. The Carlyle quotation is from THOMAS CARLYLE, *On History* (1830), reprinted in *A CARLYLE READER* 61 (G.B. Tennyson ed., 1984). The excerpt on comparison and truth is from XIE, *supra* note 263, at 48.

279. NIKOLAUS GESSNER, *DIE UNZULÄNGLICHKEIT DER SPRACHE* 75 (1957). In this first book-length study devoted to Beckett’s work, the writer’s words, which he spoke in French (“*Que voulez-vous, Monsieur, c’est les mots, on n’a rien d’autre*”), are a response to Gessner, his interviewer. Cf. BECKETT, *UNNAMABLE*, *supra* note 8, at 211: “[T]hat’s all words, they’re all I have.” The English version of Beckett’s text is his own. BECKETT, *UNNAMABLE*, *supra* note 8, at 133.

forth in terms of an experience of place. It must *dwell*. Meanwhile, tracing allows for the significant introduction of time into the investigation of the foreign: not to trace would be to exempt a law-text from temporal finitude. Tracing thus acknowledges that the life of a text is a matter of survival. Instead of grounding textuality in a fully-fledged presence of the text that would be completely and indivisibly there, a text that would repose in itself, the trace offers a temporal amalgam: the textuality that is before the interpreter, now, exists as the past, as a memory that is left for the future that may preserve or erase it (through validating or invalidating discourses). As law reveals itself to exist in space and in time, it discloses a structural propriety to exist as culture.



For comparativists-at-law to turn to culture, as Whitman does, is to acknowledge that *recognition of local singularity and respect for local singularity are conditions for (approximation to) justice*.<sup>280</sup> In fact, any pretension at justice, if detached from local ways, can rapidly become shallow and unconvincing. *Pace* John Rawls, a compelling argument about justice requires a process not of abstraction—Gayatri Spivak rightly chastises Rawls’s “interminable suppositions”—but of concretization; in fact, as Levinas has observed, “[j]ustice is impossible unless he who renders it finds himself within proximity”.<sup>281</sup>

Even as the old scientific longings very much continue to plague orthodox comparative law and while the ancient Cartesian confidence connecting “method” and the “truth of things” still proceeds to delude comparativists-at-law of positivist obedience,<sup>282</sup> Whitman determinedly defends a comparison that cannot offer a method allowing for the objective identification of a true meaning of foreign law. Now, it must be seen that comparativists *sans* method, *sans* objectivity, or *sans* truth—the dedicated furtherers of a *negative comparative law*—are still standing in the world of law and in the world of comparative law, if slightly off-balance perhaps, the audacious (and annoying!) advocates of an epistemic tightening of the aperture

---

280. Evidently, recognition would be unjust if it operated as a process of capture whereby an individual or a community would be made to “fit” into preconceived cultural patterns and held to behave according to expectations in a way that might ultimately ensure continued exoticization and attendant marginalization. For a thoughtful study on the insidious character that recognition can assume, see ELIZABETH A. POVINELLI, *THE CUNNING OF RECOGNITION* (2002).

281. Gayatri C. Spivak, *Righting Wrongs*, 103 *SOUTH ATLANTIC Q.* 523, 538 (2004); EMMANUEL LEVINAS, *AUTREMENT QU’ÊTRE OU AU-DELÀ DE L’ESSENCE* 202 (2001 [1974]).

282. Descartes held that “[a] method is necessary for investigating the truth of things.” 10 DESCARTES, *Regulæ ad directionem ingenii* (1701), reprinted in *ŒUVRES DE DESCARTES* 371 (Charles Adam & Paul Tannery eds., 2d ed. 1986). Appearing more than fifty years after his death, this text had been left incomplete by Descartes in 1628.

around what it must mean to compare more than one law.<sup>283</sup> At any rate, these comparativists are not in another world that would not be law and that would not be comparative law. It is rather that they appreciate that neither law nor comparative law can retreat from the world, can loftily position itself above the flux, away from the *genius loci*. As they come to foreign law, these comparativists act not on the basis of unshakeable grounds, but in order to achieve what understanding they can yield (or afford) out of the other (and out of themselves) from the standpoint where they happen to be interpreting the foreign. The comparison they propound, as it objects to the hegemony of positivism's homogeneity, refuses the effacement of otherness, asserts otherness, and accepts that the singularity of the law-texts that it makes into its focus of study is constituted of traces-as-othernesses. This enriched comparativism also acknowledges that the constitutive dimensions of foreignness must form part of any credible account of the other's law or of the other-in-the-law (despite the principled misunderstanding governing the differend between self and other—which entails, for example, that the traces are destined to escape full interpretive mastery, that something about foreign law will remain not known, not said).

Whitman's brand of comparative analysis allows that the traces structurally inhere to the law-text, that they pertain to the very making of it. Try as he may, a positivist cannot get this structure to disappear: the textual matrix exists *as* a reticulation of traces (Derrida talks of "the adventure of the text as weed").<sup>284</sup> Gordley may opt to act as if the traces are not there, but he cannot do that they are not *always already* there. To affirm of a text that "[i]t spooks," to argue for "a *hauntology*" (Derrida at his neologistic best!), to claim that "[t]his logic of hauntedness [is] more sweeping and more powerful than an ontology or a thought of being" (remember Gordley's search for the being of law, for "what the law is"), is to reject the remonstrance that "a phantom is but a phantom and nothing more, nothing more than nothing, nothing at all."<sup>285</sup> And it is to welcome the fact that when put in writing, the ghost will spontaneously "shun Cartesian values, clarity and distinctness."<sup>286</sup> It is therefore to agree to an "[u]ndermining of the unmixed"—or, more accurately, of the *allegedly* unmixed, "what [would be] somehow pure and self-sufficient and autonomous, what [would be] able to be disengaged from the general mess of mixed, hybrid phenomena all around it and

---

283. See Pierre Legrand, *Negative Comparative Law*, 10/2 J. COMP. L. 405 (2015).

284. DERRIDA, *ÉCRITURE*, *supra* note 18, at 102.

285. The first quotation is from JACQUES DERRIDA, *SPECTRES DE MARX* 272 (1993) [hereinafter *SPECTRES*]. Derrida's inspiration, which he expressly acknowledges, is the German "*Es spukt*." The three other excerpts are from JACQUES DERRIDA, *MARX & SONS* 74–75 (2002). For a discussion of "hauntology," see SÉBASTIEN RONGIER, *THÉORIE DES FANTÔMES* 81–97 (2016).

286. DAVID APPLEBAUM, *JACQUES DERRIDA'S GHOST* 20 (2009).

named with the satisfaction of a single conceptual proper name,” such as “*the law*.”<sup>287</sup>

Quite apart from telling us more about the comparativist-at-law himself in as much as it serves to insist on his way of being in the world, of dwelling, on his agency and creativity, on his capacity to exercise judgment, on his sense of critical awareness, on his deconstructive and reconstructive claims, on his inventiveness as he concerns himself with otherness-in-the-law, as he elaborates his tracing and his comparison, as he fabricates foreign law, Whitman’s comparativism admits that its interpretive responsibility, its readerly indebtedness vis-à-vis the traces must “regulat[e] the justice and the justness of [its] behavior, of [its] theoretical, practical, and ethico-political decisions.”<sup>288</sup> As I read him, Whitman acknowledges that his commitment to tracing requires a comparison granting the other law’s “irreplaceable singularity”; indeed, he allows that “responsibility demands irreplaceable singularity.”<sup>289</sup> In addition to arguing for law-as-culture and thus for culture-as-trace and for trace-as-law, Whitman’s capacious interpretation of foreign law defends a case for culture-as-justice. Specifically, Whitman is pleading in favor of what could perhaps be styled as “comparative justice.”

Although his contention hardly aims to be comprehensive regarding the matter of justice (no actual instance can reveal justice), it is clear to me that the comparative justice Whitman supports is in significant respect political—a fact that I regard as an important virtue, as a sign that rather than opt for a strictly contemplative stance, his brand of comparativism engages the world through an involvement in the dynamics of power in its various guises (linguistic, rhetorical, scholarly, and so forth). Crucially, Whitman’s comparative justice is evidently political given the way in which it takes a negotiating stance *for* more than one law and thereby militates for the other law and for the other-in-the-law to be deployed in their constitutive complexity rather than countenance the effacement of legal otherness in the name of something like law’s “is-ness” or on account of some slogan such as “truth.” Still, I would earnestly dispute the view that, as he is adumbrating the idea of comparative justice, Whitman is simply replacing the strong transcendentalism that Gordley licenses with another transcendentalism. In particular, Whitman’s argument, which supplies a comparativism attending to the singular situatednesses of foreign law and of foreign law’s interpreter, cannot be that local justice is intrinsically good and that it must always trump other values. According to my understanding, what Whitman maintains instead is that local justice can no longer be disqualified out of hand as when Gordley readily externalizes

---

287. Jameson, *supra* note 152, at 43, 44–45.

288. JACQUES DERRIDA, *FORCE DE LOI* 45 (1994).

289. DERRIDA, *DONNER*, *supra* note 189, at 77.

culture on the ground that it would pertain to non-law. It is this narcotizing and crippling comparativism that Whitman's attuned work allows comparative law to overcome. In fact, there are at least three sets of reasons why Whitman's motion differs from Gordley's so that attention to "otherness," as the abiding regulatory framework within which comparative research must operate, does not simply appear to act as a substitute for exaltation of "is-ness."

Firstly, Gordley's "is-ness" connotes truth while the comparative justice that Whitman has in mind is emphatically factual as it acknowledges being implemented by a situated comparativist concerning a situated law. Again, Whitman's comparativism, rather than proceed in search of an absolute like law's "is-ness," operates from within each situation: as a culturalist endeavor, it fashions itself so as to meet the demands of each singular law and of each singular comparison-at-law. As such, it is inherently (and unapologetically) contingent. For Gordley, though, it is precisely the aleatory character of law-as-culture that he approaches as unsatisfactory. In this regard, he obeys a philosophical tradition that, ever since Aristotelian philosophy opposed contingency and necessity, has perceived the contingent as a weakness, as a "limitation of reason."<sup>290</sup> Contrary to "what the law is," law-as-culture would prove, most problematically for Gordley, impervious to full rationalization. Now, on account of the fortuity that I mention, the comparativist can only do justice according to his culturally-conditioned lights. It remains that a situated justice for a situated legal otherness is infinitely more promising, no matter how fluid, than the pursuit of the law's "is-ness," no matter how purportedly reified. Accordingly, comparative law must opt for Whitman's avowed emotion-ascription strategy and the dynamic equilibrium it constructs over against the static equilibrium that Gordley's alleged perception-description approach would protect. To be sure, contingency points to the limits of what comparative justice can achieve. But, because it is willing to integrate the fact that uncertainty will simply not go away (again, perhaps our only certainty!),<sup>291</sup> Whitman's comparative justice, despite the strictures within which it must operate, can act as a supplier of just interpretation much more optimally than a fantastic chase after law's "is-ness."

