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SITING FOREIGN LAW: HOW DERRIDA CAN HELP

PIERRE LEGRAND*

“I want to *read* what is, however, not written.”
— Maurice Blanchot¹

Jacques Derrida was born to a Sephardic Jewish family near Algiers in 1930, in what was then French Algeria (at school, says Derrida, there was “not a word about Algeria, not a single one about its history and its geography, whereas we could draw the coast of Brittany or the Gironde estuary with our eyes closed”).² As a child, Derrida was the victim of harsh anti-Semitism, which translated into his expulsion from the local French primary school in 1942 along with all other Jewish students. Five years later, plagued by adolescent anxieties, he was unsuccessful on his first attempt at the *baccalauréat* or high-school leaving assessment. He later moved to France, where in 1950 he failed the entrance examination at the prestigious *Ecole normale supérieure*, France’s training school for teachers, and did not in fact succeed in being admitted to this institution for a further two years. His academic difficulties continued, and he subsequently foundered at the national *concours d’agrégation*, which would have accredited him as a philosophy teacher. Only in 1956 did he finally qualify.

* Professor of Law and Director of Postgraduate Studies in Globalization and Legal Pluralism at the Sorbonne, Paris; Board of Visitors Distinguished Visiting Professor, University of San Diego Law School; Senior Fellow, University of Melbourne Law School; Visiting Professor, Faculty of Law, National University of Singapore. I delivered a rendition of this argument at the Center for Transnational Legal Studies in London on 25 November 2009. I am indebted to Professors Franz Werro and Carrie Menkel-Meadow who, at the behest of Georgetown University and its partner institutions, extended a generous invitation. I released an initial redaction of the text in the inaugural edition of the *Romanian Journal of Comparative Law* in 2010. I thank Professor Raluca Bercea for soliciting my participation. I owe Professor Ralf Michaels for suggesting the publication of a revised version of the essay on the occasion of my 16 February 2011 presentation at Duke Law School, which he hosted along with the Editors of the *Duke Journal of Comparative & International Law*. I was then acting as Visiting Professor at the Georgetown University Law Center.

1. MAURICE BLANCHOT, *L’ESPACE LITTÉRAIRE* 257 (Gallimard 1955) (“*Je veux lire ce qui n’est pourtant pas écrit*”) (emphasis in original).

2. JACQUES DERRIDA, *LE MONOLINGUISME DE L’AUTRE* 76 (Galilée 1996) (“*pas un mot sur l’Algérie, pas un seul sur son histoire et sur sa géographie, alors que nous pouvions dessiner les yeux fermés les côtes de Bretagne ou l’estuaire de la Gironde*”).

Somewhat surprisingly given his checkered academic itinerary, within ten years or so Derrida had revealed himself as an extraordinarily gifted, challenging, and prolific philosophical mind. By the end of the 1970s, his work having been translated in numerous languages and his thought having found a receptive audience in a whole range of disciplines, Derrida had become the most influential voice within the crowded field of French philosophy. In 1998, the *New York Times* referred to him as “perhaps the world’s most famous philosopher—if not the only famous philosopher.”³ Two documentary films were subsequently devoted to Derrida, which is perhaps another mark of his success. Jacques Derrida died in October 2004 having taught in Paris for more than forty years, acted repeatedly as visiting professor at a substantial number of distinguished U.S. universities, and given conferences all over the world. In an op-ed piece published in the *New York Times* days after his death, it was said that “[a]long with Ludwig Wittgenstein and Martin Heidegger, Jacques Derrida . . . will be remembered as one of the three most important philosophers of the 20th century.” The author aptly remarked that “[p]hilosophers, theologians, literary and art critics, psychologists, historians, writers, artists, legal scholars and even architects have found in his writings resources for insights that have led to an extraordinary revival of the arts and humanities during the past four decades.”⁴

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I did not beseech Derrida. Rather, he came to me through the very good fortune of a key encounter with a colleague to whom I continue to feel profoundly indebted. When I began reading *De la grammatologie*, *Marges*, and *Positions*, I had been teaching law for five years and was becoming more disappointed by the day as too many colleagues, reducing their scholarly mandate to that of compliant expositor of the law, promised more clarity, more stability, more harmony than they could ever deliver. Unusually, I was a teacher who harbored an interest in foreign law. To be sure, if one is a Canadian wishing to graduate from Canada, as I fervently did even before entering law school in Montreal, one has little choice but to devote oneself to foreign law. Yet, I took the matter one step further and, influenced by one of my professors, formed the view that foreign law could hold a significant and indeed crucial measure of normative purchase for judges and lawyers operating locally. My first paper, which I began writing

3. Dinitia Smith, *Philosopher Gamely in Defense of His Ideas*, N.Y. TIMES, (May 30, 1998), available at <http://www.nytimes.com/1998/05/30/arts/philosopher-gamely-in-defense-of-his-ideas.html>.

4. Mark C. Taylor, *What Derrida Really Meant*, N.Y. TIMES, (Oct. 14, 2004), available at http://www.nytimes.com/2004/10/14/opinion/14taylor.html?_r=1&adxnnl=1&adxnnlx=1259848969-ukn969Q8ncl7q+zvHCwn9g.

after my initial year of law school, thus made the case for the transposition of a French precept to the law of obligations in Quebec through what I would now regard as some kind of Heideggerian leap. Given the way in which I was fashioning my scholarly life-in-the-law, I was rapidly—and willingly—instituted in an academic field known (problematically) as “comparative law.” This meant that when the time came to engage in postgraduate work, I found myself gravitating towards the Chair of Comparative Law at Oxford. This happened before “comparative law” had become cosmopolitan chic in Princeton and also before everyone would aspire to be a comparativist for fifteen lines. These were the days, in fact, when the Chair of Comparative Law at Oxford was still identified by his peers as an academic leader rather than as someone’s disciple.

“Comparative law,” which, with hindsight, recognizably emerged in the 1820s, features, like other academic fields, its own learned societies, journals, conferences, chairs, research institutes, courses, and even its postgraduate programs. Of course, labels are in flux and words like “transnational” eventually made an appearance on the intellectual scene suggesting, perhaps, an alternative slant. Beyond fashionable designations, though, the pertinent research and teaching enterprises remain infused by one abiding concern, which is a determination to extol the value of the foreign in terms of what is relevantly legal locally. As is no doubt the case with every other field, “comparative law” boasts an orthodoxy. I have in mind established comparativists, those who edit the journals, are called upon by leading academic publishers to assess book proposals, secure large budgets to launch major research projects or fund new postgraduate programs, and direct centers or institutes. These comparativists function in a structuring capacity in that they uphold an identifiable regime of knowledge and information. On account of the institutional positions they hold, they defend what they regard as good comparative practice, that is, good comparative manners—or, which is another way of making the point, they promote themselves as good comparativists-at-law. Wanting to preserve the capital of authority they have acquired over the years, wishing to protect the credit they have built for themselves, and desiring in effect for time to stand still, orthodox comparativists are prone to exclude dissenters, those whose work is seen by them to be wavering and, paradoxically, to be competing with theirs for the assumption of institutional dominance, those whose comparison would accelerate the passage of time so that there occurs at last a displacement of the locus of institutional exemplarity. As Derrida underlines, what is deemed to be

“good writing has . . . always been *comprised*,” that is, “enveloped.”⁵ Allowing closure occasionally to recede just long enough to permit a nod to inclusivism, parts of the seventh edition of a leading U.S. casebook devoted to “comparative law” offer one illustration of how far the dogmatic architectonics within the field—nothing short of a fully-fledged process of censorship—can be taken.

While I would not deny that every comparativist speaks in a voice which retains a measure of idiosyncrasy, despite being overdetermined institutionally and otherwise, I argue that orthodox comparativists largely share an approach to the law that can legitimately be designated as “positivism” or “legal positivism.” In brief, this technology of analytical knowledge can stand for the proposition that what counts as law is what is binding as law and that the interpreter’s task is to describe “that” without distortion. It follows that what should be made into an object of study as far as orthodox comparativists are concerned is precisely what is binding as law and that comparativism ought to attest to binding law through strictly conceptual, logical, and systematic expositions articulated neutrally, objectively, and “scientifically” with a view to strict exactitude. Traditionally, positivism’s focus on bindingness had meant that “law” was to be strictly equated with the law in force *within a given jurisdiction*. One of the major emancipatory achievements of “comparative law” since its institutional inception has been to widen the range of positivism, to include foreign positivisms within the legitimate province of “law” as an object of study, mostly manifesting themselves at the national level. This has been accomplished despite the obvious fact that foreign law is in principle devoid of any binding character beyond its own jurisdictional confines.

But such deterritorialization has remained limited to a strictly geographical motion. In particular, it has failed to extend to a deterritorialization of the mind that would have taken “comparative law” beyond technical ingenuity and mathematical subtlety and would have led comparativists to develop an understanding of law adequate to the task of cross-border investigations. Instead, comparativists, unable to escape the “system” into which they were institutionalized, have simply projected onto the international scene the positivism that they were used to practicing within their “own” law (as if law belonged . . .). In other words, while orthodox comparativists are indeed occupying the pan-national stage, they remain unrepentant positivists committed as ever to a conception of the law

5. JACQUES DERRIDÀ, *DE LA GRAMMATOLOGIE* 30 (Editions de Minuit 1967) (“[l]a bonne écriture a . . . toujours été comprise”/“envelopp[é]e”) (emphasis in original) [hereinafter DERRIDÀ, *GRAMMATOLOGIE*].

as binding law and determined as always to limit their work to “that,” to the law that is binding. To this day, then, published comparative research continues to be squarely focused on statutes and reported appellate decisions—on what has been posited by relevant officials as “the law.” A prominent U.S. comparativist, in my view very much expressing himself as *pars pro toto*, thus felt able to write as follows in 2007: “I am concerned with what the law [i]s.” I claim that this statement exemplifies the governing view within the field of “comparative law,” which accordingly operates as a form of market-led, breathless technical/practical service rather than as cogitative scholarship, hence the disenchantment I expressed above. What we get is not rigor, but *rigor mortis*.