Secondly, while for Gordley law's "is-ness" stands for the fullness of the law (what could there be to law in addition to its very being?), Whitman's comparative justice does not purport to be cognizant of the "whole" of foreign law. It is partial. Although recognition and respect for the other law and for the other-in-the-law matter, while they constitute two central features of comparative justice, it would be mistaken to assume that once recognition and respect have been

---

290. George di Giovanni, *The Category of Contingency in the Hegelian Logic*, in *SELECTED ESSAYS ON G.W.F. HEGEL* 42 (Lawrence S. Stepelevich ed., 1993).

291. See *supra* text at notes 198 and 276. In a different key, see also BRUNO LATOUR, *NOUS N'AVONS JAMAIS ÉTÉ MODERNES* 96 (1991).

implemented, there is nothing left to say about justice. The political is not all there is to justice, which also harbors, for example, social and economic dimensions that comparative law cannot necessarily comprehensively address. For all its significance, then, comparative justice remains a modest claim in contrast to the self-aggrandizing argument that, if given half a chance, the comparativist will successfully ascertain, exhaustively, "what the law is." As the most astute interpretation is bound to leave a measure of interpretive incompleteness (the law-text always retains information, there is always a trace outstanding . . .), one important lesson for the comparativist-at-law emerging from the encounter between Whitman and Gordley should be *modesty*. The comparativist cannot but intervene as a humble witness.

Thirdly, the search for law's "is-ness" connotes the kind of whimsical quest that one only too readily associates with the proverbial ivory tower. Indeed, how, by confining his investigation to the identification of law's "is-ness," can a comparativist derive the kind of understanding allowing him to ascribe significance to an other law in a meaningful way and possibly to challenge himself and "his" law, epistemically or otherwise? For its part, comparative justice has the comparativist recognizing and respecting an alternative life-in-the-law with all the destabilizing implications that confrontation with otherness may entail. While Gordley regards "the grey area of ambivalence, indeterminacy and undecidability" as "the real enemy,"<sup>292</sup> the comparativist defending comparative justice accepts that his own life-in-the-law now finds itself exposed to the claim wrought by otherness. Indeed, such comparativist appreciates that, on account of the recognition and respect he is showing to the other law, he is thereby imperilling his own comfort-at-law, he is putting himself in danger. For example, he could fall victim to the unsettling realization that "his" law is so very contingent after all and thus become skeptical vis-à-vis it or, in one way or another, estranged from it and from its hitherto reassuring frames of reference. He could even find himself no longer able to work uncritically within the ambient legal discourse and its epistemic order. As it purports to be *for the other*,<sup>293</sup> as it makes itself *partial* (in this other sense of the word also), the implementation of comparative justice proves a potential source of perturbation to the self-in-the-law.

Contrary to Gordley who would confine law-texts to their restricted surface of enclosure and thereby exempt them from deep meaning, Whitman would rather save them from any form of interpretive closure. The comparative justice that Whitman defends therefore assumes a genuine attunement to the singularity of

---

292. ZYGMUNT BAUMAN, *INTIMATIONS OF POSTMODERNITY* xvi (1992).

293. For a thoughtful reflection on being "for the other," see ZYGMUNT BAUMAN, *POSTMODERN ETHICS* 90 (1993).

law-in-the-world. It relies on a hearkening to local knowledge that is both polyphonical and heterophonical—that listens to different voices and listens differently to voices. As I have indicated, the role of the ear is crucial to a self/other dynamics that would be *for* the other, that would be ethical, that would attempt justice. Along with Kierkegaard, who emphasizes the acoustical dimension and enjoins the interpreter to listen—“Hasten, oh! hasten to listen”<sup>294</sup>—and who contends that “everything ends with hearing,”<sup>295</sup> Derrida thus holds that “[t]he fine ear is an ear that hears finely, that perceives differences”, and he maintains that “[t]o perceive differences is to convey, precisely, the distinction between apparently similar things.”<sup>296</sup> Again, though, because there is always more tracing to be done, justice is never achieved. Indeed, in Beckett’s words, “there is always something more to listen to.”<sup>297</sup>

Even as the comparativist seeks to yield (or afford) an optimal account of foreign law, for all of the foreign law-text’s traces that the comparativist will have pursued, even if, to adopt Spivak’s felicitous paraphrase, he is to “attemp[t] to write the self *at its othermost*,”<sup>298</sup> to report extensively on so many of these other discourses that constitute the legal, it is clear that the other’s law, the other law, like the other *tout court*, ultimately withdraws from assertion. It remains inaccessible. In the end, the comparativist cannot get *there*, from the self to the other, two unbridgeable islands, which means that he can never fully deploy foreign law’s enigma, that there is a residual element within the singularity of foreign law that is destined to remain a secret for him. At best, the comparativist can position himself on the *verge* of foreign law—a brinkmanship that makes comparativism-at-law an inherently agonistic practice.

Articulating a strong case for the immanence of comparative thought, Whitman activates the figurability of foreign law through the fashioning—his fashioning or rather “his” fashioning—of interpretive perspectives on the concatenations of traces haunting what he ascertains as the legal. He proceeds to arrange these traces in the form of discursive assemblages or series he knows to be destined to remain fragmentary. Along the way, Whitman’s scenography locates the trace—a constitutive feature of the legal straddling the inside/outside division—as the energetic heart of comparative law. Not a

294. 4 SØREN KIERKEGAARD, FIRE OPBYGGELIGE TALER (FOUR UPBUILDING DISCOURSES) (1843), in ATTEN OPBYGGELIGE TALER (EIGHTEEN UPBUILDING DISCOURSES), in SAMLEDE VÆRKER 128 (A.B. Drachmann, J.L. Heiberg & H.O. Lange eds., 1962).

295. 1 SØREN KIERKEGAARD, PAPIRER (PAPERS) 112 (§A235) (Niels Thulstrup ed., 2d ed. 1968 [1836]).

296. JACQUES DERRIDA, L’OREILLE DE L’AUTRE 70 (Claude Lévesque & Christie V. McDonald eds., 1982) [hereinafter OREILLE].

297. CHARLES JULIET, RENCONTRES AVEC SAMUEL BECKETT 49 (1999). Beckett’s words, which he spoke in French (“*Il y a toujours à écouter*”), are a response to Juliet, his interviewer.

298. GAYATRI C. SPIVAK, DEATH OF A DISCIPLINE 91 (2003) (emphasis added).

method being followed (or an algorithm being executed), tracing is a means for the comparativist-at-law to engage law with the world's other forms of understanding of life (such as history, politics, and so forth) even as it allows him to be able to engage with the law beyond its graphical surface and find himself in a position to acknowledge this engagement without undermining the credibility of his research. Destabilizing the separatrix—the line that, in its various operations, would neatly structure comparativism's arrangements (here, a division between law and culture, but there, no division between law and its interpreters)—and either moving it away from the locations where positivists have firmly held it or inserting it in places where they have not wanted it to be, Whitman's understanding of striation (*there is the inseparability of law and culture even as they are separable and there is the separability of law and its interpreters even as they are inseparable*) heralds comparative research in a new key. Crucially, it can be said of Whitman's comparativism, as it allows access to the haunting architectonics of a discursive apparatus, as it challenges any neat antinomy between presence and absence, that it is “a political act as much as it is a legal or jurisprudential one.”<sup>299</sup>

Whitman accepts that “[t]o open the text . . . is . . . to bring one to acknowledge that there is no objective or subjective truth of reading.”<sup>300</sup> Well away from Gordley's unwarrantable attachment to the fallacy of Enlightenment normative foundationalism (at least as applied to accounts of foreign law), Whitman's comparativism allows for the return of what has been impeded by positivism and acknowledges the traces soliciting interpretation. Recognizing and respecting the trace (that is, re-considering the trace in a way different from positivism's, looking at it anew, and therefore re-respecting it in this sense also), Whitman's comparative design acknowledges its dependence on a strategy of invention of foreign law and accepts its subservience to the structural pliancy of language. Observe that as they accent certain traces and not others, as they inscribe “the incision of decision”<sup>301</sup>—interpretation not being prescribed or programmed as reproductive, another comparativist-at-law, differently emplaced, would have emphasized other traces, would have inscribed other intensities—Whitman's montages, resisting the attraction of reports on foreign law that would be totalizing, firmly intervene under the reign of incommensurability across laws. The (aporetic) shared-separation—another manner of saying the differend that exists when there are laws in co-presence—maintains the foreign law-text and the comparativist as the separated singularities that they are. What is shared between them is not a horizon, but the incommensurability

---

299. RAN HIRSCHL, *COMPARATIVE MATTERS* 282 (2014). I adopt and adapt Hirschl's observation regarding comparative constitutionalism. For a detailed review of Hirschl's book, see Pierre Legrand, *Noted Publications*, 10/2 J. COMP. L. 484 (2015).

300. BARTHES, *supra* note 2, at 35.

301. JEFFREY KIPNIS, *A QUESTION OF QUALITIES* 232 (Alexander Maymind ed., 2013).

that there is. And now that Whitman has himself connected the laws from diverse places, he, too, remains disrelated to these laws. To adopt and adapt Derrida's words, what a foreign law-text and a comparativist "[have] in common [is] that [they] have *nothing* in common" (the word "nothing" referring to the spacing of the separation, where the incommensurability—"the incoercible absence of relation"—is to be found).<sup>302</sup>

Not only does Whitman's work on the laws of privacy undermine national (and international) law, but it also defeats comparative law's orthodoxy. It thus effectuates subversion *squared*.<sup>303</sup> One of Whitman's main lessons is that one's challenge, as one finds oneself enmeshed in a complex form of life-in-the-law that is different from one's "own," must edge one's way, responsively and responsibly, with interpretive acumen, toward characterization and justification of foreign law through a resolute focus on local knowledge, best described in terms of its history, its politics, its socialness, its philosophy, its episteme—its *culture*. At the point that he has held would mark the end of his exploring, Whitman extends his interpretation, offers it; he invites those who encounter his work as world-discloser, as law-text-discloser also, to endorse his conclusions. Whitman thus makes an invitation—which is not to say that he is carefree about the reaction his work will generate. While an invitation does not entail a necessary adhesion—it does not operate by way of imperative or obligation—it is not indifferent either. It is "pressing."<sup>304</sup> For example, Whitman, wanting his interpretation of the German law of privacy to be epistemically ameliorative, to improve understanding of German law, purports to make it the best interpretation ever of the German law of privacy (which, *pace* Dworkin, is not at all the same as pretending it to be true). Ultimately, though, Whitman's invitation, no matter how compelling, leaves the reader free to accept it or not. One is at liberty to disengage from the reading on offer—at least within the bounds of readerly responsibility, for one must behave *honestly*.

The risk of an audience's retreat, however, changes nothing to the primordial requirement that the comparativist must address foreign law-texts by proceeding to invent the singularity of the foreign with a view to recognizing and respecting its difference. "*Le fantôme*,

302. The first quotation is from JACQUES DERRIDA & MAURIZIO FERRARIS, "IL GUSTO DEL SEGRETO" 52 (1997) (emphasis added). The translation of Derrida's contribution from the French is Ferraris's. The second excerpt is from 4 SAMUEL BECKETT, *Three Dialogues* (1949), reprinted in THE GROVE CENTENARY EDITION 563 (Paul Auster & J.M. Coetzee eds., 2006). This phrase is missing from the DISJECTA edition, *supra* note 164. For an investigation of the two incommensurabilities with specific reference to comparative law (that between the laws in co-presence and that between the foreign law and the comparativist), see Pierre Legrand, *Foreign Law in the Third Space*, 4 JURIDIKUM 32 (2012).

303. Cf. George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683 (1998).

304. JACQUES DERRIDA, *PASSIONS* 36 (1993).

*toujours, ça me regarde*!”<sup>305</sup> Derrida’s clever formulation wants to indicate that the trace, the ghost, is always facing the comparativist-at-law (the trace is *there*) and, more idiomatically, that it is always the comparativist’s concern, which means that it is always the comparativist’s task to conjure its apparition and, through the space that his tracing opens, to participate in law-world formation—not to mention to apply oneself to self-transformation, “recognizing that the other to one’s self [also] resides in oneself, or rather that ‘oneself’ may comprise two or more selves (or even a multitude).”<sup>306</sup> To draw on Beckett once more, every time he traces, the comparativist-at-law is fated to “[f]ail again”; but every time he traces, his goal must be to strive to “[f]ail better.”<sup>307</sup> Now, Beckett reminds me of Derrida’s argument that one must possibilite the impossible. While uncircumventable failure makes tracing ultimately impossible, tracing must remain immediately possible; it must take place.<sup>308</sup> Even as comparison-at-law exists as a work of failure, and even as it acknowledges its defeat (either comparative work compromises otherness as otherness by always already shrouding it in the comparativist’s language or else it compromises comparativism’s ability to disclose otherness, the very foreignness that makes the comparative discourse of interest, on account of the language it deploys), always it has to persevere in the supersession of its own defeat, as comparison *quand même*: it must *trace on*.



It may appear unlikely that the interpretation of law-texts, of foreign law-texts, should feature the motif of “play.” Yet, play obtains on account of the very constitution of a text, of any text, and therefore of any foreign law-text. Indeed, “[t]he law of the play is structural,” that is, it pertains to the very fabric of a text—which is why “[a]s we . . . read . . . , we are continually engaging in interpretive play.”<sup>309</sup> It follows that if one turns one’s attention to lawyers, and to comparativists in particular, with a view to arming oneself with a critical (and a self-critical) understanding of comparativism, which entails observing comparativists as they follow their winding course through the act of comparison, one notes that comparativists, too,

305. DERRIDA, *SPECTRES*, *supra* note 285, at 214.

306. RODOWICK, *supra* note 52, at 264. Frankenberg urges comparativists “to be self-reflective and self-critical.” Frankenberg, “Comparisons”, *supra* note 37, at 441. For critical observations on the French expression, see JACQUES DERRIDA, *THÉORIE ET PRATIQUE* 36-37 (2017 [1975]).

307. BECKETT, *WORSTWARD HO*, *supra* note 238, at 81. Writing with specific reference to comparison (upon Tennyson’s death), Mallarmé remarked on the doomed character of the enterprise: 2 STÉPHANE MALLARMÉ, *Quelques médailles et portraits en pied*, in *DIVAGATIONS* (1897), *reprinted in ŒUVRES COMPLÈTES* 138 (Bertrand Marchal ed., 2d ed. 2003) (“Every comparison is defective at the outset”).

308. See, e.g., JACQUES DERRIDA, *SAUF LE NOM* 32 (1993), who refers to “the very experience of the (impossible) possibility of the impossible.” What is happening—the tracing—is, properly speaking, impossible; *it is the impossible that is happening*.

309. RODOLPHE GASCHÉ, *INVENTIONS OF DIFFERENCE* 148 (1994); UPTON, *supra* note 75, at 259.

find themselves at play as they engage in legal interpretation. In this regard, the difference informing Whitman's and Gordley's practices can therefore be said to concern the acceptance of play rather than its presence. While play animates both Whitman's and Gordley's comparativism—inescapably so for the reader of a text, of a law-text, of a foreign law-text, simply cannot not be at play as long as he is involved with a text—I take the view that Whitman would be more willing than Gordley to acknowledge the play of the text. Gordley's positivism, with its contention in favor of techno-rationalism, fixity of meaning, and truth, with its claim that the text and its exact meaning would be there, solidly grounded, and therefore within methodical and objective grasp, in fact seeks to fashion textual coherence by denying play and by cancelling the ambiguity or vagueness that characterizes it.<sup>310</sup> In the way there is either stasis or motion, “[t]here are, then, two interpretations of interpretation . . . . One seeks to . . . escap[e] the play . . . . The other . . . asserts the play and attempts to go beyond . . . [the] drea[m] of a full presence, a reassuring foundation, . . . and the end of play.” Just as stasis and motion cannot be made to accord, “these two interpretations of interpretation . . . are absolutely irreconcilable.”<sup>311</sup> However, even as he would regard as lying in the vicinity of the unfathomable any idea that the meaning of foreign law must contend with play, Gordley can be said to be involved with play at least twice, that is, once as a comparativist interpreting foreign law-texts and once also as a comparativist who, through the deliberately restricted economy of meaning within which he expressly claims to operate, plays at hiding the play of the text.<sup>312</sup>

Not all play consists of games. There is “non-game” play or play *tout court*, which neither refers to frivolous or capricious amusement nor to children's activities. This play is far removed from any idea of mere entertainment. Indeed, play and seriousness need not be opposites, which is Gadamer's claim as he observes that “play itself contains its own . . . seriousness,” and as he notes that “seriousness in playing is necessary to make the play wholly play.”<sup>313</sup> According to the use that is pertinent as regards research into foreign law, “play” applies specifically to the process of textual interpretation or, more accurately, to the constraints and opportunities arising from the interpretation of law-texts because of the structure of the texts

310. See DERRIDA, OREILLE, *supra* note 296, at 95. See generally BRIAN SUTTON-SMITH, *THE AMBIGUITY OF PLAY* (1997).

311. DERRIDA, *ECRIURE*, *supra* note 18, at 427. I have already referred to part of this excerpt. See *supra* text at note 45.

312. Cf. *id.* at 381–82 (“[T]he conscientious suspension of play . . . [i]s itself a phase of play”).

313. GADAMER, *supra* note 24, at 107–08. For an influential argument articulating scholarship as serious play, see PIERRE BOURDIEU, *RAISONS PRATIQUES* 221–36 (1994). See also BARTHES, *supra* note 2, at 35, who remarks that play must not be understood as “distraction,” but as “work.”

themselves, of a “structural necessity inscribed in the text.”<sup>314</sup> I have in mind the semantic movement made possible, and indeed rendered necessary, because of the structural plasticity of language generating inherent equivocacy of meaning. (The idea of movement evokes that of leeway. Consider two pipes made to be inserted into one another and imagine, once installed, the smaller pipe not fitting tightly within the larger one.) I am thus thinking of how the language out of which texts are constituted inevitably produces “room for [interpretive] action” or “scope for [interpretive] activity.” These definitions from the electronic edition of the *Oxford English Dictionary* make apparent that the play I address concerns interpretive re-creation—or invention—rather than recreation—or fun.

As it evokes instability or flux, contingency or indeterminacy, as it leads one away from the permanence intimated by the notions of adequation or correspondence, from the disease of transcendentalism also (and from the malady of authoritarianism with which idealism tends to be entangled), the play of the text is “not as innocuous as it may appear” since “it takes issue with the Western philosophical tradition and its central belief in the subject/object dichotomy.”<sup>315</sup> Play suggests an emancipation from a range of ideological, institutional, or disciplinary strictures, from a kind of closure or constriction of the interpretive mind. It connotes interpretive restlessness, perhaps evoking an oscillation that would remind one of dance.<sup>316</sup> Note, however, that for all the semantic heterogeneity toward which play gestures, for the case it argues in favor of primordial interpretive an-archy (literally, the absence of an ontological ground, of secure foundations that would connote the objectivity and the truth of a meaning, which method would somehow allow one to access),<sup>317</sup> observe that for all the prevalence of play (“[b]eneath, behind, around, to the side of all grounding and founding, in the ground’s cracks and crevices and interstices, is the play”),<sup>318</sup> the freedom at issue as regards the constitution of meaning—“meaning *depends* on play”<sup>319</sup>—is *not* the freedom for an interpreter to do whatever he wants. Play is not free play.<sup>320</sup> The player, not occupying a privileged

314. DERRIDA, *DISSÉMINATION*, *supra* note 19, at 252.

315. Francis J. Mootz, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer*, 68 BOSTON U.L. REV. 523, 531 (1988).

316. For a reference to dance, see DERRIDA, *MARGES*, *supra* note 17, at 29. See also Paul Ricœur, *Appropriation*, in *HERMENEUTICS AND THE HUMAN SCIENCES* 186 (John B. Thompson ed. & trans., 1981 [1972–1973]). This text would be available in English only.

317. Cf. GASCHÉ, *supra* note 309, at 129 (“[P]lay escapes the horizon of truth”).

318. CAPUTO, *supra* note 197, at 225.

319. DERRIDA, *ÉCRITURE*, *supra* note 18, at 382 (emphasis original).

320. The many English texts translating Derrida’s “*jeu*” as “free play” are unjust. For a recension of the basic facts concerning this issue (including a reference to Derrida’s complaint), see Jeffrey T. Nealon, *Deconstruction and the Yale School of Literary Theory*, in *POSTSTRUCTURALISM AND CRITICAL THEORY’S SECOND GENERATION* 389–90 (Alan D. Schrift ed., 2014).

position whereby, Descartes-like, he would claim to exercise dominion over the world and hold interpretive guarantees about the world, “relinquish[es] the pretense of subjectivity and . . . follow[s] the possibilities offered by the work, without . . . wholly subordinating the meaning of the artifact to one’s creative powers”; in other words, the player accepts that “[t]he [text] has an autonomous existence apart from the viewer’s subjective aims,”<sup>321</sup> that he therefore does not get to make all the rules.