But what is wrong with addressing statutes and judicial decisions? Why is legal positivism problematic for comparative legal studies? In a nutshell, my argument is that it is impossible simply to transfer beyond borders an approach to the legal which prevails locally because primordially different considerations obtain in those two situations. At the local level, the creation of a harmonious legal environment in the name of values such as predictability and certainty may well call, in the end, for the elimination of discordance. Consider how a judge strives to ensure that her decision does not contradict legislation and how she attempts to reconcile it with opinions already 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 and that they do not contradict one another. Throughout, the dominant values are very much those of predictability and certainty. The last thing that French or German lawyers operating in France or Germany want is the kind of cacophony that would make it difficult to ascertain what the law in force states on any given point at any given time.⁶

Is the situation not precisely the same on the transnational scene? For legal agents engaging in legal analysis that involves more than one law, it is arguable that predictability and certainty matter as much in that context as they do locally. Thus, I do not wish to dispute the affinity that can be claimed between the two sets of circumstances in this regard. But it is the

6. This argument is usefully developed by Rodolfo Sacco, who 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 that 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 (UTET, 5th ed. 1992) (“*si tende a vedere, all'interno di un ordinamento, una volontà del legislatore, che crea la norma, e una dottrina ed una giurisprudenza che interpretano e applicano questa volontà. Le varie regole (legale, dottrinale, giudiziaria) sarebbero, in via di principio, identiche. Se una difformità esiste, ciò si deve imputare ad un errore dell'interprete*”).

case that irrespective of the relevance of predictability and certainty in cross-border settings, these values have to contend with a competing set of ideas that are specific to dynamics involving the foreign. I have in mind the premises that always already need to inform any relationship 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. For me, these primordial notions go under the names of "recognition" and "respect" (which need not entail complaisance to fundamentalist regimes or agreement with rain dances). They attest to the fact that the other is not just another self, that he cannot be reduced to an *alter ego*. In the process, they incline the self to resist hegemonic or totalitarian thinking (which is not to be apprehended as a strictly Nazi or Stalinist phenomenon) and to avoid positioning himself as that by reference to which the other ought to be assessed. While univocality may be desirable locally, the exigencies set by the co-presence of the foreign in cross-national situations firmly demand equivocalty.

My basic contention, then, is that the foreign makes especial claims on one. For the Anglophone reader, the poetry of Char in French or of Celan in German creates an interpretive situation which challenges him in a manner that differs from, say, the way in which does Blake's poetry. Within cross-national dynamics, in a situation where one is dealing with a law that is not one's "own," with a law that is, in effect, someone else's, certain protocols imperatively need to be implemented in order to avoid the surfeit of ethnocentricity that is liable to discredit the comparative analysis. One could say that the matter concerns the formulation of an ethics responding edifyingly to the specific type of summons conjured by the co-presence of the other. Surprisingly, I should think, one observes that this attitude represents but a minoritarian stance within comparative legal studies. Thus, in 1995, a leading U.S. comparativist, someone whom I situate firmly within the comparative orthodoxy, felt able to write, "[t]here [is] nothing distinctively German, French or American about [German, French, or American judicial] decisions." For his part, an influential German comparativist who, in the published English translation of his work, declares the "immaterial[ity] of differences across laws" and proclaims a "unitary sense of justice," offers a further illustration of the established perspective. While these opinions faithfully exemplify the orthodoxy within the field of "comparative law," they fail—rather abysmally—to do justice to the singularity of the laws that are other than one's "own." What we have instead is a not-so-discreet ethnocentric projection allowing one to say that the various laws under scrutiny, not being different from one another in ways that matter, are in effect like

one's "own," which entails, most conveniently, that one need not call one's law (or oneself) into question.

But the demonstrably empirical fact is that if there is more than one law, there is difference across laws. It is not a matter of whether difference is there or not, for it exists. It is about what the comparativist will make of the difference that exists. Will he try to efface it on account of its inconvenience to his research program? Will he try to ignore it? Along these lines, a well-known comparativist-at-law wrote in 1995 that comparativists ought to engage in the "manipulation" of data in order to make laws look similar. Or will the comparativist, in the name of recognition and respect for the other's law, try to do justice to difference-at-law through an examination of the matrices within which laws are ensconsed? Will a comparativist accept, for example, that if the French legislature will not allow the wearing of conspicuous religious dress at school, there are historical, political, social, demographic, and epistemological reasons for this decision, which deserve to be elucidated *as law* if one is to get a meaningful understanding of the relevant French statute? And will the comparativist acknowledge that if the Supreme Court of Canada will allow a twelve year-old Sikh to wear his ceremonial metal dagger (or "*kirpan*") at school, there are, also, historical, political, social, demographic, and epistemological reasons for this determination, which deserve to be elucidated *as law* if one is to get a meaningful understanding of the Canadian decision? For those who prefer corporate law with their dinner, I can offer an analogous argument with respect to the rights of minority shareholders. In the United States and in the United Kingdom, the crucial determinant of the legality of management action has been "shareholder interest." To decide what management can do to combat a take-over attempt, for instance, judges ask themselves whether the best interests of shareholders are being served. In France, the criterion is different. French judges examine not shareholder interest but the interest of the company as a whole, what is known as "*intérêt social*" (or "social interest"). This distinction is not insignificant. One can easily imagine, for instance, management attempting to foil a take-over bid in the interest of the company as a whole (which they happen to be managing) while the bid would benefit individual shareholders.⁷ My claim is that, just as with religious dress at school, what we have here is more than one model of corporate governance, each being informed by historical, political, social, philosophical, and epistemological considerations, which require to be

7. See Ben Clift, *French Corporate Governance in the New Global Economy: Mechanisms of Change and Hybridisation Within Models of Capitalism*, 55 POL. STUD. 546 (2007).

elucidated *as law* if one is to get a meaningful understanding of, say, the U.S. or French law of corporate governance.

Does positivism or legal positivism assist the comparativist in capturing this constitutive dimension of the law, which, incidentally, will be found to prove singular to each law? Positivism is inherently about determining what law is and what is law. It is concerned with circumscribing what counts as “law.” This is what, structurally, positivism would be in a position to accomplish. As regards foreign law, then, positivism can allow one only to *identify* the law in force. It cannot do more than that and cannot reasonably be expected or made to do more than that. When it comes to foreign law, positivism is thus seen to behave in stubbornly static and documentary fashion. *How can a comparativist who is operating across borders and addressing a law that is not his “own,” a law which is an other’s law and another law, a law which requires to be understood, which calls for ascription of meaning, how can such a comparativist, then, be content with a mere process of identification?*

Imagine that I am teaching U.S. students in California, and that I am trying to get them to make sense of the French statute on religious dress at school, which they initially regard as excessive, intolerant, and contrary to what they envisage as freedom of religion. How do I help the case for understanding if I engage in a positivistic re-presentation of the French statute? What good is it for me to rehearse how the French courts have interpreted the word “schools” or what meaning, broad or narrow, textbook writers have assigned to the expression “religious signs”? 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 on account of their situation within a multicultural society, they can at least get to appreciate it? The answer, it seems to me, is negative: positivism will simply not allow me to generate such sensitivity for the foreign.

Of course, to ascertain what counts as “law” can be regarded as a necessary first step, which the comparativist would be hard-pressed to avoid.⁸ It is law that we lawyers have made our concern, and as one moves into foreign legal territory one evidently needs to determine where “law” is to be found to exist and what it says. Yet, precisely because one is dealing with the foreign, it would be unacceptably reductionist to confine one’s

8. *But see* 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): “I do not wish to enter into the largely sterile and boring discussion of what can be considered law.” While it is hard to comprehend why a comparativist-at-law would openly want to identify himself with such philistinism under any set of circumstances, the inclusion of this statement in an essay devoted to the classification of laws makes matters especially difficult even for the benevolent reader.

encounter with the “legal” to a process of formal identification. As an account of foreign law, mere identification of what that law is, of what it says, will not do. A more complex form of understanding is needed. And this claim cannot be reduced to an esoteric argument concerning the academic practice of “comparative law.” It raises, rather, a crucial political issue. To summarize, positivism is predicated upon an anterior practical view of the world and of the law. Given the way in which it strategically seeks to work itself pure under cover of science, such that certain information is mechanistically excluded from the sphere of relevance and some questions made never to arise, it is obvious that positivism harbors a specific disposition, that *it assumes a (political) position* no matter how much it strives to disclaim any interest in law’s political governance (*any positing is someone’s positing*, which means that not even exegesis can be presuppositionless). My dissatisfaction with “comparative law”’s smothering artifices stems from the fact that I find its sclerotic political position intellectually indefensible and ethically untenable. I argue, then, that “comparative law” requires a different politics. I have, in fact, been making this case for more than fifteen years safe in the knowledge that the battle for an alternative “comparative law” would confine me, as a nomadic theorist and a theoretical nomad, to a marginal itinerancy at the periphery of the field. As was to be expected, orthodox comparativists have been content to discredit my work or ignore it.⁹ To be sure, I could simply have left the field and, rather than obstinately inscribe my protest when offered the opportunity to do so, have made my intellectual life elsewhere (which I want to continue thinking I may yet do). As I have been pursuing my challenge to the orthodoxy in favor of a different economy of knowledge better suited to the polyvocality and equivocality characteristic of the cross-border legal scene, I have found Derrida to be supplying a unique brand of intellectual assistance, at once discerning and indefectible. To those who, in response to this statement, are preparing to abridge their reading of this paper on the assumption that Derrida, qua philosopher, cannot have anything worthwhile to contribute to “comparative law,” I retort that such inference is about as informed as that of a traductologist who would deny

9. I am referring strictly to “orthodox comparativists.” At times, their omissions have proved caricatural enough to attract scholarly attention thus confirming the fact that being ignored can lead to an alternative form of *existence*. See, e.g., Peter Goodrich, *Intellection and Indiscipline*, 36 J.L. SOC’Y 460, 474 (2009). See also Mathias M. Siems, *Book Review*, 12 EDINBURGH L. REV. 334, 335 (2008) (reviewing ESIN ÖRÜCÜ & DAVID NELKEN, *COMPARATIVE LAW: A HANDBOOK* (2007)). Having noted Siems’s text for present purposes, I would not want to be taken to endorse its crude statistical apprehension of the matter of relevance, which I find simplistic and, well, vulgar.

Luther's relevance because he was a theologian or of an anthropologist who would object to Saussure's pertinence since he was a linguist.