That there is the play of the text means, then, that the interpretive dynamics are not simply about the individual purporting to domesticate the text. To return to the metaphor of the dance, “like two dancers who are given over to the dance, the [text] and the individual each make claims of meaning upon the other.”<sup>322</sup> Even as play is acknowledged, it is therefore accepted that there is *that text, there*, which means also that there is something like “the law of the other text, . . . its injunction, . . . its signature.”<sup>323</sup> To say, in effect, that the interpreter’s re-creation must be distinguished from any wreck-creation is thus to admit that no interpreter can act without restraint; it is to allow that a “taming” of the semantic “wildness” or a “measure of stilling the flux” must intervene, to accept how the interpretive quest has to be constrained.<sup>324</sup> Indeed, “[t]he best sense of play is play watched and contained within the safeguards of ethics and politics.”<sup>325</sup>

I say “play,” but there are “plays.” Any suggestion that there would be a universally valid or eternally stable idea of “play,” that there would be something like inherent truth to the notion of play, would prove contradictory; it would, in the end, be making play self-refuting. Within the non-reductive and pluralist explication I defend, there are, broadly speaking (and, once more, very much bearing in mind the deficiency plaguing any binary differentiation), two dominant philosophical senses of play with respect to the matter of textual interpretation. Leaving to one side a host of secondary variations *inter se*, the older meaning is promoted by Friedrich Schiller, Eugen Fink, Johan Huizinga, and Gadamer, who all locate play in “a human center rather than in a decentered system of signs” (I shall return to the “decentered system of signs,” the second understanding of play, the one that I find supplies a more sophisticated interpretive yield—or affordance).<sup>326</sup> For those who emphasize “a human center,” play suggests freedom. Schiller’s view, largely a deployment of Kant’s

---

321. Mootz, *supra* note 315, at 532.

322. *Id.*

323. Jacques Derrida, *Fidélité à plus d’un*, 1998/13 *CAHIERS INTERSIGNÉS* 221, 262 [hereinafter *Fidélité*].

324. CAPUTO, *supra* note 197, at 145 (emphasis original).

325. DERRIDA, *DISSÉMINATION*, *supra* note 19, at 180.

326. James S. Hans, *Hermeneutics, Play, Deconstruction*, 24 *PHIL. TODAY* 299, 304 (1980).

ideas, is thus that “play is the means by which humankind expresses the voluntary and creative dimension of will”; and, according to Fink, “in play man actually jumps out of himself and realizes otherwise unrealizable potentialities.”<sup>327</sup> Huizinga also claims the idea of play as voluntary activity.<sup>328</sup>

For his part, as he develops his conception of “play,” Gadamer holds to the notion of a fundamental merger between subject and object, to the possibility of a neutralization of differences or a suspension of conflicts, to the ideals of totality and harmony.<sup>329</sup> Gadamer thus maintains that interpretation ultimately consists of a unifying structure featuring an all-inclusive common ground, a living or meaningful continuity, to be established by dialectical means. And play is what makes a text essentially continuous across worlds, the world whence it originates and the world in which it is experienced by its interpreter, across the two poles between which it moves. It is play that mediates the claim of the text itself to be ascribed meaning and to be made present, on one hand, and the assertion of the interpreter for ascription of meaning to the text and for an investment of it with interpretive presence, on the other. Here, play is dialogic. Importantly, Gadamer emphasizes the priority of play over the player. His reflection on play as essentially involving an attitudinal component, an intention, “a subjective accomplishment in human conduct,” thus features another dimension altogether that cannot be reduced to the player’s attunement and that re-orientates one’s attention to aspects of the play itself, to play as it exists “independent[ly] of the consciousness of those who play.”<sup>330</sup> Rather than suggest a restricted focus on the ludic comportment of the player, Gadamer asserts that “all playing is a being-played,” that play is a separate phenomenon enjoying “primacy” over the player, a matter that “surpasses” the player, that “masters” him, that “draws him into its dominion”; if you will, there is a crucial way in which play is larger than the player so that, through the player, play “merely reaches presentation.”<sup>331</sup>

Problematically, though, Gadamer’s play as it performs to and fro acquires the characteristics of a transcendental structure: it sublates into its own presence any difference between text and interpreter, and it enjoins any act of interpretation to conform to it in order to become acceptable as valid. No stance (such as the argument acknowledging the differend between text and interpreter)

---

327. R. RAWDON WILSON, IN PALAMEDES’ SHADOW 67, 68 (1990).

328. See generally JOHAN HUIZINGA, *HOMO LUDENS* (1938).

329. For a discussion of Gadamer’s understanding, see MONICA VILHAUER, *GADAMER’S ETHICS OF PLAY* (2010); Flemming Lebeck, *The Concept of the Subject in the Philosophical Hermeneutics of Hans-Georg Gadamer*, 14 INT’L. J. PHIL. STUD. 221 (2006); MIHAI I. SPARIOSU, *DIONYSUS REBORN* 133–43 (1989).

330. GADAMER, *supra* note 24, at 130, 108.

331. *Id.* at 112, 111, 115, 112, 115, 108.

can legitimately exist outside Gadamer's dialogic structure: dialogue becomes the only ontological framework governing interpretation and the only hermeneutically acceptable position. In other words, Gadamer's standpoint always already comprises any critical perspective affirming the irreducible differend across text and interpreter, that is, the originary heterogeneity inhabiting dialogue itself (as it involves more than one interlocutor). Through this authoritative gesture of exclusivity (a comportment that implies violence), Gadamer's assertive esemplasy—the idea of the “fusion of horizons” is a recurring theme in his work<sup>332</sup>—falls prey to the objection that he is committed to a metaphysical conceit, the prioritization of dialogue as continuity and of the continuity of dialogue. Because, in sum, it expresses a desire for the presence of a ground and a yearning for stability, Gadamer's philosophy appears at once as too simple and too cautious. It also reveals itself as unduly dogmatic.

With respect to the player's subordination to play, Gadamer was influenced by Heidegger for whom play also surmounts the player.<sup>333</sup> But, as is often the case, Gadamer refused to draw bold conclusions from Heidegger, although the relevant *unbuilding* blocks (so to speak) were on offer.<sup>334</sup> Heidegger's governing idea is to defend an alternative economy of presencing—which, in fact, would be older than the traditional one for it would have emerged with Ancient Greece (a chronological claim that need not detain me in the context of this argument). Heidegger's other thought must overcome any metaphysical suggestion of presence being grounded, any metaphysical desire for presence to be stable. Consider a text: Heidegger's claim is that one must move beyond any suggestion that the text could exist as something grounded and stable, as an entity that would be fixated, toward a post-metaphysical appreciation accepting presencing (including the text's presencing) as movement, as play, as the movement of play. Here, “[p]lay is the disruption of presence.”<sup>335</sup> Heidegger thus enjoins the analyst to take a leap away from any sense of grounding and to approach play as the other of the ground. But what is this to mean?

Heidegger argues that originary presencing, far from being grounded or stable, consists of “the originary and intermittent process of coming-into-presence out of an ungrounded general economy of play.”<sup>336</sup> Imagine a text and its interpreter. For Heidegger, even as the interpreter projects himself toward the text with a view to

332. See, e.g., Stanley Rosen, *Horizontverschmelzung*, in *THE PHILOSOPHY OF HANS-GEORG GADAMER* 207–18 (Lewis E. Hahn ed., 1996); Philippe Eberhard, *THE MIDDLE VOICE IN GADAMER'S HERMENEUTICS* 77–95 (2004).

333. See, e.g., 27 MARTIN HEIDEGGER, *Einleitung in die Philosophie* (1928), in *Gesamtausgabe* 316 (Otto Saame & Ina Saame-Speidel eds., 2001). See also MARTIN HEIDEGGER, *Der Satz vom Grund* 186 (2006 [1957]).

334. For a discussion of Heidegger and play, see generally TILMAN KÜCHLER, *Postmodern Gaming* 23–53 (1994); Spariosu, *supra* note 329, at 99–124.

335. DERRIDA, *Écriture*, *supra* note 18, at 426.

336. KÜCHLER, *supra* note 334, at 37.

making sense of it, the text, in some sort of counteracting drive, has always already undertaken to control or determine the interpreter's doing. Although the text meaningfully originates in the interpreter's projection, it simultaneously offers the interpreter the worldly parameters providing for his existence (and for the limits of his existence) as interpreter. Both the text and the interpreter come to interpretive existence through their reciprocal play. Again, as the interpreter projects himself toward the text, he always already finds himself being determined by the text. There is an "oscillating movement between the projection of a world and its simultaneous 'control' by this world."<sup>337</sup> Contrary to the metaphysical assumption, the interpreter cannot legitimately claim priority over the text as if somehow he reigned supreme over it (nor incidentally can the text assert priority over the interpreter). Otherwise said, the interpreter does not occupy a position that would make it possible for him to ground the text coming into interpretive existence. One is aptly reminded of Sloterdijk's "pneumatic pact": *the text is embodied and the interpreter is entexted*.

While the interpreter purports to achieve the unconcealment of the text, the text itself, asserting its autonomy, thus resists disclosure; it pursues withdrawal from the attempt being made to reveal it across the self/other line. In this regard, Heidegger refers to "the primal conflict between clearing and concealing."<sup>338</sup> Far from there arising any consensus, there is strife. And it is because of the primordiality of such antagonism that Heidegger rejects "the structure of an agreement between knowing and the object in the sense of the correspondence of one being (subject) to another (object)."<sup>339</sup> As the presencing of the text takes the form of intermittent manifestations of obtrusion and retraction (the text is simultaneously affirmed and resistive to affirmation), the play must be seen to be agonistic: in the absence of any possible *adæquatio*, there will inevitably be an interpretive remainder. Note that as Heidegger argues that the economy of play always already precedes any interpretation taking place (which is also Gadamer's point, as I have indicated), his understanding can be said to be challenging an unalloyed humanism. Be that as it may, the gist of Heidegger's claim, as he "bring[s] together into one and the same originary process the two opposing moments of unconcealment and concealment,"<sup>340</sup> is that what might have been regarded as the stable ground of interpretation is in fact unavailable.

As is often the case, Derrida's views radicalize Heidegger's more than Gadamer was willing to do.<sup>341</sup> And, as is habitual also, Derrida's

---

337. *Id.* at 31.