Admittedly, law was not Derrida's principal interest; however, he worked tirelessly on texts and on interpretation. And since law, including foreign law, can reasonably be said largely to consist of texts (even on a narrow definition of the word "text")—for example, the text of the statute, of the judicial decision, of the treatise, or of the law-review article—and because what we do as comparativists as we interact with foreign law is in substantial part to interpret texts, Derrida's work on texts, more than forty years of it, deserves our attention. I unhesitatingly accept that other contemporary thinkers have also made major contributions to our understanding of texts. I have in mind, for instance, such key intellectuals as Hans-Georg Gadamer, Paul Ricœur, and Stanley Fish. But Derrida, in addition to his work on texts and interpretation, conducted in parallel a further reflection, extending over all of these forty years also, on the relationship between self and other, on ethnocentricity and otherness (of course, anyone at all familiar with the cultural claustrophobia within which French academia remains mired can easily see how, as a North-African Jew living in Paris, he would have felt personally concerned). Indeed, in the very first sentence of one of his first three major books, all published in 1967, Derrida explicitly foregrounded ethnocentrism.

In order to appreciate the merit of Derrida's contribution to a more sophisticated understanding of texts against the background of the relationship between self and other, I hasten to add that there is no need to turn oneself into some ventriloquizing disciple of his. Personally, I regard myself as a *reader* of Derrida, which means, for one thing, that I feel entitled to behave rather as Andreas Philippopoulos-Mihalopoulos does vis-à-vis Niklas Luhmann: I can close a book of Derrida's after having read two chapters only (and not necessarily consecutive ones at that), go for a walk in the Jardin du Luxembourg, and upon returning to my study open a different book, possibly written by some other intellectual.¹⁰ My point is that one can easily take the view that Derrida's insights in interpretive matters and as regards the self/other dynamics are worthy of serious consideration, and may deserve to be received as theoretical investigations warranting translation into a textual praxis, without embracing the French philosopher's world-view in all its ramifications. In any event, Derrida's philosophy was never meant to be systematic, that is, it was never intended

10. For the thoughtful expression of his connection with Luhmann, on which I draw, see ANDREAS PHILIPPOPOULOS-MIHALOPOULOS, NIKLAS LUHMANN: LAW, JUSTICE, SOCIETY 1-2 (2009).

to form a finished system in which each term would be precisely defined and situated.

As I try to account for Derrida's engagement with texts and with otherness, to assist progress through Derridean foothills and mountains, especially as steep escarpments present themselves, I propose to organize my thoughts around eight key clusters of ideas. Inevitably, I base my account on Derrida's philosophy *as I read it*. Although I would not perform anything that I do not perceive as being already there, in Derrida's work, waiting to be brought forth, while I would not consciously embellish or deface Derrida's text, I proffer *my* Derrida—not unlike the way in which a violinist who plays Paganini's "Caprices" remains at once compliant with the score and yet injects interpretive idiomaticity in the course of her performance.¹¹ After all, reading, even silent reading, like playing the violin, is an activity and an intervention—it is something that one *does*—and it therefore begets an account which cannot be merely constative. It is, then, to my experience of Derrida that I now turn.

On the Surface

As he approaches the text, Derrida's first interpretive motion looks anything but revolutionary. Indeed, he suggests a reproductive reading along the lines of a "duplicating commentary."¹² He thus notes "the necessity of first ascertaining a surface or manifest meaning . . . : the necessity of gaining a good understanding, in a quasi-scholastic way, philologically and grammatically, by taking into account the dominant and stable conventions" of authorship which manifest themselves "on the . . . surface of [the] text."¹³ But for Derrida, ascription of meaning cannot stop at this conventional stage; rather, it must involve a "double gesture."¹⁴ His second operation boldly wants to be productive and critical. It is not that the "declared intention is . . . annulled . . . but rather [that it is] *inscribed* within a system which it no longer dominates."¹⁵ At this juncture, Derrida,

11. I deliberately inscribe a reference, albeit distant, to NELSON GOODMAN, *LANGUAGES OF ART* (1976).

12. DERRIDA, *GRAMMATOLOGIE*, *supra* note 5, at 227 ("*commentaire redoublant*").

13. JACQUES DERRIDA, *THE WORK OF MOURNING* 84 (Pascale-Anne Brault and Michael Naas eds., Pascale-Anne Brault and Michael Naas transl. 2001) (1991). It must not be thought that, as regards the first step in his strategy of interpretation, Derrida simply assumes basic semantic determinacy. Indeed, he observes that "[i]ntention is at once differing and deferred": JACQUES DERRIDA, *LIMITED INC.* 111 (Galilée 1990) ("*L'intention est a priori (aussi sec) différante*") (emphasis in original) [hereinafter *DERRIDA, LIMITED*]. See *infra* on Derrida's idea of "differance" ("*différance*").

14. DERRIDA, *LIMITED*, *supra* note 13, at 50 ("*double geste*").

15. DERRIDA, *GRAMMATOLOGIE*, *supra* note 5, at 345 ("*[l]'intention déclarée n'est pas annulée mais inscrite dans un système qu'elle ne domine plus*") (emphasis in original).

controversially, takes the view that “the self-identity [of the text] is always withdrawing and displacing itself.”¹⁶ I devote the remainder of this essay to an explication of this other dimension of interpretation, which, as understood by Derrida, achieves at once the destabilization and dissemination of meaning.

About Presence

Somewhat unthinkingly, the identity of a text is predicated upon a conception of presence as visibility. Derrida challenges our habitual understanding that the presence of the text—what is present as text—can be reduced in this fashion to the text’s graphical dimension. In the process, he calls for a different politics of memory and suggests that the text be envisaged otherwise and, in my words, other-wise—that is, in a manner that would be more conducive to the endless negotiation with the other that it necessarily affirms, if discreetly. Simply put, the notion of “presence” is more complicated than what we have been assuming. What is visible is, of course, present. Thus, the words on the page are evidently an important part of the presence of the text. But graphematic substance is not all there is to the presence of a text. The text, if you will, does not coincide with its graphic surface. Specifically, something *can* be present as text—and indeed be a fully-fledged, constitutive, part of the text—even though not graphically visible. By way of analogy, consider Véronique at the café. When we were dating, we used to go to *L’Ecritoire* often. This was a long time ago. Yet, when I find myself in that café, I can still see her there, sitting at our favorite table. I am not talking of the kind of presence that readily comes to mind when we mention presence, that is, I am not referring to physical presence. But I am certainly not adverting to absence either. Although invisibly so, Véronique is present in the room. She haunts the café. Texts, too, are haunted. In the same manner as the café is not the (physical) room, as it is not in effect confined to that room (it includes Véronique, who is not physically at the café), “the text is not the book”—it is not limited to the book: it “comprises and does not therefore exclude the world,” it embraces “the other.”¹⁷

Of Spectrality and the Trace

Derrida’s claim is that a text consists of its visible dimension—this would be the graphical part of it—and that it is also made of an invisible

16. *Id.* at 72 (“l’identité à soi du [texte] se dérobe et se déplace sans cesse”).

17. DERRIDA, LIMITED, *supra* note 13, at 253 (“le texte n’est pas le livre”/ “comprend et n’exclut donc pas le monde”/ “l’autre”).

aspect. This constitutive, imperceptible element, he calls the “trace” in the sense of sign/clue—a notion which he derives from Emmanuel Levinas.¹⁸ Derrida’s argument is that a text is but “a fabric of traces.”¹⁹ In addition to its graphical features, a text, being irreducibly relational, or being always already inscribed in the world (no one can even imagine a text existing “in the air”), is constituted of a unique if intricate assemblage of an infinite number of unique traces. To be sure, these heterogeneous traces assembled—this singular plural—do not leap to the interpreter’s eye, but they are there: they do haunt the text. Derrida thus urges us to accept that there is a “spectral” dimension to texts. He wants us to think of traces as ghosts (the ghost is present, although invisible). These traces are the precipitate or the deposit left, for example, by history, politics, or philosophy. They are what history, politics, or philosophy survives as; they are history, politics, or philosophy’s remains—Derrida refers to ashes or cinders.²⁰ In this sense, the traces indicate the presence of other discourses of which they are the vestiges, which they retain (a trace is “retentional”),²¹ which they iterate (“iteration” is an important Derridean motif, designating repetition-with-a-difference: the trace is not the same thing as that of which it is the remainder), whose staying power they manifest, even as they show themselves to be unstable and transient rather than monumental and permanent. Somewhat mystically perhaps, Derrida associates the identification or naming of the remains, of the traces, to a *work of mourning*: the thought of the trace involves acceptance of death at work within life.²² In his words, “[d]eath strolls between the letters.”²³

By way of application of Derrida’s argument, consider the French statute on religious dress at school. It is, of course, constituted of the words that we see on the page—such is its graphical presence—but it is also made of the traces that have been left by history, politics, or philosophy.

18. For an acknowledgment of his indebtedness, see DERRIDA, *GRAMMATOLOGIE*, *supra* note 5, at 102-03.

19. JACQUES DERRIDA, *PARAGES* 118 (2d ed., Galilée 2003) (1979) (“*un tissu de traces*”). This text first appeared in English as Jacques Derrida, *Living On*, in HAROLD BLOOM ET AL., *DECONSTRUCTION AND CRITICISM* 62-142 (James Hulbert transl. 2004) (1979).

20. According to Derrida, “the best paradigm for the trace . . . is not . . . the trail of the hunt, the fraying, the furrow in the sand, the wake in the sea, the love of the step for its imprint, but the cinder.” JACQUES DERRIDA, *FEU LA CENDRE* 27 (Editions des Femmes 1987) (“*le meilleur paradigme de la trace, . . . ce n’est pas . . . la piste de chasse, le frayage, le sillon dans le sable, le sillage dans la mer, l’amour du pas pour son empreinte, mais la cendre*”).

21. JACQUES DERRIDA, *LA VOIX ET LE PHENOMENE* 95 (Presses Universitaires de France 1967) (“*réentionnelle*”) [hereinafter DERRIDA, *VOIX*].

22. One of Derrida’s books bears that title. See *supra* note 13.

23. JACQUES DERRIDA, *L’ECRITURE ET LA DIFFERENCE* 108 (Le Seuil 1967) (“*La mort se promène entre les lettres*”) [hereinafter DERRIDA, *ECRITURE*].

Specifically, it is haunted by the history of the relationship between churches and state as it has developed in France since the early fourteenth century; by nineteenth-century French colonial politics in North Africa; by a contemporary conception of “Republican citizenship” prohibiting the idea of minority rights; and by an epistemological distinction between the “public” and the “private” harking back to Roman law. In other words, “[a] text . . . is simultaneously the condensation of a scarcely delimitable history . . . , of the encyclopedia”; in it “can be gathered the greatest potentiality of historical, theoretical, linguistic, philosophical culture.”²⁴ It bears emphasizing that the traces, in all their polyvocality and equivocality, are *constitutive* of the text and that they cannot therefore be withdrawn from the text and find themselves relegated to the text’s context or parergon, somewhere on the wrong side of the disciplinary palisades. The statute exists *as* the history of the relationship between churches and state, *as* colonial politics in North Africa, and so forth. Strictly speaking, therefore, and in Derrida’s own famous words, “[i]l n’y a pas de hors-texte,” which is to say, for one thing, that there is nothing which, dogmatically, can be pronounced to lie in a beyond of the text.²⁵ Accordingly, any act of closure (recall legal positivism’s strategy) is inadequate in the sense that it necessarily excludes something yet to be thought through in its textual relevance. Ultimately, the claim regarding traces is structural in the sense that the traces inhere to the text; they pertain to the very making of it. Try as he may, a positivist cannot get this structure to disappear. He may opt to ignore it,²⁶ but he cannot eliminate it. Indeed, to ignore the trace is to close one’s eyes to what is always already there. For Derrida, then, there is a law of spectrality at work—“the spectral structure is the law here”²⁷—which means that what legal positivism would frame as radical exteriority vis-à-vis the text or as absence from the text, such as history, politics, or philosophy, is shown not to be exterior to it or absent from it after all (Véronique is not not-at-the-café). Because the textual matrix exists as a reticulation of traces (Derrida talks of “the adventure of the text as weed”),²⁸ each trace being different from all others, it thus exists as a differential matrix: “Textuality [is] constituted by

24. JACQUES DERRIDA, *ACTS OF LITERATURE* 43 (Derek Attridge ed. 1992).

25. DERRIDA, *GRAMMATOLOGIE*, *supra* note 5, at 227 (“There is no out-of-text”). This passage appears in italics in the French original.

26. *Cf.* LAWRENCE ROSEN, *LAW AS CULTURE* 6 (2006): “It is no mystery that law is part of culture, but it is not uncommon for those who, by profession or context, are deeply involved in a given legal system to act as if ‘The Law’ is quite separable from other elements of cultural life.”

27. JACQUES DERRIDA, *PAPIER MACHINE* 307 (Galilée 2001) (“*la structure spectrale fait ici la loi*”).

28. DERRIDA, *ECRITURE*, *supra* note 23, at 102 (“*l’aventure du texte comme mauvaise herbe*”).

differences and by differences from differences.”²⁹ And the text therefore operates to fasten or bind or band the traces as they come together to constitute it (as, say, traces of history enmeshed with traces of politics or of philosophy become a statute).³⁰ The mark of a process of condensation or agglutination, the text takes the form of a *gathering*.

To return specifically to law-texts, the motifs of “spectrality” and “trace” eschew the unduly crude binary distinction between law and non-law (the kind of dualism which Derrida, throughout his decades of writing, consistently derided as “metaphysical”). They reveal that law does not exist in isolation from other discourses but is affected by them as regards its very constitution: it is constructed, made, fabricated, assembled, actively constituted *of* them. In sum, spectrality marks “the relation of the intimacy of the living present to its outside, the openness upon exteriority in general, upon the non-self.”³¹ It should be clear that we have here a very different, much more capacious, interpretation of what it must mean to interpret a law-text.³² There is one additional point. Since they are invisible, the traces await their unfolding or elucidation or unconcealment—their bringing forth—by the text’s interpreter who, as he undertakes this archival work, is required to engage in an anamnesis, indeed in a hypermnesis (a recollection or recollective thinking, as opposed to an amnesia or forgetting), thus deploying a sensibility that is in crucial ways more akin to that of the archeologist’s than the mathematician’s. Only by *staging* the traces—a gesture featuring a transacted, kinetic, and performative dimension even as it purports to abide by the text—can the interpreter (say, the comparativist) affirm the life of the law-text by giving the traces their due, by doing justice to the traces, which, as *survivancies*, have come to constitute the text. (Note, however, that even the “bringing forth” of traces will fail to generate the text’s full presence.)

29. JACQUES DERRIDA, *LA DISSEMINATION* 111 (Le Seuil 1972) (“*la textualité étant constituée de différences et de différences de différences*”).

30. In French, Derrida repeatedly uses the verb “*bander*” as in “*le texte bande*.” Now, “*bander*” in familiar French is to have an erection. Derrida’s pun is that as the text proceeds to band the traces, it allows itself to stand, erect, as text. See JACQUES DERRIDA, *GLAS* 151b (Galilée 1974): “I suggest that we try everywhere to replace the verb *to be* by the verb *to band*” (“*je propose qu’on essaie partout de remplacer le verbe être par le verbe bander*”) (emphasis in original).

31. DERRIDA, *VOIX*, *supra* note 21, at 96 (“*le rapport de l’intimité du présent vivant à son dehors, l’ouverture à l’extériorité en général, au non-propre*”). See also JACQUES DERRIDA, *POLITIQUE ET AMITIE* 107 (Michael Sprinker ed., Galilée 2011) (1993).

32. In DERRIDA, *ÉCRITURE*, *supra* note 23, at 427, Derrida expressly refers to “two interpretations of interpretation” (“*deux interprétations de l’interprétation*”).

On Unconcealment

Etymologically, the word “text,” in addition to evoking authority (the Scriptures, especially the Gospels, are known as the “Holy Text” or, simply, the “Text”), connotes the idea of weaving and, more extensively, of interlacement. In Rome, a “*textor*” was indeed a weaver and “*texere*” was “to weave” (consider the word “textile”). Now, this intermingling of traces (or threads) whereby texts are woven or fabricated is something that happens irrespective of the interpreter of the text and yet requires the interpreter of the text in order to happen. Looking at the matter from the interpreter’s standpoint, he can be seen to act as an *inventor*, which, literally, means that he is simultaneously a finder (someone discovering the traces which are there as the text) and a creator (someone elucidating the traces that are there as the text, bringing them to light, fashioning them). Consider, again, the French statute on religious dress at school. This statute is haunted by traces of French colonial politics and Roman law. These traces are there as the statute; in inevitable ways, they *are* the statute. And they are the statute irrespective of any comparativist coming along to ascribe meaning to the statute (“[t]he trace is not an attribute”).³³ In other words, the statute exists as a text featuring traces of French colonialism and of *Romanitas* whether or not there is a comparativist around. Yet, without the comparativist, these traces, which are “necessarily occulted,”³⁴ are doomed to a kind of mutism. They signify, but they do so in silence. In this sense, they are destined to remain without effective meaning, that is, effectively meaning-less. Again, the idea of “invention” accounts for the fact that the comparativist will have at once found and made foreign law, that he will have simultaneously identified and configured it.

It is the comparativist-at-law who, by going underground in order to explore the text’s rhizomes, awakens meaning, brings the traces into interpretive existence, makes the traces actively mean, attributes dynamic meaning to them, acts as an enabler of resonant meaning, makes the traces meaning-ful. As he engages in this act of elevation to fully-fledged meaning, the comparativist is, strictly speaking, involved in a process of iteration, which takes us back to my earlier point about “invention.” While the comparativist reproduces what there is out of fidelity to the text—Derrida insists that “the reading . . . cannot legitimately transgress

33. DERRIDA, VOIX, *supra* note 21, at 95 (“*La trace n’est pas un attribut*”).

34. DERRIDA, GRAMMATOLOGIE, *supra* note 5, at 69 (“*nécessairement occulté[es]*”).

the text towards something other than itself³⁵—he inevitably proceeds in his own (situated) key. Along the way, he brings to bear his own familiarity with the law that he has made into his object of study, which will indeed act as an index of his rhetorical ability to persuade his interlocutors or his readership of the merit of his elucidation. For instance, a comparativist will fail to realize the presence of traces of French colonial politics haunting the French statute on religious dress at school unless he is in a position to apply a sound knowledge of French history, French politics, French philosophy, French society, French international affairs, in sum, of French culture—an undertaking which need not fall prey to the trappings of essentialism. There follows an important implication, no doubt profoundly disturbing for legal positivism's allegedly secure but spectacularly self-aggrandizing conceptual assumptions, which is that, strictly speaking, foreign law is not simply discovered: it is also *achieved*. And this fashioning produces a legal knowledge that can only be situated in relation to a certain epistemological framework embedded in place and time—interpretation proceeds from prejudice, from a pre-understanding which, even as it makes emergence of knowledge possible, also acts to constrain what can manifest itself as knowledge. In other words, it is impossible for a comparativist to work referentially only, that is, to operate exclusively by making reference to something that would be there, without injecting any added value of his own. Foreign law, therefore, bears the comparativist's "singular signature" and appears as nothing short of an "autobiographical inscription."³⁶ Discreetly perhaps, in silence even, writing in white ink, so to speak, no matter how seemingly self-effacing or external to the matter, the comparativist is actively at work—inescapably so—within the formation of foreign law and is continuously bringing his pre-understanding into play in order to structure it. Not only is he producing foreign law but he is producing himself. It follows that there are potentially as many French statutes on religious dress at school as there will be comparativists coming to the matter of interpretation of the relevant law-text. Yes, yes. Now, the fact is, which Derrida never tired of emphasizing, that the moment one articulates anything about something, one does violence to it. No matter how purportedly loyal my detailed account of my conversation with Imogene, I will distort our exchange and, in this way, do violence to it (of

35. *Id.* at 227 (“[La lecture] ne peut légitimement transgresser le texte vers autre chose que lui”). See also Jacques Derrida, *Countersignature*, 27/2 PARAGRAPH 7, 28-29 (2004) (Mairéad Hanrahan transl. 2000).