338. MARTIN HEIDEGGER, *HOLZWEGE* 41 (1980 [1950]).

339. HEIDEGGER, *supra* note 186, at 218–19.

340. KÜCHLER, *supra* note 334, at 39.

341. The two Heideggerian streaks are well acknowledged. Thus, Rorty refers to "Gadamer's right-wing and Derrida's left-wing Heideggerianism." Rorty, *supra* note 256, at 751.

outlook offers a stronger interpretive yield (or affordance)—or so I want to maintain. While “[b]oth Derrida and Gadamer agree that the fundamental sense of play lies in the possibilities of enchainment, . . . Gadamer conceives this play within the terms of spatio-temporally limited arenas whereas Derrida seems to suppose an always already illimitable boundlessness.”<sup>342</sup> The play I defend, and the play that I see Whitman upholding (although, again, I accept that he may well disagree with my reading of his comparativism), is play to be understood otherwise, that is, as “a decentered system of signs.”<sup>343</sup> In this sense, play is, literally, to be approached as the play of the text, that is, as the play coming out of the text or emanating from the text itself: “[T]he text itself *plays*.”<sup>344</sup> As opposed to Schiller’s, Fink’s, Huizinga’s, and Gadamer’s notions of freedom, play according to this other meaning connotes both the text’s “random motion” and the “bondage” exuding from the text.<sup>345</sup> Somewhat paradoxically, the two expressions, both pointing to play being generated by the text and unfolding out of the text—both indicating the primordially of the text as regards the process of play—are complementary.

The idea of “random motion” wants to show that language being intrinsically ductile, a text consisting of language disseminates, and can only disseminate, an infinity of meanings rather than any original, fixed, or ultimate meaning. While the interpreter—say, the comparativist—may be said to be playing as he purports to ascribe meaning to a law-text, in effect, “*scriptor ludens* plays, necessarily and ceaselessly, because the game (of language) plays through him.”<sup>346</sup> While the interpreter “seems to manipulate (and perhaps actually believes that he controls) [the system of language], [it] plays through him, both inevitably and as a matter of course”; indeed, “[i]t is much like saying that football or chess play through the players who play.”<sup>347</sup> In other words, “the play-system precedes acts of play and only manifests itself in play.”<sup>348</sup> This entails that the player is always already part of a play that is not at his sovereign disposal. It is therefore the play of the text that one must address before all else,<sup>349</sup> the expression of “random motion” aiming to capture the fact that a text is not dead but active, and that as ascription of meaning intervenes, reading is interactive. Accordingly, there occurs the endlessness of possible semantic permutations, the “infinite substitutability” of meanings.<sup>350</sup>

---

342. WILSON, *supra* note 327, at 33–34.

343. Hans, *supra* note 326, at 304.

344. BARTHES, *supra* note 2, at 76 (1971). Cf. JORGE LUIS BORGES, *La busca de Averroes* (1947), reprinted in EL ALEPH 11 (2008) (“I felt that the work was teasing me”).

345. Both formulations are in WILSON, *supra* note 327, at 66, 69.

346. *Id.* at 41.

347. Robert R. Wilson, *Play, Transgression and Carnival: Bakhtin and Derrida on Scriptor Ludens*, 19/1 MOSAIC 73, 80 (1986).

348. WILSON, *supra* note 327, at 41.

349. Cf. DERRIDA, GRAMMATOLOGIE, *supra* note 25, at 73.

350. GASCHÉ, *supra* note 309, at 129. See also DERRIDA, ECRITURE, *supra* note 18, at 423.

The interpretive fact of the matter is that, in the absence of “a center stopping and grounding the play of substitutions,” “semantic saturation is impossible.”<sup>351</sup> In practice, some slants are more predictable or usual than others. And there are tilts that can be expected to prove more compelling than others to (certain) readerships or audiences. Still, while any interpreter “inevitably limits this very play by its mere investigation,”<sup>352</sup> because any question, as it is put, proves exclusive of many other interrogations, it remains that interpreters obey no fixed rules. Unlike a game, no set constitutive or regulative rules govern that would constrain the individuality of response, that would mechanically or dogmatically direct interpretation toward a pre-specified goal. Rather, interpreters enjoy the kind of open-ended freedom that pertains to the more elusive aim of good interpretation and that allows for un-pre-determined variants along un-pre-determined pathways. One can affirm of texts what Rodolphe Gasché asserts of concepts, which is not that they have a fixed meaning to be determined by abstracting from the concrete situation, but rather that whatever meaning they are to be ascribed can only be revealed through the situation, that “[texts] receive their meaning by virtue of the differential play of sense constitution.”<sup>353</sup> Still, there persists the interpreter’s fidelity to the text that is “almost sacred.”<sup>354</sup> (It is *almost* sacred since, because of the play, there must remain a space of interpretive latitude.)

Meanwhile, the idea of “bondage” wishes to capture the manner in which the interpreter is bound to contend with a text’s structure, the way in which he has no choice in the matter and is tied to the text’s concealment of its disseminative characteristics (otherwise put, there is also the “unplaying” of the text: it will not wager its semantic instability).<sup>355</sup> The interpreter is compelled to accept that given the irrepressibility of the text’s solicitation of an interpretation and because of the semantic inability on the part of a text to disclose a central meaning, whatever meaning is ascribed to the text, whatever meaning will be said to be the text’s central meaning, will not be a meaning that the text forces upon the interpreter, but one that the interpreter imposes upon the text, *against* the background of the text. According to the way in which the interpreter elects to respond to the differential play of the text, that is, to constitute the text’s meaning by choosing to defend this reading rather than that or by deciding to emphasize this potential signification rather than that, in the light of the different interpretive options that he sees the text revealing to him, the text will receive its meaning from him. (Since

---

351. DERRIDA, *ÉCRITURE*, *supra* note 18, at 423; DERRIDA, *DISSÉMINATION*, *supra* note 19, at 30.

352. GASCHÉ, *supra* note 309, at 28.

353. RODOLPHE GASCHÉ, *THE TAIN OF THE MIRROR* 129 (1988).

354. DERRIDA, *Fidélité*, *supra* note 323, at 262.

355. Wilson, *supra* note 347, at 82.

any ascription of meaning is ever subject to revision, either by this self-same interpreter or by another, this expenditure of meaning will be provisional only.)

The interpreter's serfdom compels him to deploy his interpretive input in the absence of a center that would be what there is to be understood in that text that is being interpreted—and in the acceptance that any such center is nullibiquitous. Arguably, there is bondage in another sense also since the interpreter who comes to the text must operate within the framework of his pre-understanding ("whether [it] be in the preselected words that are available to us or in the selection of sensory information that is available to us through the workings of our nervous systems or simply the prejudgments inherent in our cultural tradition"),<sup>356</sup> that is, he must concede that his interpretive possibilities are contained and constrained within a horizon.<sup>357</sup> Ultimately, then, there is bondage squared, which is a variation on the double bind, one of Derrida's recurrent themes.<sup>358</sup> (Here, the two "musts" characterizing the dual perstringement could be framed thus: one must ascribe meaning to a text, to that text that is structurally decentered, even as one must allow that one's situatedness and textual structurality will frame one's meaning-ascription enterprise.)

In the end, the difference between the two principal understandings of play that I mention concerns the distinction between "a willed, free or purposeful act," on one hand, and "a necessary condition and an inevitable effect," on the other; it addresses the difference between "the presence or absence of a purpose."<sup>359</sup> After Derrida, I value play not as a (Hegelian) framework of mediation and continuity within a dialogical exchange that would lead to the unity of understanding, but as a decisive motif epitomizing the critical affirmation of an inevitable condition of semantic heterogeneity that is primordially differential and disseminative and that is therefore divested of the fixity characterizing the ground. I claim "a more deeply suspicious eye, a greater sense of the fragility of our thought constructions and the contingency of our institutions."<sup>360</sup> The play I have in mind encounters the text, the reticence of the text, within projective existential structures of pre-understanding. There is, then,

---

356. Hans, *supra* note 326, at 316. Cf. JACQUES DERRIDA, POINTS DE SUSPENSION 139 (1992 [1983]) ("We have received more than we think we know from 'tradition'"). Although this sentence suggests some convergence with Gadamer, Derrida's understanding of the survival or "living on" of tradition is idiosyncratic. See, e.g., Derrida, *Living On*, *supra* note 149.

357. The significance of pre-understanding is not in doubt. Consider HEIDEGGER, *supra* note 89, at 109–10 ("Every confrontation between different interpretations of a work, not only in philosophy, is in reality a mutual reflection on the guiding presuppositions; it is a discussion of those").

358. The idea of the "double bind" traverses Derrida's work. See, e.g., JACQUES DERRIDA, ULYSSE GRAMOPHONE 99–100 (1987); DERRIDA, RÉSISTANCES, *supra* note 178, at 40–53.

359. WILSON, *supra* note 327, at 69, 69, 70.

360. CAPUTO, *supra* note 197, at 97.

no feasible appropriation. What disclosedness, or *deconstruction*, the interpreter can achieve must therefore eschew any founding or positing. Rather, since interpretation is relayed and inscribed—indeed constituted—through a re-presentation (that is, a presentation anew by the situated re-presenter), it must be the case that the meaning the interpreter will fashion, or his *reconstruction*, being inscribed within re-presentation, will differ from any meaning the text would otherwise have held. It will, in any event, prove fragmentary, intermittent, and transitory.



Like Derrida (and unlike Gadamer), Whitman refuses “to tell a bedtime story so we can sleep a little better”; rather, because of the anxiety that comes with the exercise of the freedom to read, with the fostering of new becomings, responses, and trajectories, he proves to be “someone trying to make life difficult.”<sup>361</sup> In Whitman’s narrative, a realization of one’s inadequacy awaits the comparativist rather than the happy-ending-in-the-law that lawyers desire and unreflexively assume to be possible. In his discussion of Fascism, Whitman thus shows that he is unwilling to accept the fusty claim that the text of statutes or of judicial decisions would be fully present before him, that law-texts would feature data, that is, information posited and existing as a given, information for which he would be able faithfully to account in every respect, methodically, objectively, truthfully, without the intrusion of the slightest interpretive twist or spin whatsoever, somehow leaving the text as such, all there, no more of it after interpretation, no less of it either, just *it*. For Whitman, these postulates are epistemically indefensible, and he certainly cannot allow that the interpreter would come to a text and subsequently subsume it under a neutral conceptual vocabulary without either detracting from it or adding to it in any way, without “deficiency” or “exuberance,” to say it like Ortega y Gasset.<sup>362</sup> According to Whitman, the matter of interpretation is not, simplistically, one of restitution without further ado.<sup>363</sup> Instead, he takes the view that a text, even as it demands or expects interpretation, conceals more than it allows to appear, that it features a multiplicity of forces beneath its graphical surface, that it consists of traces that therefore make it inherently heterogeneous, that locate it beyond interpretive reach. Further, Whitman holds that this heterogeneity can be brought forth only through an exercise in negotiated ascription of meaning that is, perforce, performative in as much as it

---

361. *Id.* at 189.

362. 8 JOSÉ ORTEGA Y GASSET, *La reviviscencia de los cuadros* (1946), reprinted in *OBRAS COMPLETAS* 493 (2d ed. 1994).