36. DERRIDA, *ACTS OF LITERATURE*, *supra* note 24, at 43. This point is excellently argued in Raluca Bercea, *Toute comparaison des droits est une fiction*, in *COMPARER LES DROITS, RESOLUMENT* 41-68 (Pierre Legrand ed., Presses Universitaires de France 2009).

course, my violent narrativization is also a means whereby I can account for my interlocutor's utterances). While this tension can be attenuated and a lesser violence exerted, it is beyond resolution. Such is the alternative economy of meaning: not only does the comparativist-at-law save meaning (by taking what is there), but he also dispenses it (by fabricating what there is). In the final analysis, this economy is an economy of war, which no interpreter can avoid.³⁷ The appeasement that would come with "saving" nullifying any role for "dispensing" or with "dispensing" occupying the scene completely, thus leaving no room whatsoever for "saving," is beyond reach. One implication following upon these observations is that posited law will not be overcome. Indeed, it should not be.

Of Obliquation

The traces can be regarded as a supplement to the text understood in its graphical dimension, as that which "replaces a lack."³⁸ Consider the taking of a dietary supplement, such as vitamins, which the body may require in order to operate optimally as body. My basic goal, then, is to redeem the repressed, that is, to put what has been relegated to the exterior of law-texts back within the legal so that law-texts can be approached by their interpreter in a way which will enable a more edifying interpretive *yield* than has been possible under the aegis of positivism. Arguably, what has been deemed superfluous can indeed be shown to count even more than what has been said to matter: the traces haunting the words of the statute or of the judicial decision can be understood as telling us more about the law than an exegesis of these words themselves can ever do, no matter how much analyticity one brings to their reading. While the issue is, therefore, that of the supplementation of the text in its graphical dimension, there is no question of jettisoning that graphical dimension itself or, as far as the law is concerned, of doing away with the positivistic aspect of law (a point which connects to Derrida's claim that, as much as metaphysics has confined philosophical thought, one cannot do without its concepts, since one simply has no language that would escape that history, which would be foreign to it). To assert that after "comparative law" has been about the posited only—statutes, judicial decisions, and other technical paraphernalia—it should now be preoccupied only with traces, would simply be reversing the hierarchy, replacing one exclusion with another, and showing that comparativists are still in thrall to a simplistic binary

37. DERRIDA, *ÉCRITURE*, *supra* note 23, at 220: "One never escapes *the economy of war*" ("*On n'échappe jamais à l'économie de guerre*") (emphasis in original).

38. DERRIDA, *GRAMMATOLOGIE*, *supra* note 5, at 296 ("*remplace . . . un manque*").

division, which is always a form of closure. What is required instead of a mere inversion is a displacement of the governing paradigm. This motion pushes away from simplification towards complexification in the sense that comparative legal studies is called upon to transgress dualism and provide a resolution of the A-B antagonism through something that is neither A nor B. In no way, therefore, ought comparative legal studies to forgo the usual legal artifacts, such as statutes and judicial decisions. Indeed, the traces—historical, political, social, economic, philosophical, and so forth—are precisely to be found at work in statutes and judicial decisions, which must therefore remain one of the principal focuses of study for comparativists-at-law. Tracing thus appears as a radicalization of legal positivism indebted to the very legal positivism which it radicalizes. But the posited dimension of law cannot be that at which comparison stops, no matter how much technical virtuosity is on display by committed positivists. Rather, it must be something from which comparison begins its *presencing*. The idea is to refuse to take statutes or judicial decisions (to emphasize two of the most conventional law-texts) only as a posited or a given, to reject any idea pointing to the static condition of positivistic groundedness, and, through an unceasing movement of oscillation away from and towards the posited, to try to see how statutes and judicial decisions exist also as the traces that haunt them. In this way, one allows that which has never been countenanced within the anterior regime to invade the field (since a trace can be erased, repression was possible), causes positivism to tremble, and dismantles the received order and its violently monistic procedures so as to reveal law's enculturation and expose law qua law-as-culture (in this sense, as it seeks to interrupt and remedy a narrative of interdiction, there is no question that *the trace and the tracing of the trace is a politics*). While the legitimation of traces is bound significantly to expand the range of information deemed pertinent as regards the constitution of law-texts (although there is little doubt that from the point of view of the system being questioned, this odd and extravagant movement of opening is always going to be reduced to a form of miscegenation), it remains the case that not even the enrolment of the traces within the comparative enterprise will allow the comparativist-at-law ultimately to secure access to the meaning of foreign law, to arraign its foreignness. Less abysmal no doubt, his failure will nonetheless prove ineliminable for to interpret can never be the same thing as to have access. At the very least, though, *the comparativist must have traced*.

About Differance

As the comparativist undertakes to invent the traces that constitute the law-text in order to ascribe meaning to it, he must accept that he will never be in a position to do so—not in the sense, at least, of ascertaining a meaning of the text that would be fixed and definitive, immobile and certain. For one thing, meaning is always postponed. Even as the comparativist identifies a trace, he realizes that that trace is not fully present since it can itself be traced to another trace (still regarding the French statute on religious dress at school, for example, while the text of the statute can be traced to the French political unwillingness to recognize minority rights, that unwillingness—that trace—can be traced to the political philosophy of Rousseau). But this process, being structural to the text, is infinite (the political philosophy of Rousseau can itself be traced to Sparta, which he adopted as model), which is to say that the text is infinitely palimpsestic. Indeed, it becomes impossible to reach an originarity.³⁹ In Derrida's words, "there is no atom."⁴⁰ Yet, even if, strictly speaking, endless traceability marks the singularity of every law-text, the comparativist will have to bring his tracing of this dissemination—his "errancy"⁴¹—to an end, if only on account of the kind of existential compromise that institutional circumstance requires (I have in mind a word limit or a submission deadline, not to mention the financial constraints confining scholarly mobility). This manifestation of how the will maintains itself in the tracing implies that the comparativist will necessarily fall short of the full meaning of the text or, to return to the idea of "presence," that he will never succeed in making the text fully present to itself, that he will not ensure that the text is, so to speak, at peace with itself. "The" meaning of the text, then, will always find itself deferred.

But there is one other reason why no meaning identified by the comparativist can be regarded as "the" meaning of the text, and it is that textual meaning will vary with each interpreter.⁴² Not only, then, is meaning deferred but it is also the case that meaning differs according to the specific interpreter of the text (the notion of "specificity" being, of

39. *Id.* at 233: "[I]t is impossible absolutely to justify a point of departure" ("*il [est] impossible de justifier absolument un point de départ*").

40. JACQUES DERRIDA, POINTS DE SUSPENSION 147 (Elisabeth Weber ed., Galilée 1992) (1983) ("*il n'y a pas d'atome*").

41. DERRIDA, GRAMMATOLOGIE, *supra* note 5, at 232 ("*errance*").

42. For a famous statement along these lines, see STANLEY FISH, IS THERE A TEXT IN THIS CLASS? (1980). An instantiation of Fish's striking recantation is at Stanley Fish, *Intention is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109 (2008).

course, most problematic in the sense at least in which it brings to bear matters arising beyond individuality, such as processes of institutionalization). Consider this analogy. The old Paris café within which I am writing does not mean the same thing to my German friend as it does to me and does not mean to an architect what it does to my German friend and does not mean to a historian what it does to an architect and so forth. To the extent that any of us can be said to “understand” the café, each of us does so according to his own lights (again, institutional processes are relevant to the matter in important ways: imagine two architects, one having studied under Renzo Piano and the other with Frank Gehry). Once more, what can be said of a café can be affirmed of a foreign law-text. If he understands it at all, a comparativist understands a law-text differently from other comparativists (institutional socialization proving significantly and ascertainably pertinent to any act of understanding).⁴³ Yet, none of the meanings being generated by different comparativists can lay a legitimate claim to being “the” meaning of the text. Both the structure of the text (it is never fully present to itself) and the structure of interpretation (it is never identical to itself) undercut any attempt to fixate meaning. To return to the illustration of the café, how could we tell who is “right” about it: the historian, the architect, my German friend, or me? The fact is that we all bring to bear different perspectives, none of them being “the” true one. Indeed, it seems that “truth” has very little to do with the interpretive situation. At best, since truth is not a matter of the thing itself but a question of words, truth is plural.⁴⁴ Although Derrida himself took the view that “[o]ne must have truth,”⁴⁵ if there are but truths, any number of them, one might arguably do well to renounce the word “truth” altogether; after all, is there not more than a touch of the oxymoronic in “truths”? Be that as it may, Derrida, in order to capture the infinite motion of a meaning that is at once deferred (from the transitive French verb, “*différer*”) and different (from the intransitive French verb, “*différer*”), coined the neologism “differance” (in French, “*différance*”). Although it sounds exactly like “difference” (in French, “*différence*”), the word is spelled idiosyncratically and purports to attest to a process whereby the meaning of a text is

43. I have in mind a key sentence in the leading text of Gadamer on hermeneutics: “It is enough to say that we understand in a *different* way, if we understand at all.” HANS-GEORG GADAMER, TRUTH AND METHOD 296 (2d rev. English ed., Joel Weinsheimer and Donald G. Marshall transl. 2004) (1986) (“*Es genügt zu sagen, daß man anders versteht, wenn man überhaupt versteht*”) (emphasis in original). Although Derrida was often critical of Gadamer’s assumptions and strategies, I cannot see that he would have disapproved of the gist of this particular statement.

44. JACQUES DERRIDA, EPERONS 83 (Flammarion 1978) (“*la vérité est plurielle*”).

45. JACQUES DERRIDA, POSITIONS 79-80 n. 23 (Editions de Minuit 1972) (“[I] faut *la vérité*”) (emphasis in original).

infinitely-deferred and ever-different, which is to say that, in Derrida's parlance, it is always to-come (it is not there as object, at least not in the way in which a pen can be said to be on Casimir's table at this moment). Incidentally, this neologism proved very influential and was received in leading French and English dictionaries.

There is one more point, which is of especial relevance to comparative endeavors as they operate across languages. Derrida's idea of "différance" challenges the very possibility of translation or, at least, of a translation which could be said to be accurate or correct. After all, if the translator does not have access to "the" meaning of a text, how could he be said to be translating it accurately or correctly? Indeed, Derrida asserts that "[w]hat guides [him] is always untranslatability."⁴⁶ He observes that "Peter . . . is not a *translation* of Pierre" and also remarks that "the words *deux*, *two*, *zwei* . . . remain bound to a language."⁴⁷ And there is no way, no matter how excellent the translation, in which singularity can be surmounted and misunderstanding/maladjustment effaced. Indeed, because it is inherently inadequate, translation does not erase difference: it exacerbates it. What there is in the third space where meaning is negotiated, that is, deconstructed and reconstructed, is neither, say, the "original" Shakespeare in sixteenth-century English, at once authoritative and vulnerable, nor a piece of twentieth-century French literature: it is a transacted hybrid, which features inherent indeterminacy and irresolution, which is the result of intercultural tension and which is the source of further intercultural tension. In this regard, Derrida's view is uncompromising:

[B]etween my world and every other world, there is initially the space and time of an infinite difference, of an interruption incommensurable with all the attempts at passage, of bridge, of isthmus, of communication, of translation, of trope, and of transfer, which the desire for world or world sickness . . . will attempt to pose, to impose, to propose, to stabilize. There is no world, there are only islands.⁴⁸

46. This passage is taken from the transcript of an interview with Derrida in the *MAGAZINE LITTÉRAIRE*, (Apr. 2004), at 26 ("*Ce qui me guide, c'est toujours l'intraductibilité*").

47. JACQUES DERRIDA, *PSYCHE* 209 (2d ed., Galilée 1998) (1985) ("*Peter . . . n'est pas une traduction de Pierre*") (emphasis in original); 1 JACQUES DERRIDA, *LA BÊTE ET LE SOUVERAIN* 241 (Galilée 2008) (2002) ("*les mots 'deux', 'two', 'zwei' . . . restent liés à une langue*") (emphasis in original).

48. 2 JACQUES DERRIDA, *LA BÊTE ET LE SOUVERAIN* 31 (Galilée 2010) (2002) ("*[E]ntre mon monde et tout autre monde, il y a d'abord l'espace et le temps d'une différence infinie, d'une interruption incommensurable à toutes les tentatives de passage, de pont, d'isthme, de communication, de traduction, de trope et de transfert que le désir de monde ou le mal de monde . . . tentera de poser, d'imposer, de proposer, de stabiliser. Il n'y a pas de monde, il n'y a que des îles*").

For Derrida, then, “the *cruel* law of difference” entails that there can be no anticipation of agreement in the face of disagreement, that there can be only negotiation and its attendant power dynamics, rather than dialogue.⁴⁹ The fact is that one keeps meeting one’s failure to meet the other. Yet, even in the face of *communicatio interrupta*—which is also *communio interrupta*—despite this discontinuity between emitter and receiver, against unsurpassable semantic lability, Derrida refuses to renounce the constitution of meaning. Even as he accepts that meaning is always already exposed to the irresistible anarchy of *play* (the word does not connote a game so much as the semantic movement left on account of structural plasticity),⁵⁰ that translanguistic identity of meaning is impossible, he actively pleads for translation: “I *must* translate, transfer, transport (*übertragen*) the untranslatable.”⁵¹ How to understand this aporia, which, incidentally, brings to mind Robert Cover’s claim that “unification of meaning . . . exists only for an instant, and [that] that instant is itself imaginary”⁵² In this regard, Simone Glanert offers a path-breaking reflection on translation in the law as that which must be possible even as it is impossible. Displaying thorough familiarity with Derrida’s thought, making specific reference to comparative legal studies (it is noteworthy that translation has been overlooked by most orthodox comparativists-at-law, an omission which stands as another indictment of “the system functioning as the effacing of difference”)⁵³, she shows that localization/circumscription of meaning does not leave comparison bereft. But “the play of the world” is such that comparative legal studies has to address the hurdle of embeddedness beyond the structure of language and its attendant implications on meaning.⁵⁴

49. See JACQUES DERRIDA, *ALTERITES* 85 (Osiris 1986). The quotation is from DERRIDA, *ECRITURE*, *supra* note 23, at 291 (“*la loi cruelle . . . de la différence*”) (emphasis in original).

50. See DERRIDA, *ECRITURE*, *supra* note 23, at 382: “[P]lay includes the work of meaning” (“*le jeu comprend le travail du sens*”).

51. JACQUES DERRIDA, BELIERS 77 (Galilée 2003) (“*Je dois traduire, transférer, transporter (übertragen) l’intraduisible*”) (emphasis in original).

52. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 15 (1983).

53. See Simone Glanert, *Comparaison et traduction des droits: à l’impossible tous sont tenus*, in *COMPARER LES DROITS, RESOLUMENT 279-311* (Pierre Legrand ed., Presses Universitaires de France 2009); SIMONE GLANERT, *DE LA TRADUCTIBILITE DU DROIT* (Daloz 2011). The quotation is from DERRIDA, *GRAMMATOLOGIE*, *supra* note 5, at 38 (“*[le] système fonctionnant comme effacement de la différence*”).

54. DERRIDA, *ECRITURE*, *supra* note 23, at 337 (“*le jeu du monde*”).

On the Double Bind

The interpretive process involves two key sets of constraints. These strictures put the interpreter in a double bind (the expression, which Derrida presses into service in a variety of settings, is indebted to Gregory Bateson). At the outset, the interpreter—in our case, the comparativist-at-law—is embedded in the culture into which he has been thrown. He is, in crucial ways, unable to overcome that horizon. Consider the fact that I was thrown into a French language and, therefore, into a binary vision of the world. As a Francophone, I experience the world as either feminine or masculine. And this apprehension extends to objects. For me, a chair is feminine, while an armchair is masculine; a computer is masculine, while a printer is feminine. Now, I am not at liberty to jettison this linguistic identity. I may choose to learn other languages. I may indeed decide not to speak or not to read French ever again. But I cannot make it such that my francophony will never have been there, that it will never have constituted me into the being that I am as I write today. The same goes with law. If in a first-year class in a Paris law faculty I have been inducted into the view that there exists, and that there must exist, a firm division between “private law” and “public law” (or, more specifically, between “*droit privé*” and “*droit public*”), and if I have spent a further four years of study acting on the basis of this distinction, I cannot simply eradicate such experience when at some later point I undertake to take an interest in English law. And, whether I am conscious of this fact or not, my institutionalization into French law will intrude into “my” interpretive picture of English law—how could it not? One implication following upon these observations is that the interpreter—here, the comparativist-at-law—must forgo objectivity. Indeed, the comparativist must renounce the very idea of “understanding” as we commonly approach it. A French lawyer cannot understand English law and certainly cannot enter into a dialogue with an English lawyer. There is only discord, and all that the French lawyer can hope to understand is English law as filtered, for example, through the linguistic and legal schemes of apprehension into which he himself has been thrown. In other words, what he can access, and all that he can access, is “his” image of English law (I hold the word in the tweezers of quotation marks in order to recall the matter of institutionalization, which colors the particularity of any interpretation). Since he cannot transpose himself into someone who speaks from English law’s words, all he has is “his” appreciation, which entails that, in the final analysis, the comparison goes

in a circle starting with the self and ending with the self: “Everything given to me under the light appears as given to myself by myself.”⁵⁵

Thus, when the comparativist articulates an interface between “*Schuld*” in the German law of divorce (or, rather, “*Ehescheidung*”) and “fault” in the Californian law of divorce around, say, the notion of “transgression,” the alleged “commonality” is necessarily the speculative outcome of his own translations. The tale of “transgression”, then, is the narrative receptacle of the tales of “*Schuld*” and “fault,” themselves the receptacles of other tales recounted, for example, by German judges or Californian law professors. Prompted by a desire to engage foreign law, purporting (violently) to organize disparate information, constructing the third space even as it seeks loyally to account for the laws of Germany and California, the re-presentational vocabulary “produc[es] difference out of incommensurability (rather than equivalence out of difference)”.⁵⁶ Far from erasing difference, the commensurative act redeploys it. And because difference thus finds itself multiplied, the fashioning of this hybrid, very much a refraction of the comparativist’s power, is shown to be traversed by the political. Ultimately, apart from the comparativist-at-law, there is no common denominator possibly authorizing the bridging of the gap between more than one law in co-presence: *the gap is the gap*, which is not a problem for comparativists-at-law who can recognize and respect the differend. Again, comparison does not operate referentially, but differentially: it does not refer to a “law-in-itself” to which, somehow, the comparativist-at-law could gain access, but to a strategy of re-presentation. (These remarks, incidentally, do not mean to denigrate the kind of insight that remains possible from a critical distance and, indeed, which can only be had from such vantage point: I *can* affirm, except that I do so *on my “own” behalf*.)

To those who say that to articulate research in foreign law around the idea of “fiction” demeans “comparative law,” which ought to extol objectivity, I reply that objectivity is itself a fiction (if a notion whose fictionality tends to be denied in unexamining fashion). Importantly, to say that the comparativist-at-law cannot be objective is not to suggest that his observations will be subjective. As I have explained, his linguistic and legal identities, for example, will inevitably play a role in his apprehension of foreign law—and these, in significant ways, do not have to do with

55. *Id.* at 136 (“*Tout ce qui m’est donné dans la lumière paraît m’être donné à moi-même par moi-même*”).

56. Meaghan Morris, *Foreword*, in NAOKI SAKAI, *TRANSLATION AND SUBJECTIVITY* xiii (1997). I also draw on JACQUES DERRIDA, *KHORA 75* (Galilée 1993).

“subjecthood.”⁵⁷ In the event, though, the comparativist will inescapably generate a meaning that is “other than” anything that would be “there.”