363. Cf. JACQUES DERRIDA, *LA VÉRITÉ EN PEINTURE* 436 (1978) (“One must not reconstitute anything”).

makes meaning happen.<sup>364</sup> The fact is, then, that a text discloses “a relation suspended to meaning”—the idea of suspension involving at once that of suspense (as he unconceals the text, who knows what an interpreter will make it say?) and that of dependence (what an interpreter says of the text as it is unconcealed hinges at once on interpretive prejudices and textual availability).<sup>365</sup>

Marshalling his interpretive resources, mobilizing his ability to respond to the German law-texts before him, to texts that were there in advance of his decision to make them into his focus of study and that now stand in front of him, mustering his responsibility, his response-ability, his ability to respond, engaging with the texture of these texts, deploying his proposed interpretation of German law-texts through attentiveness to the law in the singularity of its existence, ensuring that he does not transgress the texts and make them say something they do not say, therefore subordinating himself to the obstinacy of the texts, acknowledging textual resistance, Whitman thus elicits Fascism. If you will, he makes Fascism happen out of the law-texts that are there—which is very different from alleging that he is acting in a strictly controlling capacity and forcing Fascism to happen (and which is also not at all the same as pretending that Fascism is contextual vis-à-vis the texts, that it belongs to the texts’ environment). Crucially, the Fascism that Whitman generates is always already within the texts as textual *potentiality*. It is latent, and it is now being triggered so as to manifest itself through interpretation. Indeed, Fascism is being disclosed and expressed not as an entity that would simply be re-collectable and re-producible, to which one could simply point (again, the challenge is not blately restitutive). In other terms, as he discerns Fascism in the relevant German law-texts, as he traces it and gives it form through a process of trans-cription, Whitman actualizes it as one of the law-texts’ always already traceable virtualities. As he assigns salience to this specific trace haunting the German law-texts, as he therefore unconceals this trace from texts that were secreting it (and that would have kept it a secret), as he asserts both the vitality

364. As I underlined, for example in relation to Sloterdijk’s model (*see supra* text at notes 78–79), interpretation is performative in another sense also as it fashions the comparativist. Consider Ricœur’s observation, which I apply to comparative law, that the interpreter “expose[s] himself to the text and receive[s] from it a more ample self” so that “the self is constituted by the ‘matter’ of the text.” PAUL RICOEUR, *CINQ ÉTUDES HERMÉNEUTIQUES* 73 (2013 [1972]) (emphasis omitted). The governing idea is that of the comparativist’s *becoming*. After his interpretation, Whitman thus stands as a comparativist who perceives traces of Fascism haunting the German law of privacy. As I can attest, this disposition is not without aggravation, for instance as one is faced with a senior German academic who stridently and aggressively, in public, refusing to countenance the very idea of this connection being drawn, launches an *ad hominem* attack challenging the comparativist’s competence. Affect also structures the inscription of the foreign.

365. Derrida & Attridge, “Etrange institution,” *supra* note 70, at 267 (emphasis omitted). The words are Derrida’s.

of these texts and of “his” act of interpretation-in-situation, as he affirms the trace’s living-on and thus the life of the law-texts (even as this life is beholden to the Fascism that visited Germany during the first half of the twentieth century, that Fascism now having died), as he attests to the worldhood of the law-texts (the texts are in the world—for instance, in the world of history, politics, and ideology—and the world—history, politics, and ideology—is in the texts), Whitman is promoting one desiring interpretation toward the law spinning away from any hypothetical textual center or, say, from any assumed textual truth. Even as Fascism emerges as the precipitate of Whitman’s research, as it appears that Whitman does not seek to evade the manifestation of as toxic a trace as Fascism, as Whitman is seen to withstand the implacability of Fascism, even then, readers must accept that no perspicacity on the comparativist’s part can overcome the fact that the tracing of German privacy law to Fascism ultimately pertains to speculation—Whitman’s goal being to ensure the creditability of his speculation beyond ephemerality, to make it durably felicitous.<sup>366</sup>

Whitman, then, is defending one interpretation and not others that were possible also, which is to say that his process of actualization excludes the other actualizations that were also legitimately liable to be invented within the play-space issuing from the text over against the text’s in-built reticence. In this important sense, Whitman, through the play of the text, is keeping alive both the difference concealed within any textual identity (the German law-texts could have elicited another interpretation) and the difference that the very act of discernment sustains (one can observe this or that; meanwhile, someone else can behold something else). As the German law-texts on privacy are made to become other to themselves on the way to being authentically themselves, there is acknowledgment of the world and of its life within the law just as there is realization of the law’s life within the world—arguably culturalism’s most important insight. I have mentioned Whitman’s *desiring* interpretation. Indeed, it cannot be that an interpretation on display, any interpretation on offer, “would be insignificant,” that “it [would] not [be] informed, in a certain way, by an operation, a desire, the search for a benefit.”<sup>367</sup> Since there is no interpretation unencumbered by desire, Whitman’s *enactment* must be related to Whitman’s own interpretive vitalities, impulses, or forces. Whitman’s response to the German law-texts, whose selfhood consists of many other “others” here unelicited (Fascism being but one striking example of those many “othernesses”), is interest-relative; it is imbued with the comparativist’s

366. Cf. BECKETT, *INNOMMABLE*, *supra* note 8, at 138: “What can one do but speculate, speculate, until one hits on the happy speculation?” The English version of Beckett’s text is his own. BECKETT, *UNNAMABLE*, *supra* note 8, at 85.

367. DERRIDA, *OREILLE*, *supra* note 296, at 93.

expectations.<sup>368</sup> Again, Whitman's interpretation of foreign law is persistently affective, thus in significant ways a self-portrayal.<sup>369</sup> It is, in a complex manner, the self-portrait of *something else*.

The Fascism that Whitman claims to be witnessing, then, is not found on the graphical surface of the German law-texts that he is considering. Instead, it arises *out of* these texts, from the textual depths, through "his" reading, "his" interpretation, and "his" writing as movements fostering the texts' opening to the world. Crucially, Whitman's analysis is thus an anamnesis and, as such, it pursues a deployment of the texts' contents. Fascism therefore stands as "a possibility that produces [the texts] by delayed action," a "strange structure."<sup>370</sup> In other words, through reading, interpretation, and writing, there takes place "[an] effectuation, a coming to action, of the semantic possibilities of the text,"<sup>371</sup> whereby Fascism is unfolded as one of the interpretive options through which, long after the German statutes and judicial decisions have been written, Whitman as interpreter reveals *and* generates the German law-texts as German law-texts being haunted by Fascism (in a context where Fascism has long been trailing clouds of meaning, where it is a word that has come from elsewhere, a word of the other). This process of ascertainment and arrangement, of circumscription and ascription, of textual elicitation and imputation of meaning is, in fact, "indefinit[e]."<sup>372</sup> Whitman is purporting to enunciate "an unmasterable polytonality," his intervention, if it wanted to saturate the meaning of foreign law (which it knows it cannot do), being destined to embark upon an "analysis . . . that would be infinite," an "archaeology . . . that would be . . . interminable."<sup>373</sup>

Crucially, scribing is not describing, and Fascism stands as Whitman's *invention* ("every invention [remains] a matter of culture, of language, of institution, of history and of technique").<sup>374</sup> If you will, Whitman is making a text speak that is speaking for itself except that it cannot speak for itself without Whitman, who, the moment he expresses himself, inevitably slants the text's speaking-for-itself (again, as soon as there is any enunciation about the text, there is an emendation to the text, even if the enunciator desperately wishes to restate exactly the semantic information that the text would be

368. Cf. JAMES S. HANS, *THE PLAY OF THE WORLD* 85 (1981) ("Production, desire and play are all part of the same process").

369. Cf. Angus, *supra* note 171, at 24 ("Textual interpretation is thus founded on self-interpretation, and the specific projects of the social sciences and humanities are folded into the philosophical task of knowing oneself").

370. DERRIDA, *VOIX*, *supra* note 148, at 99.

371. PAUL RICEUR, *DU TEXTE À L'ACTION* 153 (1986 [1970]).

372. DERRIDA, *MONOLINGUISME*, *supra* note 23, at 53.

373. The first quotation is from JACQUES DERRIDA, *D'UN TON APOCALYPTIQUE ADOPTÉ NAGUÈRE EN PHILOSOPHIE* 67 (2d ed. 2005) [hereinafter *Ton*]. The other two excerpts are from DERRIDA, *DISSÉMINATION*, *supra* note 19, at 231, 233.

374. 1 JACQUES DERRIDA, *PSYCHÉ* 34 (2d ed. 1998).

holding). Yet, Whitman's argument remains that Fascism is not an ideology that he himself has imported into the German law of privacy. Rather, Fascism was always already constitutive of the German law of privacy, it lay concealed within the German law's textuality, and Whitman is now elucidating the matter, *that* matter, the matter that matters (to him). Speaking of a viewer interpreting a photograph, Barthes says that "[he] add[s] to the photograph [that] *which however is already in it*."<sup>375</sup> The supplement of meaning is not exterior to the text or contextual around it, environmental (which would facilitate its dismissal as non-law). Thus, the traces do not have to do with the perigraphy of the law-texts; rather, they pertain to its *hypergraphy*.

I emphasize that Whitman, irrespective of the strength of his willingness to do so, is unable to confine himself to a strictly reportorial role, to engage in sheer mimeticism vis-à-vis the text, since any interpretation he propounds of it can only arise on account of what is possible *for him*. Whitman's reading must emerge by way of projective existential structures, which are inevitably in situation<sup>376</sup>—the location of Whitman's pre-understanding being at variance with the emplacement of the text itself, so that there is inevitably a gap between *interpretans* and *interpretandum*. The least interpretation necessarily produces the interpreter's intrusion into the text, if in an instant so brief that withdrawal is, for all intents and purposes, immediate. However, it would be too easy to suggest that the exercise in ascription of meaning has to do with Whitman's subjectivity. To quote Fish, "[t]he 'I' or subject, rather than being the freestanding originator and master of its own thoughts and perceptions, is a space traversed and constituted—given a transitory, ever-shifting shape—by ideas, vocabularies, schemes, models, and distinctions that precede it, fill it, and give it (textual) being."<sup>377</sup> Whitman's self consists, not unlike a text's, of many "othernesses," and in an endless number of significant respects what he now calls "his" language or "his" thought is effectively other people's languages and other people's thoughts into which he has been thrown and which he has incorporated.<sup>378</sup>

Whitman thus effectuates both an interpretive move toward the texts that are there, before him, and another interpretive move twisting himself away from these texts (away from their graphical

375. ROLAND BARTHES, *LA CHAMBRE CLAIRE* 89 (1980) (emphasis original).

376. Heidegger notes that "the formal, existential framework of the disclosedness belong[s] to understanding." HEIDEGGER, *supra* note 186, at 151.

377. STANLEY FISH, *THINK AGAIN* 100 (2015). In Gasché's words, "[s]ubjective reading, thus, is not subjective": RODOLPHE GASCHÉ, *THE WILD CARD OF READING* 228 (1998). *Cf.* BECKETT, *INNOMMABLE*, *supra* note 8, at 196 ("I, who cannot be I"). The English version of Beckett's text is his own. BECKETT, *UNNAMABLE*, *supra* note 8, at 123.