But not only is the comparativist operating under constraint, the law that he has made into his object of study is encumbered also. Such, then, is the other aspect of the double bind. Indeed, the English law of anticipatory breach or the French law of *promesse de vente* also features a history, a politics, a philosophy, and so forth. As I have mentioned, this array of traces is structural and it is, ultimately, infinite—so much so, in fact, that meaning is unsaturable, which implies that any account of the law-text is fated to be subtractive (it will be less than what the law-text is in effect saying) and that the law-text will always remain the repository of a secret, forever inaccessible in its withdrawal from presence (which, incidentally, is the text’s opportunity to have a future as an object of interpretation). In other words, the law-text being interpreted can never be ascribed all the meaning that it solicits. For example, the French statute on religious dress at school means infinitely more than any comparativist can ever say about it, and there is not a method in the world that could allow him fully to trace the extent of the statute’s embeddedness. In the apt counsel of Samuel Beckett, “*il y a toujours à écouter*” (“there is always something more to listen to”).⁵⁸ Always, then, the singularity of foreign law can be enhanced, that is, yet another trace can be identified, still more information can be offered about the text. Addressing interpretation, George Steiner points to the exorbitance of the sphere of relevance:

The informing [situation] of any single sentence in, say, Flaubert’s *Madame Bovary*, is that of the immediate paragraph, of the surrounding chapter, of the entire novel. It is also that of the state of the French language at Flaubert’s time and place, of the history of French society, and of the ideologies, politics, colloquial associations and terrain of implicit and explicit reference, which press on, which perhaps subvert or ironise, the words, the turns of phrase in that particular sentence. The stone strikes the water and concentric circles ripple outward to open-ended horizons.⁵⁹

A legal “translation” of this claim might be that:

57. See DERRIDA, *ÉCRITURE*, *supra* note 23, at 335: “The ‘subject’ of writing does not exist if one means by that some sovereign solitude of the writer. The subject of writing is a *system* of relations between layers: . . . mental, society, world. Within this scene, the punctual simplicity of the classical subject is nowhere to be found” (“*Le ‘sujet’ de l’écriture est un système de rapports entre les couches: . . . du psychique, de la société, du monde. A l’intérieur de cette scène, la simplicité ponctuelle du sujet classique est introuvable*”) (emphasis in original).

58. CHARLES JULIET, *RENCONTRES AVEC SAMUEL BECKETT* 49 (Editions P.O.L. 1999) (1973).

59. GEORGE STEINER, *ERRATA* 19 (1997).

It would be unwise . . . to regard anything in Japanese society as *prima facie* irrelevant to the understanding of Japanese law on first setting out to get to grips with it. The links between law and language, law and the political or social and economic order, law and the history and traditions of the country, its codes of morality, its senses of justice and the relationship between the legal profession and other professions and between legal scholarship and other forms of scholarship, the relative standing of different actors in and around the legal system, all have their impact on law and its administration and the definition of law and legal scholarship.⁶⁰

Ultimately, “[t]he world is utterly, thoroughly legal.”⁶¹ Unsurprisingly, then, the comparativist-at-law, or at least the comparativist-at-law whose life experiences have heightened his sensitivity to difference, is afflicted by the suspicion that his analysis is never singular *enough* (“*Il y a toujours quelque chose d’absent qui me tourmente*,” to quote the haunting words of Camille Claudel inscribed on an Ile Saint-Louis building in Paris). Yet, there is no possibility of coincidence—in the sense of a total or perfect overlap—between the law-text’s singularity and the singularization of it being performed by the comparativist as he has the text turning within itself to reveal its traces (just like a glove, which doubles back on itself to show its other side), a process which Derrida often refers to as “invagination,” a term he appears to have borrowed from embryology.⁶² Think, for instance, of “the invagination of an inside pocket.”⁶³

Of Invagination as Justice

In the same way that no language is ever pure, no text ever consists of purely one language. The idea that a law-text, such as a statute or a judicial decision, could be exclusively about something that would be called “law” cannot withstand scrutiny. There is inevitably more than one language at work within a text. For Derrida, then, an (unconditional) law of heteronomy must replace the Kantian unconditional law of the self-determination of the subject. In his words, “[i]t is a matter of heteronomy,

60. Geoffrey Wilson, *English Legal Scholarship*, 50 *MOD. L. REV.* 818, 831 (1987).

61. THOMAS BERNHARD, *IST ES EINE KOMÖDIE? IST ES EINE TRAGÖDIE?* (1967), in *ERZÄHLUNGEN* 74 (Suhrkamp 2001) (“*Die Welt ist eine ganz und gar, durch und durch juristische*”).

62. GEOFFREY BENNINGTON, *JACQUES DERRIDA* 210 (Le Seuil 1991).

63. JACQUES DERRIDA, *DU DROIT A LA PHILOSOPHIE* 497 (Galilée 1990) (“*L’invagination d’une poche intérieure*”). Another example is the Centre Georges-Pompidou in Paris: “[A]ll the mechanical services, as well as structural elements, are exposed. It is like a human body with all its organs and systems externalized, including the skeleton.” IVAN ŽAKNIĆ, *Pompidou Center* 23 (Flammarion 1983). For a “definition” of “invagination,” see DERRIDA, *PARAGES*, *supra* note 19, at 133.

of a law come from the other—of the other in [the text], an other greater and older than [the text].”⁶⁴ There is “the non legal or pre-legal origin of the legal.”⁶⁵ Yes, yes. “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 by new programmes.”⁶⁶ According to Derrida, the fact that, through the trace-as-other, “the other participates originally to meaning” shows that, ultimately, justice is at stake.⁶⁷ As every text realizes the other within itself—as every law-text stands as primordial heterogeneity, as the coalescence of historical, political, social, economic, philosophical, and other traces showing difference to be always already at work within the text—justice requires that difference necessarily be recognized and respected, even as any encounter with the other must take place in the mode of a non-encounter given that the relation to the other adopts, in effect, the form of a “no-relation” on account of the other’s ultimate inaccessibility (in the end, the self cannot reach the other: he will not close the gap).⁶⁸ Comparativists-at-law, who concern themselves with otherness, are asked to accept that their hyper-responsibility vis-à-vis the trace-as-other must “regulat[e] the justice and the justness of [their] behaviour, of [their] theoretical, practical, and ethico-political decisions,”⁶⁹ to acknowledge that this ineluctable commitment, this indebtedness arising from a debt which cannot be cancelled (the other *is* there and *remains* there), demands an appreciation allowing for the other law’s “irreplaceable singularity.”⁷⁰

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“Play,” of course, when “viewed from within rationalist discourse . . . seems almost to gesture toward[s] a realm outside value altogether.”⁷¹ Arguably, though, it heralds the liberation of thought from its obsessive strategies of containment and preoccupations with categories, concepts, definitions, not to mention the shibboleths of objectivity and truth. As one

64. JACQUES DERRIDA, VOYOUS 123 (Galilée 2003) (“*Il y va ici . . . d’une hétéronomie, de la loi venue de l’autre . . . — de l’autre en moi plus grand et plus ancien que moi*”).

65. JACQUES DERRIDA, POLITIQUES DE L’AMITIE 176 (Galilée 1994) (“*l’origine non juridique ou pré-juridique du juridique*”).

66. PETER SLOTERDIJK, DERRIDA, EIN ÄGYPTER 27 (Suhrkamp 2007) (“*Im Innersten des Eigenen ha[ti] sich die Spur des Anderen unauslöschlich eingeprägt, mochte sie noch so sehr unkenntlich gemacht und von neuen Programmen überdeckt sein*”).

67. DERRIDA, ÉCRITURE, *supra* note 23, at 107 (“*L’autre collabore originairement au sens*”).

68. DERRIDA, ACTS OF LITERATURE, *supra* note 24, at 109.

69. JACQUES DERRIDA, FORCE DE LOI 45 (Galilée 1994) (“*règle la justice et la justesse de nos comportements, de nos décisions théoriques, pratiques, éthico-politiques*”).

70. JACQUES DERRIDA, DONNER LA MORT 77 (Galilée 1999) (“*la singularité irremplaçable*”).

71. ELIZABETH D. ERMARTH, SEQUEL TO HISTORY 143 (1992).

twists oneself out of positivism, without ever marking a complete break with it, one dissociates oneself from any idea that law can be grounded in the unambiguously posited and exhaustively present. The trace, which is the other of the ground (it is, properly speaking, an-archival), reveals that any alleged grounding of law in the posited has nothing to do with anything that would be intrinsic to law and has everything to do with the work of individuals determined to make things look so. But there is the play, which shows not so much the individual at play as the interpreter *being played by something which escapes his control*. This point is but one implication of the focus on the trace, which emphasizes the conditions that must govern “meaning-making” as a disseminative and differential process. Most importantly, perhaps, tracing, and the comparativist-at-law’s tracing in particular, engages in the suspension of the (calamitous) suspension of heterogeneity (it acts to interrupt the hiding/repression of otherness that legal positivism has been sponsoring) on the understanding, of course, that the coming of heterogeneity into the comparison announces but more interpretation—more instantiation, more unpresentability, more intermittence, more *play*—which no pretence at synthetic closure—mediation, communication, sublation, totalization—can overcome.⁷²

By way of non-conclusion (how could a mere introduction terminate anything?), I want to indicate, briefly, what my ever-pragmatic U.S. friends style the “take-home” with respect to this argument. To be sure, Derrida makes this task particularly challenging, if only because his range of intellectual interests was much too extensive for him to pursue only one theme. Nonetheless, it is possible to ascertain what can be styled “persistences” in his writing. Such a significant preoccupation, it seems to me, has to do with the idea of “difficulty.” Derrida was always concerned with difficulty, especially with the difficulty of understanding and, specifically, with the difficulty of understanding what is manifestly complex, such as a text. I take the view, then, that Derrida teaches us how there is more to a text than meets the eye (or is it the “I”?). And he instructs us also that there is more to interpretation than we have been assuming. Since comparativists-at-law are primarily called upon to act as interpreters of (foreign) texts, these two lessons should stand us in very good stead indeed. Along the way, as he assigns an immense critical capacity to the trace, Derrida shows that “negativity is a *resource*,”⁷³ if only because, given no objectivity and no truth, the comparativist-at-law must assume

72. Here also, I derive insight from Andreas Philippopoulos-Mihalopoulos, *The Suspension of Suspension: Settling for the Improbable*, 15 LAW & LIT. 345 (2003).

73. DERRIDA, *ÉCRITURE*, *supra* note 23, at 381 (“*la négativité est une ressource*”) (emphasis in original).

substantial responsibility for his normative (and fallible) elections. To accept that he is situated firmly within contingency is for the comparativist to begin to take responsibility for his own perspectival appreciations. To negative objectivity and truth is, in the end, the way to avoid intellectual complacency, which is precisely what engulfs one when one stops thinking of one's re-presentation as a re-presentation and begins to see it as being endowed with a transcendental quality that would make it objective or which would permit it access to truth (that is, when one turns a provisional private vocabulary into a permanent public one). As it allows for ethical space—" [t]here is no ethics without the presence of *the other*"⁷⁴—Derrida's strategy invites interpretive dispute, enhances agency, and forces the comparativist-at-law to defend his views in the course of exchanges with other comparativists. The negativity at issue is, therefore, anything but sterile. Negativity is assertion (of an alternative): "The artist is active, but negatively."⁷⁵ It is on account of negativity's enabling valency that the conversation continues.

It befits comparative legal studies that "theory," on account of its Greek roots, should refer not only to sight but to travel. In ancient Greece, a "*theoros*" was, for instance, someone who went on a pilgrimage to a religious festival, embarked on a journey to consult an oracle, or travelled abroad for the sake of learning.⁷⁶ As Jacques Derrida, himself an incessant traveller, equips one with a theory of the trace and of the ghost, of differance and of the double bind, of the dissolution of the transcendental, he makes it possible for the comparativist-at-law to attend to urgent instances of concrete comparison away from the (conservative) politics of sameness and towards an otherness which, while occult and inexhaustible, motivates, calls, and indeed summons him.

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In the spirit of a "joyful affirmation of the play of the world,"⁷⁷ the trace reveals the non-linearity and interstitiality haunting the text. It takes

74. DERRIDA, *GRAMMATOLOGIE*, *supra* note 5, at 202 ("Il n'y a pas d'éthique sans présence de l'autre") (emphasis in original). Derrida insists that he does not use "ethics" in the way in which the notion has traditionally been deployed. See, e.g., DERRIDA, *ALTERITIES*, *supra* note 49, at 71: "[R]espect for the singularity or for the call of the other cannot simply belong to the domain of ethics, to the domain conventionally and traditionally determined of ethics" ("*le respect de la singularité ou de l'appel de l'autre ne peut pas appartenir simplement au domaine de l'éthique, au domaine conventionnellement, traditionnellement déterminé, de l'éthique*").

75. SAMUEL BECKETT, *PROUST* (1931), in 4 *THE GROVE CENTENARY EDITION* 539 (Paul Auster ed. 2006).

76. See generally ANDREA W. NIGHTINGALE, *SPECTACLES OF TRUTH IN CLASSICAL GREEK PHILOSOPHY* 40-71 (2004).

77. DERRIDA, *ÉCRITURE*, *supra* note 23, at 427 ("*l'affirmation joyeuse du jeu du monde*").

the text beyond stasis, that is, beyond the analytical limits reductively allowed by the hard copy, thereby recasting the text as a hypertext whose constitution is shown to be the product of an intricate, decentered, structure of interactive and interconnected discourses linked through multiple pathways in an open-ended textuality where the interpreter, as he pursues this or that string of references, as he elects his reading route, becomes, in significant ways, the inventor of meaning. The appendix to this essay conveys a sense of what comparison *à la trace* may resemble as the comparativist-at-law weaves the threads that are constitutive of the text into an argument about reterritorialization featuring inherently indeterminate and interminable meaning, as he creatively/critically inscribes the survival of foreign law not as a posited, but as a text *under way*. As such, it shows the patrons, merchants, and middlemen of “comparative law” how the presencing of the trace, by “giv[ing] signified meaning no respite, no rest,”⁷⁸ wants to mark the emergence into relevance, into licit comparative writing, of what could be termed a re-presentation of singularity through the trace traceable to another trace itself traceable to another trace . . .

78. *Id.* at 42 (“*ne laissant aucun répit, aucun repos au sens signifié*”).

APPENDIX

Tracing the French Statute on Religious Dress at School

“Statute No. 2004-228 Dated 15 March 2004 Regulating, in Application of the Principle of Secularism,⁷⁹ the Wearing of Signs or Clothes Expressing a Religious Affiliation in Public Primary Schools, Junior and Senior High Schools”

[“*Loi no 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*”]

Article 1

“In public primary schools, junior and senior high schools, the wearing of signs or clothes whereby students conspicuously express a religious affiliation is prohibited.”

[“*Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit.*”]

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By way of supplement to the usual reading of law as only that which is posited, the comparativist-at-law, having made the French statute into his object of study, abiding by a sophisticated appreciation of textuality, purports to invent articulable traces constitutively haunting the law-text through infinitely complex networks of enmeshment—and therefore structurally partaking of it as law-text. Illustrative statements of such comparativism *other-wise*, deliberately set in the epigrammatic mode, follow. (In a context where other editorial strictures obtained, each entry would be developed at length.) As he performs this deployment with deconstructive scrupulosity, being aware that no text allows for the production of meaning at will, the comparativist-at-law, whose engagement

79. French has “*laïcité*,” which carries a local cultural colour that “secularism” fails to convey. Indeed, the French language also has words like “*séculier*” and “*sécularité*.” These, however, are not used in France in matters concerning churches and state. In other terms, there exists a specifically French version of secularism bearing a specific appellation.

is always contingent and whose account/ascription of significance remains unsaturable (and therefore irreconcilable with the idea of a totalized or holistic system of meaning), hearkens to law-as-culture and thereby militates for the recomposition of the coordinates of comparison away from mere positivism, whose yield can only ever be confined to an identification of foreign law and not to the requisite understanding of it. Observe that to the extent that they would want to resist tracing, casting it as counterlaw rather than accepting it as the hyperlaw that it is, perhaps denigrating it as some form of contemplative aestheticism mired in unauthorized lucubrations, orthodox comparativists-at-law would be objecting to *what has always already happened*.

The tracing at hand, then, is informed by theoretical commitments which, before I turn myself into a sort of Borgesian "*hacedor*," I am keen to supplement by way of a brief exercise in heteroglossia. For these purposes, I have appropriated fragments from five different texts, which I now want, no doubt artificially, to exhibit adjacently.

"Come on! Play! Invent the world! Invent reality!"⁸⁰

"For the point at issue is merely the meaning of the texts, not their truth."⁸¹

"What can one do but speculate, speculate, until one hits on the happy speculation?"⁸²

"No one, however special his point of vantage, can get . . . into the shrine of the single sense. . . . The pleasures of interpretation are henceforth linked to loss and disappointment."⁸³

"A thousand possibilities will always remain open even as one understands something of that sentence that makes sense."⁸⁴

80. VLADIMIR NABOKOV, LOOK AT THE HARLEQUINS!, in NOVELS, 1969-1974 571 (Brian Boyd ed. 1996) (1974).

81. BARUCH SPINOZA, THEOLOGICAL-POLITICAL TREATISE 88 (2d ed., Samuel Shirley transl. 2001) (1670) ("*De solo enim sensu-orationum, non autem de earum veritate laboramus*").

82. SAMUEL BECKETT, THE UNNAMABLE (1958), in 2 THE GROVE CENTENARY EDITION 363 (Paul Auster ed. 2006) ("*Que voulez-vous, il faut spéculer, spéculer, jusqu'à ce qu'on tombe sur la spéculation qui est la bonne*"). The English text, a re-writing from the French, is Beckett's.

83. FRANK KERMODE, THE GENESIS OF SECRECY 123 (1979).

84. DERRIDA, LIMITED, supra note 13, at 122 ("*Mille possibilités resteront toujours ouvertes, alors même qu'on comprend quelque chose de cette phrase qui fait sens*").

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- A series of recent judicial, legislative, and political interventions.
 - o Decision of the *Conseil d'Etat* dated 27 November 1989
 - o Circular of the Minister of National Education dated 12 December 1989
 - o Report of the Stasi Commission dated 11 December 2003
- A history of anti-clericalism manifesting itself as early as 1302.
 - o Edict of Nantes (1598)
 - o XVIIIth-century Enlightenment (Voltaire *et al.*)
 - o Revolution (1789)
 - o XIXth-century ultramontanism
 - o "Dreyfus Affair" (1894-1899)
 - o Statute on separation between churches and state (1905)
 - o Constitution of 4 October 1958
- A Rousseauian conception of "freedom" whereby freedom is achieved through the state rather than against it.
- A cultural idea of "citizenship" whereby "citizenship" is created by the state and is premised on the ideas of "universalism" and "equality", thus excluding the notion of "groups" or "collective rights" and entailing cultural assimilation to "Frenchness" for all.
- A "Gallican" glorification of the state manifesting itself by way of a centralized state authority and strong state involvement in the fashioning of Frenchness.
- A highly-respected school sector entrusted with the highly-valued mandate of instituting French Republican values and designed as a "neutral" space beyond the reach of counter-powers (such as the church, groups, or the family).
- An intellectual and spatial organization of French society featuring the categorical distinction between the "public" and the "private" realms.
- A growing presence of Islam in France.
 - o Demographic significance of the Muslim community in France
 - French colonial policy
 - French post-colonial policy
 - o Perceived irreconcilability between French Republicanism and Islam
 - o Fear of Islam/Islamophobia
 - Heightened visibility of the Muslim community in France

- Revival of Islamic militancy in Algeria
- “9/11” (and subsequent terrorist attack in Madrid on 11 March 2004)
- A distrust of localism and differentialism correlating with a longstanding commitment to a unitary and egalitarian citizenry.
- A strongly hierarchical society and work environment correlating with ascertainable risk-aversion on the part of individuals (and, specifically, individual public servants).
- An openly-expressed desire for sustained state activism.
- A predilection for the enactment of apodictic statutes purporting to ensure fixity of meaning as an optimal instrument of social engineering.
- A predilection for abstraction over casuistry correlating with an institutional prioritization of “law” over “fact”.
- An objectification of women correlating with a longstanding conception of manliness translating into a specific approach to the conduct of gendered relationships.
 - “Courtly love” (or *amour courtois*)⁸⁵
 - Specificity of feminisms, more philosophical/literary than political/pragmatic
- A keen confidence in the French “civilizing mission” (or “*mission civilisatrice*”).
- A largely hermetic attitude vis-à-vis outside cultural influences.
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85. For an illustration of the kind of creative and erudite scholarship which, in my view, comparativists-at-law ought to have in mind as they proceed to substantiate their research, see PETER GOODRICH, *THE LAWS OF LOVE* (2006). In its author’s words, this text is concerned with “*lex amatoria*.”