378. The notion of "thrownness" ("*Geworfenheit*") is Heidegger's. *See, e.g.*, HEIDEGGER, *supra* note 186, at 383, who refers to the self "being dependent on a 'world,' "[being] lost in the 'they.'"

surface).<sup>379</sup> Consider a German statute or judicial decision. Whitman takes both a step forward and a stride backward; he practices a double gesture: “Two texts [the graphy and the traces], two hands [one handling the graphy with a view to producing meaning here and the other handling the traces in order to generate meaning there], two gazes, two auditions. Together at once and separately.”<sup>380</sup> No interpretation issuing from this complex approach can duplicate the statute or judicial decision; it must differ from it, it must iterate it or, if you will, translate it.<sup>381</sup> In other words, a text’s being conceals a becoming—let us refer to the text’s “being-becoming”—which, in the end, through the configuration of a singular interpretation, adopts the form of a “becoming-different.” Any production of meaning conceives a meaning that is different from what it would be if the same interpreter were to draw on other traces (“differences *play*”<sup>382</sup>) or if it were engendered by another interpreter.<sup>383</sup> (Again, the ongoing iterative effort means an unceasing re-creation of oneself-as-comparativist as a self open to the world and therefore influenced by it—an important aspect of Sloterdijk’s pneumatic claim. In the words of Richard Rorty, Whitman is “engaged in a process of reweaving [his] beliefs and desires.”<sup>384</sup>)

While Gordley wants to posit “what the law is,” to arrest the law, Whitman’s research into foreign law is incessantly underway, without rest and, as I see it, without the confidence of ever being able to reach a stable meaning (thus, perhaps, the fact that he has devoted a number of different texts over a number of years to the issues that detain him in the article I address).<sup>385</sup> There is play also in “the structural moment of non-totalization itself,” in the fact that any attainment of “full” meaning, of exhaustive or complete meaning, is

---

379. The “twisting” is Heidegger’s “*Verwindung*.” For discussion, see KÜCHLER, *supra* note 334, at 7–8.

380. DERRIDA, MARGES, *supra* note 17, at 75.

381. Note that if I state the impossibility of a literal statement (or interpretation) and if it must follow that this enunciation (my statement about the impossibility of a literal statement) cannot be taken literally, such interpretive limit does not mean that the possibility of literality is thereby established. Cf. Hans-Jost Frey, *Undecidability* (Robert Livingston trans.), 1985/69 *YALE FRENCH STUD.* 124, 128–30.

382. DERRIDA, MARGES, *supra* note 17, at 12 (emphasis original).

383. Cf. Barbara Johnson, *Translator’s Introduction*, in JACQUES DERRIDA, *DISSEMINATION* ix (Barbara Johnson trans., 1981): “As soon as there is meaning, there is difference.” Famously, Derrida fashioned the word “*différance*” (“*differance*” in English) to capture the idea that the meaning of a text is at once ever different and ever deferred. See, e.g., DERRIDA, MARGES, *supra* note 17, at 1–29. See generally DERRIDA AND DIFFÉRENCE (David Wood & Robert Bernasconi eds., 1988).

384. RORTY, *supra* note 256, at 752. For the reference to Sloterdijk, see *supra* text at notes 78–79.

385. For Whitman’s work, see *supra* note 116. Note that “[w]riting is a part of being underway . . . ; instead of a mere documentation it is an ongoing act.” KÜCHLER, *supra* note 334, at 100. Küchler refers to PETER HANDKE, *DIE WIEDERHOLUNG* 157 (1999 [1986]). For a thoughtful reflection on the active character of writing, see 1 CLAUDE SIMON, *DISCOURS DE STOCKHOLM* (1986), reprinted in *ŒUVRES* 898 (Alastair B. Duncan ed.) (2006).

always postponed or differed, which means that “[p]lay . . . becomes the sign for the unavailability of any kind of original and grounded condition.”<sup>386</sup> Indeed, to the extent that Whitman would want to keep things in place, play could not be kept away or put “out of play.”<sup>387</sup> In what I think is a particularly inspiring formulation, Derrida thus holds that “[the concept of play] . . . heralds . . . the unity of chance and necessity in an arithmetic without end.”<sup>388</sup> Otherwise said, the contingency of interpretation (the text is always open to further *inventions*) and the inevitability of this contingency (the text is *always* open to further inventions) combine, endlessly. Within this intricate situation, justice is at stake. As a matter “of vigilance, of lucid vigil, of elucidation,” *it is indeed a question of doing justice to the text, to the law-text, and to the foreign law-text*; and “justice . . . implie[s] non-gathering, dissociation, heterogeneity.”<sup>389</sup>

Importantly, Whitman is not aiming to overcome positivism in the sense of annihilating the posited. Rather, he is promoting “a going-beyond that has in itself the traits of an acceptance and of a deepening.”<sup>390</sup> Whitman, of course, admits posited law (say, the statutes and their authoritative judicial interpretations) as the point of departure of his investigation into foreign law. But he wrests himself free of the posited-as-limit, he disrupts “the autism of the closure” by opening textuality toward its non-positivist other.<sup>391</sup> Hence, the idea of a “deepening” evoking a move to a general economy of meaning, an economy without reserve, suggesting an unrestricted interpretive outlay, which features a release of the traces through an archaeological or genealogical exercise, which is also a depropriation (a move away from posited law proper), an agonistic to and fro, a movement, a play. It is crucial to observe that Whitman’s interpretive strategy does not articulate a synthesis or a reconciliation between *interpretandum* and *interpretans*, but fabricates a space of encounter that, as befits play, is also a site of confrontation. In sum, Whitman produces a differend, a variant on the differend that there is across laws, there. Unsurprisingly, it has been observed that “difference is really the life-blood of the play-movement of understanding.”<sup>392</sup> While Whitman makes possible a significant challenge to the enframing of the force that is positivization and permits the emergence of another discourse in its manifestness—the traces that positivism had

386. KÜCHLER, *supra* note 334, at 128, 135. Cf. Johnson, *supra* note 383, at xi: “[T]he loss of presence has always already begun.”

387. DERRIDA, *GRAMMATOLOGIE*, *supra* note 25, at 439.

388. DERRIDA, *MARGES*, *supra* note 17, at 7.

389. DERRIDA, *TON*, *supra* note 373, at 64; JACQUES DERRIDA, *DECONSTRUCTION IN A NUTSHELL* 17 (John D. Caputo ed., 1997).

390. GIANNI VATTIMO, *LA FINE DELLA MODERNITÀ* 180 (1985).

391. DERRIDA, *MARGES*, *supra* note 17, at 162.

392. Monica Vilhauer, *Gadamer and the Game of Understanding*, in *THE PHILOSOPHY OF PLAY* 85 n.4 (Emily Ryall, Wendy Russell & Malcolm MacLean eds., 2013).

strenuously sought to keep hidden, that it had wanted to suppress and forget in its quest for ultimate fixity of meaning as a matter of law—, Gordley is at pains to exclude this intrusion into the system of orthodox thought, to ban this interruption of established thought.

For Gordley, legal thought, and research into foreign law specifically, must ultimately be about truth, which entails that in an ideal law-world interpretation would be supplanted; if there is truth, there is no further role for interpretation (*in claris non fit interpretatio*). Indeed, “[i]n the truth, [interpretation] ought to fill itself, accomplish itself, actualize itself to the point of effacing itself, without any possible play, before [the text] that manifests itself properly within it.”<sup>393</sup> To adopt and adapt this analysis of Adorno’s, interpretations—there are bound to be more than one—are “stigmas indicating that *not enough has yet been done*.”<sup>394</sup> In his attempt to ground a unitary order of knowledge by various means of coercive epistemic control, Gordley hardly hesitates in identifying Whitman’s assemblage as deviant or dysfunctional, as a lesser state of knowledge, and in roundly disparaging it as non-law. In so doing, Gordley is mindful that “all playful production involves risk,”<sup>395</sup> including the risk that, as an interpretation becomes itself the focus of interpretation it will prove persuasive to its readership. Whitman’s readers, for instance, might acknowledge Fascism as existently haunting German law-texts and recognize its interpretive significance *as a matter of law*. For Gordley, Whitman’s history of ideas, because it threatens positivism’s empire of analytical jurisprudence, cannot but qualify as a “dangerous supplement” of meaning—not an instance of rhyparography, of course, but a kind of exornation perhaps.<sup>396</sup> If you will, according to Whitman Fascism is the detail of the German law of privacy in the sense that it epitomizes the comparativist’s acuity, sensitivity, exhaustivity, realism, and expertise. Meanwhile, Gordley regards Whitman’s Fascism as a detail with respect to the German law of privacy in the sense that the term would attest, from the standpoint of law, to negligibility, superfluity, desultoriness, errancy, and irrelevance.

Gordley’s defence of arborescent thought wanting to assume by way of basic assurance the text’s fixed root, its stable center, stands firmly opposed to Whitman’s rhizomatic or decentered interpretation, that is, to Whitman’s nomadic or wandering exercise in textual distension generating other scenes or evocations. In the apparent neutrality of his analytical commitment, Gordley encodes ideological presuppositions and (un)conscious preferences, which would consign Whitman’s ambulatory tracing to signifying the contrivance of

393. DERRIDA, MARGES, *supra* note 17, at 288.

394. THEODOR W. ADORNO, *MINIMA MORALIA* 184 (1951) (emphasis added).

395. HANS, *supra* note 368, at 180.

396. DERRIDA, *GRAMMATOLOGIE*, *supra* note 25, at 203. *See also supra* text at note 276.

language, the destruction of the text, and the ruin of the law. But comparativism *à la trace* does not do anything of the kind. It does not in the least. Despite the fact that it is doomed to a Beckettian failure, comparative-law tracing heralds language, it celebrates the text, it extols the laws as the *Spielplätze* that they are and that have always already, maddeningly, undermined positivism, its supposed referentiality and its claimed ability to attain exact literality, its epistemic and ontological certitudes, which would make the legal disappear behind the mask of the (allegedly) scientific. Featuring “the situated self anxiously address[ing] a particularistic law in its cultural location,” the comparativist-at-law’s tracing acknowledges that “[n]o degree of knowledge can ever stop this madness, for it is the madness of words.”<sup>397</sup>



The debate between Whitman and Gordley as regards the construals of the various laws of privacy into which they inquire, that took place irrespective of me *and* that I have now staged, is an argument over contrastive epistemic strategies. Also, this discussion involves comparativisms-at-law that are deeply cathected with (antagonistic) ethical and political passions. Many of the theoretical issues at stake are urgent. Indeed, since one’s conception of comparison has a direct impact on the kind of knowledge that will be apprehended as “legally” relevant (or as “legally” insignificant) and therefore on what voice the other law will be allowed and thus on the very *presencing* of the other-in-the-law, I consider that comparative law must militantly advocate an approach allowing for the recognition and respect of the radical singularity of the other’s law that is different. One can discern, I think, how the comparative dynamics between self and other conceal capital issues for human existence, for collective life, and indeed for the future of the planet. Of course, “[i]n the face of planetary depredation, the vast exploitation of human and other populations, the proliferating spectacle of human and other suffering, the powers of [comparison] seem more limited and constrained than ever”; but comparative law can, significantly, “*affir[m] the radical demand that comes from the other.*”<sup>398</sup> As I see it, one’s ambition must accordingly be to enlist comparative law and comparativists for the best possible cause, that is, for the recognition and respect of an otherness that, because it can be configured as an interruption of one’s assumptions, enriches one’s appraisal of what there exists in the world as law and ameliorates one’s capacity to act on that existence in the name of what can still (perhaps)

---

397. Goodrich, *supra* note 195, at 215; PAUL DE MAN, *THE RHETORIC OF ROMANTICISM* 122 (1984).

398. LESLIE HILL, *RADICAL INDECISION* 336 (2010) (emphasis added). I adopt and adapt Hill’s observations concerning literary criticism.

be called *justice*. Purporting to step beyond one's law (and, in the process, beyond oneself), operating through a language of disruption (*eine Sprache der Zerrissenheit*), the disruption of one's epistemic comfort zone (since an undisruptive comparison is pointless, one way to gauge the epistemic usefulness of a comparative study may be to ask how much annoyance it generates within the orthodoxy, *si ça casse l'ambiance*), an Ariostesque negotiation with the other law and with the other's law is precisely what allows one to acknowledge the legal and axiological plurality of the world. As Whitman moves us away from comparative-law-as-we-have-known-it-in-our-law-schools-and-in-our-law-journals, as he promotes a comparison less inevitable and less despairful also, as he *validates* otherness-at-law through his tracing, as he engages law-as-culture and practices a cultural analysis of the legal, as he changes the textual *mood*, I find that his investigation of foreign law warrants support over against that of his disputant.



I want to restate the view that while it consists of lines upon lines of text, comparison-at-law is not linear. It comes and goes, it ebbs and flows. It is associative and multi-directional. It operates along ever-changing pathways. At times, the comparativist-at-law feels secure in his intuitions only to realize that he must soon reconsider them. On other occasions, he is led to track unexpected courses and follow uncharted routes. No tracing is methodical or categorical, and the apparent solidity of any singularization is deceptive. As he incessantly reworks his *bricolage* on account of his augmenting acquaintance with the unfamiliar foreign law, the comparativist is constantly retracing his steps—even as he forges ahead. In its rhetorical organization, in its mode of exposition of knowledge deemed relevant, in its staging of its thesis, in its articulation of its argument, in its specific configuration of textuality, this Article intervenes performatively as it purports to convey some of the comparativist-at-law's inexorable meandering. It, too, proceeds in complicated ways. It, too, detours and at times repeats itself (whether in the same or in different words, whether deploying its own or someone else's words). Like the comparativist's intervention on foreign law-texts, it features interfaces, intersections, and overlaps (not to mention reticences, omissions, and gaps). It splits itself and multiplies itself. It refers to itself (and, even, to its author). It supplements itself. It exceeds itself. In the way the comparativist-at-law produces his comparison, it constitutes itself through a seemingly infinite tracing of references to other texts, which it transforms and from which it differs (but which it cannot appropriate absolutely to do whatever it wants just as the comparativist cannot confiscate foreign law in order to serve his ideological agenda). It offers an arrangement that twists itself out of

positivism, that circulates upon itself, that is not static or stagnant. In the way it painstakingly knots the interlacing traces to constitute a text, it implements the thought of the thread and the strategy of entanglement. It scrapes. It rakes. It inscribes information not initially destined to be “legal.” Out of these grafts and intrusions, it generates meaning. It seems at times interminable, not unlike the way in which comparative research occasionally appears to be endless. It breaks with the constituted normality within the field of comparative law as comparison other-wise must do. It is idiomatic. As such, it is irruptive rather than serene, fervent rather than impassive, it is fragmentary rather than totalizing, it is a self-portrayal rather than a withdrawal. It eschews univocity instead of seeking indisputability, it foments perplexity instead of implementing convention—although it concedes an important role to the posited. It abrades. It is interpretive, neither objective nor true. It says “I.” It says other things than what it wants to say. It does not say all that it wants to say: it interrupts itself. It offers new insights and seeks to promote original connections. It is adventurous. It is theoretical (without the Burkean, Francophobe slur). It defends the ideas that I want to promote at this juncture. It is located within what I am pleased to style as “my” intellectual trajectory. It is situated in terms of the sources of inspiration that I have encountered over the years: the texts that have become available to me and that I have valued because of certain propensities or on account of having been thrown into specific predispositions, the colleagues and friends who have agreed to engage in conversation with me even as I was working on the argument. It is constrained by my linguistic (in)competence. It took a long time to research and to write. If it had been written five years ago, this text would have been different because I was then different. And if I had waited a further five years to enunciate my claim, it would have become different because I would then have become different, too. Again, therefore, the production of this Article will have proved analogous to the fabrication of comparisons-at-law. And my contention—neither vituperation nor lamentation—has much to do with my appraisal of the field of comparative law as it stands at this writing or rather as I apprehend it. It concerns in significant ways how I see my task within the field. This tractation is inadequate rather than right. It is maladjusted. It is not achieved. It remains unfinished. It is speculative. As comparison other-wise must aim to do, it wants to be progressive and emancipatory, to reinvigorate and to reorient. It is different. It is singular. It aims to deconstruct foreign law and then to reconstruct it so that the legal will yield (or afford) optimal information about its constituted self. It is inventive. It is allowing itself to be assessed. It is putting itself into play. It is vulnerable. It is *living on*, dangerously.

Making specific reference to the field of comparative law, taking its cue from Whitman’s investigation of the laws of privacy, this

text asks for a major shift in the comparative sensibility that must inform the study of foreign law. Supplying argumentative weapons or diplomatic tools, it claims that comparativists-at-law require to acknowledge law as culture, culture as trace, and trace as law. It also defends the irreducibility of the differend across laws and enjoins comparativists to appreciate what is the case. Rather than recycle implausible epistemic claims, which obscure the singularity of foreign laws, comparativists must strive to do justice to the dignity of the foreign by recognizing and respecting it as foreign—which involves a constitutive engagement with foreign law rather than a (purported) dualist detachment from it. In the process, comparativists-at-law are asked to accept that both the foreign law and the comparativist are constituted as open-ended becomings. Because these becomings are irrevocably entangled with one another—that is, since there takes place a constantly decentered interplay—neither the itinerary of the re-presentation of foreign law nor its end-point can be known in advance. There is the legal's semiotic unrest, its liquidity.

Foreign law is temporally emergent, which means that it is fashioned over the time of the comparison (and, indeed, *after* the comparison also as the comparativist's readers continue to make sense of the matter). No response, however, will exhaust the summons of the foreign, and no comparativist-at-law's account will ultimately reach beyond the threshold of foreignness. In case it should be necessary to assert this reservation once more, let me say again that I do not defend the eradication of posited law from comparative interventions. I do not seek to dispense with statutes and judicial decisions. What I claim must be removed from the comparativist-at-law's epistemic tool-box and relegated to the waste chute of comparative law, as a "protestation of singularity," are entrapping ideas like method, objectivity, and truth, this clanking caravanserai erringly suggesting the accessibility (and the existence) of something like "what the law is."<sup>399</sup>



Instead of the epistemic complexity that the comparative intervention ought to elicit, the stultifying image of "the law," of "the law" that "is," holds comparativists captive, and it is the most difficult challenge to overcome. This picture inhabits and underlies the field of comparative law, at least as comparativism manifests itself through its orthodoxy. It exists before any theory, as a background understanding that has come to seem so obvious, so unquestionable, that it thoroughly informs mainstream comparative practice

---

399. BARTHES, *supra* note 375, at 21. Cf. RICCO, *supra* note 85, at xix ("[W]hat if we stopped looking for either a method or an object for our research and theorizing?").

even as it remains unexamined. The product of an obsolete and pernicious Cartesian mindset, which would have individuals ablating themselves from their cultural prejudices, this less-than-whelming configuration distorts understanding while its prevalence prevents comparativists-at-law from acknowledging the profound inadequacy of the orthodox framework to what it means to negotiate with foreign law, with the foreign, with the other-in-the-law, with the other—to the jagged unfolding of comparison. Unsurprisingly, a discerning theoretician like Upendra Baxi conveys comparative law to “the inauguration of an *epistemic break*.”<sup>400</sup>

In the face of established comparative law’s rigidly restrictive comparison of the comparative mind, an animadversion upon comparative work, comparativists-at-law (I mean those inquirers who have not fully succumbed to the orthodoxy and its analytical stratagems) must engage in a remediative effort to surpass their trained epistemic incapacities. Specifically, as they occupy a legal heterocosm, as they activate their participatingly present observational position of adjacency vis-à-vis another law, as they purport to invent the here of there, interpreters of foreign law must fashion themselves into contracentric, egregious questioners, as disobedient and subversive interpreters of the foreign affirming an ethics and a politics of theoretical production that assert an anacoluthic approach to epistemic governance within the field of comparative law. Fostering the textual shocks that are needed to criticalize orthodox comparativism-at-law, research into foreign law must heighten the appreciation of pluralism and singularity, themselves the operational principles of the legal diversity and decentration—the experience of discordance—that must be valorized, not least because existing cultural instantiations *make a difference* as they withstand the transnational processes of diffusion of infrastructures or liberalization of tariffs in thrall to mondial stockholders who readily consider that only the losses should remain local. (Is it useful to emphasize that no one—neither Whitman nor I—considers local knowledge to enjoy some sort of immunity from critique, and that everyone—including Whitman and I—accepts that there are situations where localism calls for displacement?) Also, as a matter of justice, comparativists-at-law must countenance the play inhering to the dehiscence of textuality, to the dissemination of meaning, too. In sum, bracingly, they must trace and *trace on* . . .

---

400. I have in mind WITTGENSTEIN, *supra* note 235, at 53 (§115) (“A picture held us captive. And we couldn’t get outside it, for it lay in our language, and language seemed only to repeat it to us inexorably”) (emphasis original). I draw on DREYFUS & TAYLOR, *supra* note 115, at 1–3. The quotation is from Upendra Baxi, “The Colonialist Heritage,” in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 50 (Pierre Legrand & Roderick Munday eds., 2003) (emphasis original). I essayed the rupture in PIERRE LEGRAND, *LE DROIT COMPARÉ* (5th ed. 2015).